TRANSFER OF PROPERTY ACT, 1882

BY

THE RIGHT HONOURABLE SIR DINSHAH FARDUNJI MULLA, KT., C.I.E., M.A., LL.D.

SOMETIME MEMBER OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL; HONORARY BENCHER OF LINCOLN'S INN; LAW MEMBER OF THE COUNCIL OF THE GOVERNOR-GENERAL OF INDIA; AND JUDGE OF THE HIGH COURT OF BOMBAY; TAGORE LAW LECTURER, 1929; JOINT AUTHOR, POLLOCK AND MULLA'S INDIAN CONTRACT ACT, AND MULLA AND PRATT'S INDIAN STAMP ACT, ETC.

THIRD EDITION

BY

THE HONOURABLE MR. JUSTICE S. R. DAS, B.A. (CAL.), LL.B. (LOND.), OF GRAY'S INN.

CHIEF JUSTICE OF THE EAST PUNJAB HIGH COURT.

ASSISTED BY

J. R. DHURANDHAR, B.A., LL.B., O.B.E.

FORMERLY LEGAL REMEMBRANCER TO THE GOVERNMENT OF BOMBAY PROVINCE.

Price Rs. 25 (nett)

CALCUTTA:
THE EASTERN LAW HOUSE, LTD.
BOOKSELLERS & PUBLISHERS
1949.

PRINTED BY E. W. DIXON AT THE TIMES OF INDIA PRESS, BOMBAY,
AND
PUBLISHED BY K. D. MULLA, BOMBAY.

PREFACE TO THE THIRD EDITION.

In preparing this edition I have adopted the headings and adhered to the general arrangements of the notes under different sections as made by the late author. The original text has in the main been left intact except at places where, by reason of recent judicial decisions, any alteration became necessary.

There have been several pronouncements of the Judicial Committee, since the last edition was published, which have materially affected the earlier decisions of Courts in India. *Ramkinkar*'s case (1938) 66 I.A. 50, and that of *Jagadamba Loan Co.* (1940) 68 I.A. 67, have completely changed the notions as to an English mortgagee and as to privity of estate between an English mortgage and the lessee from the mortgagor. *Ram Lal Dutt Sarkar*'s case (1942) 70 I.A. 18, has, by way of explanation, practically rendered nugatory the observations of the Board in the earlier case of *Katyayani*, 52 I.A. 160 at p. 166, which were understood as sanctioning the doctrine of suspension of the entire rent on the failure of the landlord to give possession of any part of the demised premises. The case of *Shah Ram Chand* v. *Pandit Prabhudayal* (1942) 69 I.A. 98, has, by insisting on a strict adherence to the language of the concluding paragraph of section 60 as amended by the insertion of the word "only" therein, set at rest the divergence in judicial opinion as to partial redemption. *Sopher*'s case (1944) 71 I.A. 93, throws new light on section 113 of the Indian Succession Act which corresponds with section 13 of the Transfer of Property Act and lays down that a gift over to an unborn person which is subject to any contingency does not extend to the whole of the remaining interest of the giver, for it is not in the same unfettered form as that in which the giver held it. There have been many Full Bench decisions on different topics including subrogation under the amended section 92 which have been noted at the proper places. As far as possible the case law as reported in different Indian reports and in the authorised English Law Reports series has been brought up-to-date. Some of the recent decisions of the Bombay and Calcutta High Courts under special legislation giving protection to tenants will be found collected in one place.

Owing to scarcity of paper Mr. Topham's valuable note on the Law of Property Act, 1925, and the text of the Transfer of Property Act before and after the amendments of 1929 given in parallel columns in the last edition have been omitted more particularly as these are not as useful now as they were when the second edition was published. Attention, however, is drawn to the valuable glossary which is Appendix VII.

Attention is also drawn to the Addenda which brings the case law up-to-date.

It has been possible for me to prepare this edition only because of the invaluable assistance I have received from Mr. J. R. Dhurandhar. Indeed the arduous task of collecting the Indian cases and placing them at their proper places and the general groundwork were performed and done by Mr. Dhurandhar. To him I freely acknowledge my indebtedness and offer my grateful thanks.

December, 1948. S. R. D.

INTRODUCTION.

BEFORE the Transfer of Property Act there was practically no law as to real property in India. A few points were covered by the Regulations and the Acts which have been repealed either wholly or in part by section 2. But for the rest of the law, the Courts, in the absence of any statutory provision, adopted the English law, as the rule of justice, equity and good conscience. This was not satisfactory, for rules of English law were not always applicable to social conditions in India, and the case law became confused and conflicting. To remedy this state of affairs a Commission was appointed in England to prepare a Code of substantive law for India.

The first Law Commission consisted of Lord Romilly, M. R., Sir Edward Ryan, Chief Justice of Bengal, Lord Sherbrooke, Sir Robert Lush and Sir John Macleod, who had assisted Lord Macaulay in drafting the Indian Penal Code. This Commission drafted the Indian Succession Act, the Indian Contract Act, the Negotiable Instruments Act, the Indian Evidence Act and the Transfer of Property Act.

The Transfer of Property Act, though drafted in 1870, was the last of these drafts to become law. The draft was sent to India by the Duke of Argyll who was then Secretary of State for India, and after some amendments, it was first introduced as a bill in the Legislative Council in 1877. The bill was then referred to a Select Committee by whom it was revised and circulated for public criticism. In deference to this criticism all matters not directly referring to transfers *inter vivos* were omitted ; some clauses referring to trusts, powers and settlements were dropped ; and other clauses were added with a view to save the provisions of local law and usage.

The bill thus redrafted was referred to a second Law Commission consisting of Sir Charles Turner, Chief Justice of Madras, Sir Raymond West, and Mr. Whitley Stokes, Law Member of the Council of the Governor-General ; but no less than seven bills were prepared before the final bill was introduced in the Legislative Council by Mr. Whitley Stokes and passed into law on the 17th February 1882.

The second Law Commission in their report of 1879 said that "the function of the bill was to strip the English law of all that was local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population and could easily be administered by non-professional judges."

Some of the provisions of the bill were borrowed from the enactments which it repeals and supersedes, but the bill was based mainly on the English law of real property. The Law of Conveyancing and Property

Act, 1881 (44 and 45 Vict. c 41) had been enacted in England before the bill was passed into law, and some of the provisions of the Act, notably secs. 57, 61 and 69, are borrowed from that Statute.

The Act was afterwards amended on twelve separate occasions by the following amending Acts:—

(1) Act 3 of 1885—amending secs. 1, 4, 6 (i), and 69. It abolishes exemptions from the Act on the ground of race and reconciles the provisions of the Registration Act with those of the Transfer of Property Act.

(2) Act 15 of 1895—which exempts Crown Grants from the operation of the Transfer of Property Act.

(3) Act 2 of 1900—amending secs. 3, 6 (e), and 6 (h), and remodelling Chapter VIII which treats of transfers of actionable claims.

(4) Act 6 of 1904—amending secs. 1, 59, 69, 107 and 117. It enables a Local Government to extend part of the Act to specified territories, and to apply the provisions of the Act relating to leases to particular classes of agricultural leases. It provides for the registration of certain mortgages and leases, and for equitable mortgages in Moulmein, Bassein and Akyab.

(5) Act 5 of 1908—transferring the adjective law of mortgages to the Code of Civil Procedure.

(6) Act 11 of 1915—amending sec. 69.

(7) Act 26 of 1917—validating mortgages and gifts in Agra and Oudh executed before the first January 1915 and attested on acknowledgment of execution.

(8) Act 38 of 1920—omitting the words " with the previous sanction of the Governor-General in Council from secs. 1 and 117.

(9) Act 38 of 1925—amending sec. 130.

(10) Act 27 of 1926—amending sec. 3 by inserting a definition of the word " attested."

(11) Act 10 of 1927—amending sec. 3 by making the definition of the word " attested " retrospective.

(12) Madras Act 3 of 1922—modifying the provisions of the Act to give effect to the provisions of the Madras City Tenants Protection Act, 1922.

In spite of these amendments there were conflicting decisions on nearly every section of the Act and a further exposition of the law became necessary. Accordingly in 1927 a Special Committee, consisting of Mr. S. R. Das, Law Member of the Council of the Governor-General, Mr. B. L. Mitter (now Sir Brojendro Lal Mitter), then Advocate-General

of Bengal, Dr. S. N. Sen and Mr. Dinshah Mulla (afterwards the Right Honourable Sir Dinshah Mulla, P.C.) were appointed to examine the provisions of a bill prepared by the Legislative Department of the Government of India for the purpose of making a general amendment of the Act. The bill which was the result of their labour was, after slight amendment in Select Committee, enacted in the Transfer of Property (Amendment) Act 20 of 1929.

The Act as amended sets at rest points on which decisions had been conflicting, and makes several changes in the law, of which the most important are :—

S. 3.—Registration amounts to notice.

S. 3.—Constructive notice to an agent is notice to his principal.

S. 15.—Validation of transfers to a class of which some members are unable to take.

S. 53A.—Statutory recognition of the doctrine of part performance.

S. 58.—In a mortgage by conditional sale the condition must be embodied in the same deed.

S. 60A.—A mortgagor entitled to redeem may require the mortgagee to transfer the mortgage debt to a third party.

S. 60B.—Statutory recognition of the mortgagor's right of inspection of title deeds.

S. 61.—Mortgagor's right to redeem several mortgages to the same mortgagee separately or simultaneously.

S. 63A.—Statutory recognition of the mortgagee's right to compensation for necessary improvements.

S. 65A.—Statutory recognition of the mortgagor's power to lease.

S. 67.—Abolition of the remedy of foreclosure in certain mortgages.

S. 67A.—Mortgagee's obligation to enforce several mortgages by the same mortgagor simultaneously.

S. 69A.—Provision for appointment of a receiver by a mortgagee exercising a power of sale without the intervention of the Court.

S. 92.—An extension of the principle of subrogation.

S. 101.—A modification of the law of merger.

S. 107.—Provision requiring registered leases to be executed by both parties.

The Amending Act involved amendments in various other Acts, of which the more important are as follows :—

The Married Women's Property Act, 3 of 1874, has been amended to make it clear that sec. 8 of that Act is subject to section 10 of the Transfer of Property Act.

The Specific Relief Act, 1 of 1877, has been amended in accordance with the Statutory recognition of the doctrine of part performance in sec. 53A of the Transfer of Property Act.

The Code of Civil Procedure, Act 5 of 1908, is amended in Order 34 relating to mortgages. Provision is made to allow a mortgagee to recover sums spent for necessary costs, charges and expenses. This is in accordance with sec. 63A which allows a mortgagee compensation for improvements in certain circumstances. Mortgages by deposit of title deeds are included in rule 15 of Order 34 as such mortgages are included in the definition in sec. 58. The old rule 11 is omitted as the principle "redeem up foreclose down" is now embodied in sec. 94. Other amendments include provisions which make it clear that the right of redemption is not extinguished until a final decree for foreclosure has been made, or until a sale in execution of a mortgage decree has been confirmed.

The Indian Limitation Act, 9 of 1908, has been amended by including suits for the enforcement of mortgages by deposit of title deeds in the 12-year period of limitation under Article 132.

The Indian Registration Act, 16 of 1908, has been amended to provide that a mortgage by deposit of title deeds, though an oral transaction, cannot be displaced by a subsequent registered instrument; and also to allow an unregistered instrument to be admitted as evidence of part performance of a contract with reference to sec. 53A of the Transfer of Property Act.

The Indian Succession Act, 39 of 1925, has been amended to correspond with amendments made in Chapter II of the Transfer of Property Act with reference to transfers *inter vivos*.

All these amendments have been made by a separate Act, the Transfer of Property (Amendment) Supplementary Act, 21 of 1929.

Further amending Acts have been passed since the legislation of 1929. Act 5 of 1930 amends Explanation I to section 3 with reference to the operation of registration of a deed as notice when the deed is registered in a different district; and Act 16 of 1930 amends Order 43, r. 1 (o) of the Code of Civil Procedure in accordance with the amendments made in Order 34; and Act 35 of 1934 inserts the word "naval" after the word "military" in clause (g) of sec. 6. Other amending Acts have been incorporated in their appropriate places and the text has been brought upto date.

ADDENDA.

Page 2.—Add after line 21 " But the principles embodied in some of the provisions of the Act have been applied to transfers by the operation of law in some cases as the rules of equity. See Notes to various sections."

Page 5, line 13.—Add " In *Sopher* v. *Administrator-General of Bengal*, the Judicial Committee relied on one of the illustrations to section 113 of the Indian Succession Act in construing it (q^1)." Add note " (q^1) ('44) A.PC. 67."

Page 6, line 30.—After the words " Scheduled Districts (*t*) " add " which are now partially excluded areas. The phrase ' British India ' is to be read as referring to all the Provinces of India : (see The India (Adaptation of Existing Indian Laws) Order, 1947)." Add note " (t^1) Substituted by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948."

Page 7.—Add to note (*k*) " *Milkha Singh* v. *Mst. Shankari* ('47) A.L. 1 (F.B.)."

Page 16, line 23.—Add after (*h*) " So also the amount payable by a yajman to a panda, when the former visits a holy place is not immoveable property (h^1) " Add note " (h^1) *Balkrishna* v. *Saligram* (1947) A.A. 391."

Page 19.—Add to note (*y*) " *P. Timmavva* v. *Channava* 50, Bom. L.R. 260."

Page 34.—Add after line 13 " See also *Hiranand* v. *Kashinath* ('42) A. B. 339, 44 Bom. L.R. 227."

Page 35.—Add to note (*z*) " See also *Varada Raja Ayyar* v. *Kailasam* ('47) A.M. 175."

Section 5, page 47.—Add to note (*x*) " *Gulamhussain* v. *Fakir Mahomed* ('47) A.B. 185."

Page 50.—Add to note (*x*) " *Kalika Singh* v. *Sri Radha Krishnaji* ('46) A.O. 256, (1946) O.W.N. 254, 225 I.C. 32."

Section 6, page 72.—Add after line 26 " But it would be otherwise when the transfer was in the form of a gift and illicit cohabitation was its motive and not an object or consideration (h^1)." Add note " (h^1) *Istak Karim* v. *Ranchod* ('47) A.B. 198."

Page 74.—Add to note (*h*) " *Istak Karim* v. *Ranchod* ('47) A.B. 198."

Section 8, page 84.—Add after line 8 " Where a common passage was left for the use of the co-sharers in a partition between the members of one family, it was held that such an arrangement did not make the right to a share in the passage a legal incident of the shares allotted to co-sharers (q^1)." Add note " (q^1) *Hamida Khatoon* v. *Baryapur Panchayat* ('47) A.P. 122."

Section 10, page 93.—Add to note (*c*) " *Prithvi Chand* v. *Sunder Das* ('46) A. Pes. 12, 228 I.C; 148, *Lal Mohan* v. *Onkaran* ('46) A.P. 55."

Page 96, line 22.—Add after " with reference to this section " " (c^1)." Add note " (e^1) *Ambalal* v. *Baldeodas* ('47) A.B. 191."

Section 13, page 106, line 3.—Add after the words " would be valid " " The decisions in *Sopher*'s case and in *Ardeshir* v. *Dadabhoy* were considered by the Bombay High Court in *Framroz Dadabhoy Madan* v. *Tahmina*, 49 Bom. L.R. 882. In that case Bai Tahmina settled a certain sum upon trust in favour of herself for life and after her death and subject to the power of appointment by will or codicil among her issues born during her life-time, in trust for all her children who being sons shall attain the age of 18 or being daughters shall attain that age or marry under that age being daughters, in equal sums. The trial Judge (Chagla, J.) held that the arrangement in favour of the issues of Bai Tahmina was void and also the subsequent trusts. In appeal Stone, C. J. and Coyajee, J. held that this view was not correct. According to their view, the decision in *Sopher*'s case could not be applied to the trusts of a settlement which were transfers *inter vivos*. It was held that the words ' extends to the whole of the remaining interest of the transferor in the property ' in section 13 of the Transfer of Property Act were directed to the extent of the subject-matter and to the absolute nature of the estate conferred and not to the certainty of vesting. This decision was followed again by the Bombay High Court in *David Joseph Izra* v. *Sir Alwyn Izra* (Appeal 22 of 1947) (Suit No. 310 of 1946).

The Bombay Legislature has, however, passed the Disposition of Property (Bombay Validating) Act, 1947, by which it is provided that trusts or wills made prior to the 1st

January 1947 would not be deemed to be invalid by reason of section 13 of the Transfer of Property Act or section 113 of the Indian Succession Act, *i.e.*, by the construction put on those provisions by the Privy Council in *Sopher's* case : see Appendix."

Page 107, line 2.—Add after "Mahomedan law (*h*)" "But the Shia Mahomedan can create a vested remainder in favour of an unborn person provided that life estates are created in favour of persons in existence (*h*[1])." Add note "(*h*[1]) *Gulamhussain* v. *Fakir Mahomed* ('47) A.B. 185."

Section 41, page 196.—After line 21 add "The principle of this section applies to the Province of Delhi (*c*[1])." Add note "(*c*[1]) *Kanhya Lal* v. *Deepchand* ('47) A.L. 199."

Page 197, line 11.—Add after the words "owner of the property (*n*)" "A donor who has not reserved to himself any power of revocation of the deed of gift cannot be regarded as an ostensible owner, even if the deed of gift is in his possession (*n*[1])." Add note "(*n*[1]) *Ankanna* v. *Narasaya* (1947) A.M. 127."

Page 199.—Add to note (*c*) "*Kanhyalal* v. *Deepchand* (1947) A.L. 199."

Page 200, line 18.—Add after the words "as an ostensible owner (*m*)" "The inaction or silence of a real owner at a time when he was not conscious of his own rights would not debar him from urging his own claim against a transferor even if he is one for consideration. It is essential that a person giving consent must be aware of his right (*m*[1])." Add note "(*m*[1]) *Shamsher Chand* v. *Bakshi Meher Chand* (1947) A.L. 147 (F.B.)."

Section 43, page 210, line 19.—Add after "taking reasonable care (*l*)" "No duty is cast on the vendor to make an inquiry and notice to the vendee of incumbrances does not bar the application of the section (*l*[1])." Add note "(*l*[1]) *Zogu Rao* v. *Venkata Krishnayya* ('46) A.M. 107, (1945) 2 M.L.J. 478, 224 I.C. 45."

Section 44, page 218.—Add after line 2 "(6) Involuntary transfers.—This section does not in terms apply to involuntary sales, but the principle underlying may be applied as a rule of equity, justice and good conscience (*g*[1])."

Section 45, page 218, line 37.—Add after the words "a Parsee (*k*)" "and also a Muslim (*k*[1])." Add notes "(*g*[1]) *Jagatbandhu Biswas* v. *Ishwar Chand* ('48) A.C. 1" and "(*k*[1]) *Mahomed Jusab* v. *Fatima* (1948) A.B. 53."

Section 51, page 230, line 5.—Add after the words "from the improver (*m*)" "Similarly the section has no application to a case where the person making improvements does not hold under a perpetual lease, nor does he claim an absolute title to the land (*m*[1])." Add note "(*m*[1]) *Ponnia Pillai* v. *Pannas* ('47) A.M. 282."

Section 52, page 239.—Add to note (*t*) "*Natha Dhoju* v. *Ramchand* ('46) A.B. 462, 48 Bom. L.R. 301, 222 I.C. 467."

Section 52, page 240.—Add to note (*v*) "*Gouri Dutt Maharaj* v. *Sukur Mohammed* ('48) A. PC. 147."

Section 52, page 243.—Add after line 36 "(11a) Any other party.—*A* brought a suit against *B* as a legal representative of the deceased *C* and obtained a decree. Subsequently *D* who was another legal representative of *C* filed a suit for a declaration that the decree passed against *B* was not binding on the property of *C*. During the pendency of that suit the property was sold in execution of the decree in the first suit. It was held that section 52 had no application as *D* was not any other party but a legal representative of *C* (*h*[1])." Add note "(*h*[1]) *Kanagasubhu* v. *Poornath* ('47) A.M. 458." Add to note (*h*) "*Dholandas* v. *Dadubhai* ('47) A.S. 181."

Page 245.—Add after line 20 "A mere agreement to sell in favour of a pre-emptor is not sufficient to defeat another pre-emptor's suit and a sale executed after the institution of such a suit is bad on the ground of *lis pendens* (*c*[1])." Add to note (*v*) "*Sada Salu* v. *Chandramani* ('48) A.P. 60." Add note "(*c*[1]) *Mahomed Sadiq* v. *Ghasi Ram* ('46) A.L. 322, 227 I.C. 2, 48 P.L.R. 505."

Page 248.—Add to note (*d*) "*Kalawa* v. *Parappa* ('46) A.B. 207, 47 Bom. L.R. 821. (1945) Bom. 885, 225 I.C. 70."

Page 250.—Add to note (*x*) "*Jamuna Debi* v. *Mangaldas* (1946) A.P. 306, 25 Pat. 13, 226 I. C. 350." Add to note (*o*) "*Gouri Dutt Maharaj* v. *Sukur Mohammed* ('48) A.PC. 147."

Page 252.—Add after paragraph (xi).—" (*xii*) *Suit on an unregistered agreement*.—Where in a suit on an agreement, seeking specific performance and alternatively a charge on the property in question, a compromise decree providing in substance for the relief of charge is passed, the decree comes within the expression "any decree or order, which may be made therein," and the fact that the plaintiffs by the terms of the compromise relinquished their rights under the agreement could not lead to a different conclusion. In the same case the Privy Council also remarked that the broad purpose of this section is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or strength or weakness of the case on one side or the other in *bona fide* proceedings. Further, nothing can depend on the question whether a suit was based on a registered or unregistered agreement."

Page 253.—Add to note (*z*) " *Chauran Singh* v. *Waryam Singh* ('47) A.L. 175; *Hafizbi* v. *Bhabut Mal* ('48) Nag. 133." Add to note (*a*) " *Sarat Chandra* v. *Chintamani* ('48) A.P. 111."

Page 255.—Add to note (*w*) " *Chauran Singh* v. *Waryam Singh* ('47) A.L. 175."

Section 53, page 261.—Add to note (*d*) " *Zafrul Husain* v. *Farid-u-din* ('46) A.PC. 177, 47 Bom. L.R. 239, 49 C.W.N. 115."

Page 263.—Add to note (*e*) " *Murli* v. *Revchand* (1946) A.S. 137, (1946) Kar. 14, 226 I.C. 340."

Page 270, line 40.—Add after the words " against the father (*j*) " " So also in a partition in which no property was allotted to the father who was indebted, it was held that the partition was illusory although the sons were directed to pay the father's debts (j^1)" Add note " (j^1) *Pulia Moopanar* v. *Velu Pillai* ('47) A.M. 203."

Page 272, line 4.—After the words " was merely one of preference " add " Thus in a Calcutta case it has been held that it must be established that the vendor or transferor acted in a manner with intent to defeat or delay the creditors generally, *i.e.*, all his creditors. If he prefers some creditors of his, the section has no application (y^1)." Add note " (y^1) *Rajbari Bank* v. *Rani Hashamukha* ('47) A.C. 154; *Namsakhdas* v. *Govardhandas* (1948) A.N. 110."

Section 53A, page 285.—Add to note (*b*) " *Subodhchand* v. *Bhagvandas* ('47) A.C. 353; *Parasram* v. *Deoram* ('47) A.N. 188."

Page 286, line 9.—Add after the words " covered by s. 53A " " See *Ajab Singh* v. *Jhabulal* ('48) A.N. 67. In that case there was a mistake in the deed regarding the survey number of the land agreed to be sold. Although the delivery of possession was given, it was held that in the absence of a registered deed, no title could pass. The vendee was not entitled to take advantage of the doctrine of part performance, as he did not get the deed rectified within the period of limitation."

Section 54, page 298, line 10.—Add after the words " specific enforcement (*y*) " " A clause in an agreement that the purchaser will at his own expense and cost take proper legal steps to protect and defend the properties was held as affording sufficient and adequate consideration. The law does not require that the consideration should be immediately ascertainable in money. It is sufficient if it is ascertainable at a time when the payment is made (y^1)." Add note " (y^1) *Beni Madho* v. *John* ('47) A.A. 110." Add to note (*z*) " *Puttam Singh* v. *Jagannath* ('47) A.P. 1."

Page 302.—Add to note (*u*) " *Puran Mahatan* v. *Bhago Mahatan* ('46) A.P. 81, 226 I.C. 39."

Section 55, page 316.—Add to note (*j*) " *Ramayya* v. *Rama Ayyar* ('47) A.M. 92."

Page 320.—Add to note (*q*) " *Sheokumar Tewari* v. *Central Corporation Bank, Dinapur* ('47) A.P. 477."

Page 321.—Add after line 25 " Under section 55 (2) there is an implied covenant for title. This covenant for title has been interpreted to include a covenant for quiet enjoyment (k^1) " Add note " (k^1) *Vishwanath* v. *Deokibai* (1948) Nag. 50."

Page 33[illegible].—Add after line 39 " It is however open to a purchaser to renounce his position as such and to fall back upon his previous relationship with the seller (j^1)." Add note " (j^1) *Biseswar* v. *Abdul Dewan* ('47) A.C. 328."

Section 56, page 346, line 28.—Add after the words "is independent of notice" "(t^1)." Add note "(t^1) *Sanu Datta Mal* v. *Balaji Mal* ('47) A.L. 320."

Section 58, page 356.—Add to note (*k*) "*Ghulam Mahomed* v. *Rahmat Jamuna* ('47) A. Pes. 33." Add to note (*m*) "*Jagannath* v. *Butto Kristo* ('47) A.P. 345."

Page 357, line 13.—Add after the words "would have to be applied (*w*)" "In an Allahabad case where the transaction took place by two separate deeds, it was held to be a mortgage (w^1)." Add to note (*o*) "*Prag Dutt* v. *Hari Bahadur* ('47) A.A. 334." Add to note (*t*) "See also *Jagannath* v. *Butto Kristo* ('47) A.P. 345." Add note "(w^1) *Prag Dutt* v. *Hari Bahadur* ('47) A.A. 334."

Page 361, line 2.—After the words "is a nullity (*s*)" add "If the mortgagee has parted with possession he cannot claim the return of the proportionate extent of the land and mesne profits of such proportion (s^1)." Add note "(s^1) *Sundaram Aiyar* v. *Itticha Thara Valia* ('47) A.M. 191."

Page 369, line 8.—Add after the words "rent and profits" "(p^1)." Add note "(p^1) *Mohammed Saeed* v. *Abdul Alim* ('47) A.L. 40."

Page 375.—Add to note (*g*) "*Fozumal* v. *Shridhar* ('46) A.B. 499, 48 Bom. L.R. 327, 227 I.C. 135."

Page 381.—Add to note (*x*) "*Mohammed Saeed* v. *Abdul Alim* ('47) A.L. 40 (F.B.)."

Section 59, page 389, line 23.—Add after "see section 48 of the Registration Act" "Even an admission of the mortgagor will not be sufficient to create a mortgage (y^1)." Add note "(y^1) *Bishnu Singh* v. *Sheodhari Lal* ('47) A.P. 110."

Section 59, page 394, line 5.—Add "A mortgagor cannot file a suit for redemption in the case of a mortgage which is invalid for want of registration. If the mortgage is usufructuary, the proper course is to treat the mortgagee as a trespasser and to sue for eviction (c^1)." Line 31, add after "Cantonments Act 2 of 1924" "If, however, the property mortgaged is situate in an area to which the Act has not been extended, the Act does not apply even if the contract may have taken place in such area (k^1)." Add to note (*j*) "*Munshi Ram* v. *Baisakhi Ram* ('47) A.L. 335." Add to note (*k*) "*Munshi Ram* v. *Baisakhi Ram* ('47) A.L. 335." Add note "(k^1) *Iqbal Begram* v. *Uttam Chand* ('47) A.L. 324." Add note "(c^1) *Lingappa* v. *Danappa* ('47) A.B. 206."

Section 60, page 405, line 19.—Add after the words "not as he pleases" "In a later case the same High Court following the decision of the House of Lords in *Samuel* v. *Jurrah Timber* (1904) A.C. 323 held that an agreement incorporated in a mortgage deed to sell the property to the mortgagee for the price already agreed upon operated as a clog (b^1)." Add note "(b^1) *Ramaswamy Patted* v. *Chuman* (1948) A.M. 7."

Section 60, page 418.—In line 26 add after the words "executed (*c*)" "and also when the first redemption suit abated by reason of the death of the mortgagor plaintiff (c^1)." Add note "(c^1) *Rajaram Vithal Sutar* v. *Ramchandra Pandu* (1948) 50 Bom. L.R. 45."

Section 63, page 441, line 30.—Add after the words "be excluded" "There may be cases in which the contract may provide that the improvements belong to the mortgagor. In such cases the mortgagor is not liable to pay costs of the improvements except in cases provided for in sub-section (2). In such cases if the improvements are such that they cannot be severed from the land and taken away by the mortgagee, the mortgagor must be made liable to pay the costs of such improvements as he will have the benefit of them. In Malabar a usufructuary mortgage carries with it a customary incident that the mortgagee may effect improvements and claim costs (k^1)." Add note "(k^1) *Sundaram Aiyer* v. *Itticha Thara Valia* ('47) A.M. 197."

Section 65A, page 447.—Add to note (*g*) "*Govind Chandra* v. *Sasadhar Mandal* (1947) A.C. 73."

Section 66, page 450, line 33.—Add after "section 65A" "In an Allahabad case a lease detrimental to the interest of the mortgagee was held to fall within the mischief of this rule (f^1)." Add note "(f^1) *Faquira* v. *Jivan Singh* ('47) A.A. 240."

Page 457, line 36.—Add after the words "and the defendant mortgagees (*w*)" "This view was followed in *Gopalswami* v. *Nataraj* (w^1) in which it was held that the right of a co-mortgagee defendant is not extinguished automatically on the passing of a decree in

favour of the plaintiff co-mortgagee irrespective of the judgment given and the language of the decree passed in it and irrespective of whether or not the right of the co-mortgagee was the subject of adjudication." Add note "(w¹) ('48) A.M. 17."

Section 68, page 474, line 31.—Add after the words "Order 34, rule 6" "Limitation.—Where a mortgage deed contains a covenant to repay the mortgage money within five years and also a covenant to put the mortgagee in possession of the mortgaged property by way of security and the mortgagor fails to deliver possession to the mortgagee, the right to sue for the mortgage money accrues to the mortgagee under this section immediately on the mortgagor's failure to deliver possession of the mortgaged property and the suit is governed by article 132 of the Limitation Act (b^1)." Add note "(b^1) *Dnyanoba Gangaram* v. *Dattoba* ('47) A.B. 162."

Section 69, page 476, line 44.—Add after the words "is under the section" "Clause (b) as it originally stood was held to apply to cases where the mortgagee was the Secretary of State. Where there was an agreement under which the land was offered as a collateral security for the tagai loan advanced by the Provincial Government under the Agricultural Loans Act, it was held that clause (b) did not apply (d^1)." Add note "(d^1) *Mutha Karuppan* v. *Sarmalappa Goundan* ('48) A.M. 130."

Section 73, page 498.—Add to note (j) "*Koru Issaku* v. *Gothi Mikkala* ('48) A.M. 1 (F.B.)."

Page 499, line 13.—Add "So also a contract of sale does not create any interest in the property agreed to be sold. The prospective purchaser is not entitled to the compensation which may be awarded for the compulsory acquisition of the property before the sale could be completed (w^1)." Add note "(w^1) *Mahomed Abdul* v. *Lalmiya* ('47) A.M. 254."

Section 76, page 510.—Add to note (s) "*Gulam Khaja Mahomed* v. *Pandharinath* (1948) 50 Bom. L.R. 271 ; *Arunachalam* v. *Jagannath* ('48) A.M. 182."

Section 76, page 513, line 35.—Add after the words "charges, or repairs (i)" "There is no warrant for limiting the word 'expenses' in clause (i) to what has been spent in connection with the management and the collection of rents and profits. Where a decree directs the mesne profits to be awarded after a particular date, the mortgagee cannot charge for public charges (i^1)." Add note "(i^1) *Puleyadi Rajagopala* v. *Karuppi* ('46) A.M. 464, 1 M.L.J. 392."

Section 77, page 514.—Add to note (o) "*Rani Ranbijoy* v. *Badri Uppadhaya* ('46) A.P. 36, 24 Pat. 545, 226 I.C. 112."

Section 82, page 533, line 18.—After the words "is not in force (w)" add "In applying the principle the ratio which the value of the items purchased bears to the value of the whole of the mortgaged property is to be taken into account and not the amount of the debt discharged (w^1)". Add note "(w^1) *Raghavacharya* v. *Kandaswami* ('47) A.M. 277".

Page 539, line 1.—After the words "the mortgage is fully paid off (s)" add "This view has not been accepted in a recent decision of the Madras High Court. In *Munjappa* v. *Pacha* (s^1) it was held that in section 92 the Legislature had taken care to provide that the right of subrogation did not arise unless the mortgage in respect of which the right was claimed had been redeemed in full. It was remarked that there was no such provision in section 82." Add note "(s^1) ('47) A.M. 86".

Section 84, page 549, line 5.—Add after the words "Code of Civil Procedure (o)" "Where the mortgagor had applied under section 83 and thereafter actually deposited in Court the amount of the principal only of the mortgage and offered to pay the amount in respect of the cost of repairs and interest, but the mortgagee refused to accept the money on the ground that the mortgage could not be redeemed, it was held that there was a legal tender and the interest ceased to run (o^1)". Add note "(o^1) *Bhagwat Prasad* v. *Ganga Din* ('47) A.A. 68".

Section 91, page 551, line 5.—Add after the words "binding on the mortgagee (c)" "In a Nagpur case, however, it was held that when after a mortgage has been executed the mortgagor grants a lease of the mortgaged property in the ordinary course of the management of the property and the lease is binding on the mortgagee the lessee not being a person whose interests are in any way jeopardised by the mortgage is not entitled to redeem the mortgage (c^1)". Add note "(c^1) *Pavan Kumar* v. *Madanlal* ('47) A.N.210".

Section 100, page 610, line 31.—After the words "apply to charges (z)" add "Where a portion of the property charged has been relieved thereof without the consent of the holder of the charge, the charge-holder can proceed against the whole property for the enforcement of the charge and the principle of rateable distribution is inapplicable (z^1)". Add note "(z^1) *Hussain Mirza* v. *Raghubir Dayal* ('47) A.C. 122."

Section 101, page 612, line 12.—After the words "subsequent incumbrance" add "(l^1)". Add note "(l^1) *Ram Narain* v. *Nawab Singh* ('47) A.A. 214."

Section 105, page 635.—Add to note (*h*) "*Dinabandhu* v. *Gopinath* ('48) A.P. 12."

Page 637, line 36.—Add after the words "is on the tenant (*d*)" "In an Oudh case (d^1) it was held that although none of the following facts taken by itself was sufficient to establish the fact that the lease was a permanent one, the cumulative effect of all of them taken together was to establish that the land was held under a perpetual lease :—(*a*) The land was given on lease at the same time as a building thereon was sold for residential purposes to the lessee, (b) no period was fixed for the lease, (c) the land was held at a uniform rent for 69 years, (d) several transfers had taken place, (e) the lessor never claimed that the lease was terminable." Add note "(d^1) *U. P. Government* v. *Church Missionary Association* ('48) A.O. 54."

Page 644.—Add to note (*p*) "*Ganguly* v. *Kamalapat Singh* ('48) A.C. 236."

Page 646.—Add to note (*d*) "*Governor-General of India* v. *The Corporation of Calcutta* ('48) A.C. 8."

Page 648, line 3.—After the words "to quit was inoperative (*w*)" add "A condition in a lease that the land was to be vacated whenever needed without notice may be a superadded condition and may not be a part of the contract (w^1)." Add note "(w^1) *Vithoba* v. *The Sholapur Municipality* ('47) A.B. 241."

Page 653.—Add to note (*p*) "*Sabetri* v. *Jalikha* ('47) A.C. 244."

Page 654.—Add to note (*f*) "*Vinod Sagar* v. *Vishnubhai* ('47) A.L. 388."

Section 107, page 659, line 2.—Add after the words "writing is not necessary (*f*)" "But this would no longer be so after the application of the Act (f^1)". Add note "(f^1) *Vinod Sagar* v. *Vishnubhai* ('47) A.L. 388."

Section 108, page 678, line 23.—Add after the words "by way of mortgage and sublease" "It has however, been held that a lessee cannot by his unilateral act by assigning his interest in the leasehold premises put an end to the obligations which he has undertaken either by contract of lease or under this section. As far as privity of contract is concerned, the only person liable is the lessee himself. The obligation to hand over possession of the property on the determination of the tenancy is not upon the assignee but upon the lessee. The lessee is, therefore, the proper person to whom notice to vacate should be given (x^1)." Add note "(x^1) *Treasurer of Charitable Endowments* v. *Tayabji* (1948) 50 Bom. L. R. 240."

Section 110, page 707, line 7.—After the words "written leases only (*i*)" add "But in a later case it was held that it was not confined to written leases but could apply to an oral lease(i^1)".

Line 30.—After the words "in the undernoted cases (*o*)" add "But there must be an express contract to the contrary within the meaning of the second paragraph (o^1)." Add notes "(i^1) *Kedarnath* v. *Ramchandra Nath* ('46) A.C. 460, 50 C.W.N. 306, 223 I.C. 466." and "(o^1) *Ganesh Lal* v. *Suchalata* ('47) A.O. 88."

Section 111, page 711, line 21.—After the words "for uncertainty (*s*)" add "A covenant in a lease that after the expiration thereof the lessor shall be at liberty to lease out the premises and the lessee shall be entitled to take the lease at the lessee's will was held as not amounting to a covenant for renewal (s^1)". Add note "(s^1) *Narendra Nath* v. *Rampal Singh* ('47) A.C. 378".

Page 714.—Add to note (*d*) "*Pusaram* v. *Deorao* ('47) A. M. 188."

Page 718, line 20.—After the words "a part of the premises (*h*)" add "But where the entire interest has been transferred by a tenant by separate alienations the condition against alienation is broken and would work as forfeiture (h^1)." Add note "(h^1) *Vidubhai* v. *Mahalaxmi* ('47) A.M. 441."

Page 723, line 31.—After the words " to be in writing " add " The principle underlying the clause is the principle of justice and equity and applies to agricultural leases (e^1)." Add note " (e^1) *Umar Palewar* v. *Dawood* ('47) A.M. 68."

Section 112, page 728, line 28.—Add after the words " may be inferred (p) " " The principle of this section applies to Punjab and Delhi (p^1)." Add note " (p^1) *Mt. Gowai* v. *Shamlal* ('46) A.L. 330, 226 I.C. 583."

Section 114, page 731.—After the words " from forfeiture is allowed (t) " add " There must be actual payment. Mere readiness to pay will not be sufficient (t^1)." Add note " (t^1) *Habib Ahmed* v. *Kish Koer* ('46) A.L. 328, (1946) A.L.J. 121, 222 I.C. 598."

Page 732.—Add to note (e) " *Ladharam* v. *Chuniram* ('47) A.B. 86."

Section 114-A, page 733, line 30.—Add after the words " against alienation (n) " " In a recent decision the Madras High Court applied the principle of this section to an agricultural lease and refused to relieve against forfeiture when notice was not in accordance with the provisions of this section (n^1)." Add note " (n^1) *Bright Souza Bai* v. *Maria Lous Bai* ('47) A.M. 119."

Section 116, page 735.—Add to note (h) " *Gur Prasad* v. *Hansraj* ('46) A.O. 144, 21 Luck. 292, 222 I.C. 604."

Section 116, page 736, line 12.—After the words " as a tenant (l) " add " So also where a tenant remained in possession after the expiry of the date on which he was required to deliver possession by the Rent Controller cannot take advantage of the section even if he had paid rent for such period (l^1)." Add note " (l^1) *Gulam Ghans* v. *Chaudhari* ('47) A.M. 436."

Section 117, page 739.—Add to note (g) " *Narayan* v. *Gokuldas* ('47) A.M. 48."

Page 740.—Add to note (u) " *Abdul Hussain* v. *Salimar* ('47) A.C. 36; *Budhan Mahtan* v. *Ramanugraha* ('47) A.P. 78."

Section 118, page 743, line 9.—After the words " delivery of possession apply " add "(v^1)." Add note " (v^1) *Debi Prasad* v. *Jaldhar Chaube* ('46) A.A. 125, (1945) A.L.J. 537, 223 I.C. 194."

Section 124, page 755, line 13.—After the words " gift of future property " add " (v^1)." Add note " (v^1) *Brindaban Bihari* v. *Oudh Bihari* ('47) A.A. 179."

Section 126, page 757, line 18.—After the words " gift is absolute (q) " add " Such condition must be express. In the absence of such condition the donor has no power of revocation and the Court will not help him (q^1)." Add note " (q^1) *Ankanna* v. *Narsaya* ('47) A.M. 117."

Section 131, page 780, line 27.—Add after the words "and address of his solicitor (e) " " The section does not require that the notice must be given forthwith. What is reasonable notice would be a question of fact. Notice given after nearly a year after the assignment was held to be proper (e^1)." Add note " (e^1) *Alapati Venkata* v. *Nomemura Kyarat* ('48) A.M. 171."

Section 137, page 789, line 1.—After the words " documents is in no way restrictive " add " The contract indicated by a railway receipt can be transferred without a writing. An endorsement in blank coupled with the delivery of the receipt is sufficient (n^1)." Add note " (n^1) *Governor-General in Council* v. *Jaynarain* ('48) A.P. 36."

CONTENTS.

	PAGE
PREFACE	III
INTRODUCTION	V
ADDENDA	IX
TABLE OF CASES CITED	XXIII
PREAMBLE	1

CHAPTER I.

PRELIMINARY.

SECTIONS.

1.	Short title	6
	Commencement	6
	Extent	6
2.	Repeal of Acts	8
	Saving of certain enactments, incidents, rights, liabilities, etc. ..	8
3.	Interpretation-clause	13
4.	Enactments relating to contracts to be taken as part of Contract Act	43

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A) Transfer of Property whether moveable or immoveable.

	"Transfer of property" defined	46
6.	What may be transferred	51
7.	Persons competent to transfer	77
8.	Operation of transfer	79
9.	Oral transfer	88
10.	Condition restraining alienation	89
11.	Restriction repugnant to interest created	97
12.	Condition making interest determinable on insolvency or attempted alienation	101
13.	Transfer for benefit of unborn person	103
14.	Rule against perpetuity	107
15.	Transfer to class, some of whom come under sections 13 and 14 ..	117
16.	Transfer to take effect on failure of prior interest	120
17.	Direction for accumulation	123
18.	Transfer in perpetuity for benefit of public	128
19.	Vested interest	132
20.	When unborn person acquires vested interest on transfer for his benefit	138
21.	Contingent interest	138
22.	Transfer to members of a class who attain a particular age	142
23.	Transfer contingent on happening of specified uncertain event ..	143
24.	Transfer to such of certain persons as survive at some period not specified	146
25.	Conditional transfer	147
26.	Fulfilment of condition precedent	149
27.	Conditional transfer to one person coupled with transfer to another on failure of prior disposition	151

SECTIONS. PAGE

28. Ulterior transfer conditional on happening or not happening of specified event 154
29. Fulfilment of condition subsequent 157
30. Prior disposition not affected by invalidity of ulterior disposition .. 158
31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen 160
32. Such condition must not to be invalid 161
33. Transfer conditional on performance of act, no time being specified for performance 162
34. Transfer conditional on performance of act, time being specified .. 163

Election.

35. Election when necessary 164

Apportionment.

36. Apportionment of periodical payments on determination of interest of person entitled 173
37. Apportionment of benefit of obligation on severance 176

(*B*) *Transfer of Immoveable Property.*

38. Transfer by person authorised only under certain circumstances to transfer 179
39. Transfer where third person is entitled to maintenance 181
40. Burden of obligation imposing restriction on use of land, or of obligation annexed to ownership, but not amounting to interest or easement.. 184
41. Transfer by ostensible owner 195
42. Transfer by person having authority to revoke former transfer .. 206
43. Transfer by unauthorised person who subsequently acquires interest in property transferred 206
44. Transfer by one co-owner 215
45. Joint transfer for consideration 218
46. Transfer for consideration by persons having distinct interests .. 219
47. Transfer by co-owners of share in common property 220
48. Priority of rights created by transfer 221
49. Transferee's right under policy 223
50. Rent *bona fide* paid to holder under defective title 224
51. Improvements made by *bona fide* holders under defective titles .. 226
52. Transfer of property pending suit relating thereto 235
53. Fraudulent transfer 256
53A. Part performance 277

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

54. "Sale" defined 294
Sale how made 294
Contract for sale 294
55. Rights and liabilities of buyer and seller 305
56. Marshalling by subsequent purchaser 345

Discharge of Incumbrances on Sale.

57. Provision by Court for incumbrance, and sale freed therefrom .. 347

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

SECTIONS.		PAGE
58.	"Mortgage," "mortgagor," "mortgagee," "mortgage-money," and "mortgagee-deed" defined	350
	Simple mortgage	350
	Mortgage by conditional sale	350
	Usufructuary mortgage	351
	English mortgage	351
	Mortgage by deposit of title-deeds	351
	Anomalous mortgage	351
59.	Mortgage when to be by assurance	388
59A.	References to mortgagors and mortgagees to include persons deriving title from them	395

Rights and Liabilities of Mortgagor.

60.	Right of mortgagor to redeem	395
	Redemption of portion of mortgaged property	396
60A.	Obligation to transfer to third party instead of re-transference to mortgagor	428
60B.	Right to inspection and production of documents	429
61.	Right to redeem separately or simultaneously	429
62.	Right of usufructuary mortgagor to recover possession	432
63.	Accession to mortgaged property	436
	Accession acquired in virtue of transferred ownership	436
63A.	Improvements to mortgaged property	440
64.	Renewal of mortgaged lease	441
65.	Implied contracts by mortgagor	442
65A.	Mortgagor's power to lease	446
66.	Waste by mortgagor in possession	449

Rights and Liabilities of Mortgagee.

67.	Right to foreclosure or sale	451
67A.	Mortgagee when bound to bring one suit on several mortgages	461
68.	Right to sue for mortgage-money	463
69.	Power of sale when valid	474
69A.	Appointment of receiver	482
70.	Accession to mortgaged property	487
71.	Renewal of mortgaged lease	490
72.	Rights of mortgagee in possession	490
73.	Right to proceeds of revenue sale or compensation on acquisition	497
74 & 75.	[Repealed]	502
76.	Liabilities of mortgagee in possession	502
	Loss occasioned by his default	503
77.	Receipts in lieu of interest	514

Priority.

78.	Postponement of prior mortgagee	515
79.	Mortgage to secure uncertain amount when maximum is expressed	520
80.	[Repealed]	522

Marshalling and Contribution.

SECTIONS.		PAGE
81.	Marshalling securities	522
82.	Contribution to mortgage-debt	526
	Deposit in Court.	
83.	Power to deposit in Court money due on mortgage	541
	Right to money deposited by mortgagor	541
84.	Cessation of interest	547
85 to 90.	[*Repealed*]	549
	Redemption.	
91.	Persons who may sue for redemption	549
92.	Subrogation	553
93.	Prohibition of tacking	587
94.	Rights of mesne mortgages	589
95.	Right of redeeming co-mortgagor to expenses	596
96.	Mortgage by deposit of title-deeds	600
97.	[*Repealed*]	601
	Anomalous Mortgages.	
98.	Rights and liabilities of parties to anomalous mortgages	601
99.	[*Repealed*]	602
	Charges.	
100.	Charges	603
101.	No merger in case of subsequent encumbrance	611
	Notice and Tender.	
102.	Service or tender on or to agent	622
103.	Notice, etc., to or by person incompetent to contract	623
104.	Power to make rules	623

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105.	"Lease" defined	624
	"Lessor," "Lessee," "premium" and "rent" defined	624
106.	Duration of certain leases in absence of written contract or local usage	646
107.	Leases how made	656
108.	Rights and liabilities of lessor and lessee	659
	(*A*) *Rights and Liabilities of the Lessor.*	
	(*B*) *Rights and Liabilities of the Lessee.*	
109.	Rights of lessor's transferee	703
110.	Exclusion of day on which term commences	706
	Duration of lease for year	706
	Option to determine lease	707
111.	Determination of lease	708
112.	Waiver of forfeiture	725
113.	Waiver of notice to quit	728
114.	Relief against forfeiture for non-payment of rent	730
114A.	Relief against forfeiture in certain other cases	732

SECTIONS.		PAGE
115.	Effect of surrender and forfeiture on under-leases	734
116.	Effect of holding over	735
117.	Exception of leases for agricultural purposes	739

CHAPTER VI.

OF EXCHANGES.

118.	"Exchange" defined	742
119.	Right of party deprived of thing received in exchange	743
120.	Rights and liabilities of parties	745
121.	Exchange of money	746

CHAPTER VII.

OF GIFTS.

122.	"Gift" defined	747
	Acceptance when to be made	747
123.	Transfer how effected	751
124.	Gift of existing and future property	755
125.	Gift to several, of whom one does not accept	755
126.	When gift may be suspended or revoked	756
127.	Onerous gift	762
	Onerous gift to disqualified person	762
128.	Universal donee	763
129.	Saving of donations *mortis causa* and Muhomedan law	764

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130.	Transfer of actionable claim	766
130A.	Transfer of policy of marine insurance	779
131.	Notice to be in writing signed	780
132.	Liability of transferee of actionable claim	781
133.	Warranty of solvency of debtor	784
134.	Mortgaged debt	785
135.	Assignment of rights under policy of insurance	786
135A.	Assignment of rights under policy of marine insurance	786
136.	Incapacity of officers connected with Courts of Justice	787
137.	Saving of negotiable instruments, etc.	788

APPENDICES.

The Hindu Transfers and Bequests Act, 1914, being Madras Act No. I of 1914	790
The Hindu Disposition of Property Act, 1916, being Act No. XV of 1916	792
The Hindu Transfers and Bequests (City of Madras) Act, being Act VIII of 1921	794
Crown Grants Act, 1895	796
Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939	797
Dispositions of Property (Bombay) Validation Act, 1947	799
Glossary of vernacular and technical terms	801
GENERAL INDEX	815

TABLE OF CASES.

A

A. Murray *v.* M. S. M. Firm, 493, 495.
A. C. Kundu *v.* Babu Rukmanand, 478.
A. G. *v.* Chambers, 671.
——— *v.* Fullerton, 702.
A. K. A. C. T. V. Chidambaram *v.* R. M. A. R. S. Firm, 275.
A. L. A. R. Chetty Firm *v.* Maung Thive, 248.
A. L. R. M. Chettiar *v.* L. P. R. Chettiar, 31, 518.
A. M. K. M. Chettyar Firm *v.* A. K. M. L. Chettyar Firm, 552.
Abadi Begam *v.* Mohammad Khalil, 297.
Abaji *v.* Luxamon, 355.
Abarthoramankutti *v.* Ittikaparamabila, 573.
Abbake Higgadthi *v.* Kinhiamma, 363, 466.
Abbas Ali *v.* Karim Baksh, 297, 305.
———— Khan *v.* Chote Lal, 561.
——— Bundi Bibi *v.* Saiyed Mohammud Raza, 49, 96.
——— Khan *v.* Ram Das, 363, 412, 454.
Abbot, *In re*, 120.
Abboy *v.* Annamalai, 238.
Abbu *v.* Kuppammal, 761.
Abdool *v.* Goolam, 51, 54, 55.
——— Ghafoor *v.* Qammaruddin, 422.
——— Hossein *v.* Raghu Nath, 222.
——— Hye *v.* Mir Mahomed, 260, 264.
——— Ruhoman *v.* Dataram, 677.
Abdoor Ruhman *v.* Kisto Lal, 545.
Abdul *v.* Kisan, 324.
——— *v.* Salimun, 18.
——— Ahad *v.* Brij Narain Rai, 443.
——— Alim *v.* Abdul Sattar, 301.
——— Aziz *v.* Appayasami, 82.
——— ——— *v.* Rahmat Ullaha, 441.
——— Cadur *v.* Turner, 107.
——— Gaffar Khan *v.* Mangal Rai, 599.
——— Guffar *v.* Ishiaz Ali, 605.
——— ——— Khan *v.* Mangat Rai, 561.
——— Guffur *v.* Ishaqali, 247.
——— Hakim *v.* Elahi Baksh, 636.
——— ——— *v.* Fazu Mia, 5.
——— ——— *v.* Sujjad Husain, 402.
——— Hamid *v.* Abdul Ghani, 305.
——— ——— *v.* Ram Kumar, 552, 577.

A—*contd.*

Abdul Hari *v.* Nathua, 640.
——— Hashim *v.* Amar Krishna, 299.
——— Hossein *v.* Golam Hossain, 58.
——— Issalam *v.* Mst. Rafiat, 471.
——— Kader *v.* Ali Mia, 276.
——— Karim *v.* Durga Prasad, 418.
——— ——— *v.* Upper India Bank, 664.
——— Latif *v.* Abudul Gani, 355.
——— ——— *v.* Debi Mahton, 304.
——— ——— *v.* Hamed Gazi, 690.
——— Majid *v.* Arunachala, 618.
——— Muhammad *v.* Seethalakshmi, 237, 243.
——— Qayum *v.* Abdul Rahman, 138.
——— Quayyum *v.* Sadruddin, 496, 570.
——— Rahman *v.* Bismillah Begum, 356.
——— ——— *v.* Ghulam Mahommad, 75.
——— *v.* Raghunandan, 427.
——— Rahim *v.* Kadu, 322.
——— ——— *v.* Madhavrao, 367, 399.
——— ——— *v.* Raghunath, 371.
——— Rahman *v.* Inayati Bibi, 248.
——— ——— *v.* Sheo Dayal, 454.
——— Rashid *v.* Safar Ali, 727.
——— Razak *v.* Nandlal, 234.
——— ——— Rowther *v.* Abdul Rahiman Sahib, 28, 568, 581, 605.
——— Rehman *v.* Vinayak, 416, 500.
——— Samad *v.* Municipal Committee, 606.
——— Wahid *v.* Nuran Bibi, 138.
——— ——— Khan *v.* Shaluka Bibi, 297.
Abdulbhai *v.* Kashi, 355, 360, 371.
Abdulla *v.* Ismail, 305.
——— *v.* Mahammad Muslim, 720.
——— *v.* Saadulla, 402.
——— *v.* Subbarayyar, 649.
——— Beary *v.* Mamhali Beary, 330.
——— Khan *v.* Abdur Rahman Beg, 320, 337.
——— ——— *v.* Bundi, 197, 199.
v. Purshottam, 276.
Abdulrahim *v.* Sarafalli, 632.
Abdur Rahim *v.* Mahomed Barkat Ali, 2.
——— Rauf Chowdry *v.* N. P. L. S. P. Chettyar Firm, 254.
Abdus Shakur *v.* Nandlal, 191.

A—*contd.*

Aberaman Iron Works *v.* Wickens, 337.
Abhachari *v.* Ramchandrayya, 768.
Abhayacharan *v.* Hemchandra, 691.
Abhiram Goswami *v.* Shyama Charan Nanda, 94, 627.
Abhoy Chetti *v.* Ramchandra Rao, 774.
——— Churn Ghose *v.* Attarmoni, 230.
Abhoyeswari *v.* Gourisunkar, 461.
Abid Husain *v.* Kaniz Fatima, 382, 507, 508.
Abinash Chandra *v.* Dasrath, 18, 19, 20, 390, 391.
Abkan Sahib *v.* Soran Bibi, 611.
Ablakh Rai *v.* Salim Ahmad, 731.
Abraham Ezra *v.* Abdul Latiff, 413, 480.
Abro *v.* Promotho, 342.
Abu Bakar *v.* Venkataramana, 649.
—— Hasan *v.* Ramzan Ali, 82.
—— Mahamed *v.* S. C. Chunder, 65, 768.
—— ——— *v.* Saraswati, 183.
—— Muhammad *v.* Kamiz Fizza, 99.
Abul Fata Mahomed *v.* Rasamaya, 111, 132.
Achal Ram *v.* Kasim Husain, 70.
Achanta Venkata *v.* Manna Venkayamma, 347.
Achath Sankaran, *In re*, 544.
Achayya *v.* Hanumantarayudu, 664.
Achhaibar Singh *v.* Rajmati, 444.
Ahoo *v.* Dhony Ram, 394.
Achut *v.* Shivajirao, 237.
Achutaramaraju *v.* Subbaraju, 356.
Adams *v.* Hallett, 263.
Adams *v.* Angell, 614.
——— *v.* Gibney, 667.
——— *v.* Scott, 479.
Adari Sanyasi *v.* Nookalamma, 335, 571.
Adhiragi Chetty *v.* Billa Tyampu, 732.
Adikesavan *v.* Gurunatha, 319, 320, 339.
Adilnarayuch *v.* Manganna, 287.
Adimulam *v.* Pir Ravuthan, 737.
Adinath Bhattacharjee *v.* Krishna Chander, 657.
Adipuranan *v.* Gopalasami, 416.
Aditya Prasad *v.* Parmananda, 209.
——— ——— *v.* Ram Ratan Lal, 431, 435.
Administrator-General *v.* Asraf Ali, 738, 739.
——————— *v.* Hughes, 107, 130.
——————— of Bengal *v.* Prem Lall Mullick, 3.
——— *v.* Premlal, 4.

A—*contd.*

Administrator-General of Bengal *v.* Agore Nath, 320.
Adolphe Shrager *v.* Emma Price, 651, 653, 657.
Adpanna *v.* Venkatasami, 433.
Advocate-General *v.* Karmali, 118, 120.
——————— *v.* Vishvanath, 131.
Afiruddi *v.* Joy Chandra, 465.
Afsar Shaik *v.* Saurava, 506.
——— Jehan Begam *v.* Mahomed Ahmed, 593.
Aftabuddin *v.* Basanta, 271.
Afzal *v.* Ramkumar Bhudra, 769.
Afzalunissa *v.* Abdul Karim, 637.
Aga Muhammadally *v.* Venkatappaya, 402, 433.
Aghore Nath *v.* Natabar, 473.
——— ——— *v.* Ram Churn, 788.
——— ——— Banerji *v.* Deb Narain, 592, 593.
Agin Bindh Upadhya *v.* Mohan Bikram, 634.
Agra Bank *v.* Barry, 27, 230.
Agrenath *v.* Ram Ratan, 770.
Ah Foon *v.* Hoe Lai Pat, 264, 271, 273.
Ahamadar Rahaman *v.* Jaminiranjan, 662, 664.
Ahearn *v.* Bellman, 651.
Ahindara Nath *v.* Twiss, 731.
Ahinsa *v.* Abdul Kader, 178.
——— Bibi *v.* Abdul Kader, 409, 410.
Ahmadali *v.* Dhondba Dasrath, 84.
Ahmad Ali *v.* Raishan Raza, 330.
——— Husain *v.* Azhar Ali, 357.
——— ——— *v.* Kallu, 262.
——— ——— *v.* Mahomed Quasim, 427.
——— ——— *v.* Riaz Ahmad, 732, 735.
——— Raza *v.* Abid Husain, 390.
——— Shah *v.* Walidad Khan, 618.
——— Wali *v.* Bakar Husain, 414.
——— Yar Khan *v.* The Secretary of State for India, 234.
Ahmaduddin *v.* Ilahi Baksh, 59.
——————— *v.* Majlis, 59.
——————— *v.* Majlis Rai, 769.
Ahmadullah *v.* Abdul Rahim, 411, 455, 543, 545.
——————— Khan *v.* Salar Bakhsh, 471.
Ahmed Alimahomed, *In re*, 387.
——— Hassan *v.* Hassan Mahomed, 283.
——— Husain *v.* Kallu Mian, 50, 241.
——— Khan *v.* Sadasheo, 644.
——— Raza *v.* Abid Husain, 392.

A—*contd.*

Ahmed Sait *v.* Bank of Mysore, 73.
Ahmedbhoy *v.* Balkrishna, 37.
——— *v.* Vulleebhoy, 240.
Ahmud Bepari *v.* Tohi Mahomed, 671.
Ahobilachariar *v.* Thulasiammal, 283.
Aisha Bibi *v.* Mahfuz-un-nissa, 208.
Aiyappa *v.* Kuppusami, 450.
Aiyasamier *v.* Venkatachella, 3.
Ajijuddin *v.* Shaikh Budan, 215, 488, 489.
Ajodhya *v.* Indra, 439.
Ajudhia *v.* Rakhman Kuar, 152.
——— Prasad *v.* Chandanlal, 211.
——— ——— *v.* Mansingh, 386, 488.
Akatty Moidin Katty *v.* Chiragil, 593.
Akbar Fakir *v.* Intial Sayal, 290.
——— Husain *v.* Mt. Husain Jahan Begum, 76.
——— ——— *v.* Shah Asanul, 408.
Akbarali *v.* Mafijaddin, 383.
Akhil Chandra Day *v.* Akhil Chandra, 699.
Akhoy Kumar Chatterjee *v.* Akman Molla, 679, 682.
——— ——— *v.* Haridas Bysack, 774, 789.
——— ——— *v.* Corporation of Calcutta, 182, 609.
Akhtar Beg *v.* Haq Newaz, 69.
Akram Ali *v.* Durga, 644.
——— ——— *v.* Durga Prasad, 95.
——— ——— *v.* Durga Prasanna, 685.
Akramunissa Bibi *v.* Mustafa-un-nissa Bibi, 11, 262, 267.
Akrurmani *v.* Madhab Chandra, 680.
Akshiyalingam *v.* Ramayya, 20, 393.
Akshoy Kumar *v.* Gopal Kamini Debi, 688.
Alagammal *v.* Sadasiva, 551.
Alagappa *v.* Dasappa, 262, 266, 271.
——— Chettiar *v.* Ko Kala Pai, 19.
——— Chettyar *v.* Chettyar Firm, 297.
Alagirisami *v.* Ramanathan, 788.
——— Mudali *v.* Akkrulu Naidu, 569, 712.
Alakan *v.* A. R. A. Arumugam, 657, 658.
Alam Ali *v.* Beni Charan, 561, 582, 583.
Alamanaya *v.* Murkuthi, 55, 211.
Alamdar Hussain *v.* Moti Ram, 299.
Alangaran Chetti *v.* Lakshmanan Chetti, 620.
Alauddin Ahmed *v.* Aziz Ahmad, 657, 658, 736.
Alayakammal *v.* Subbaraya, 557, 608.
Alderson *v.* White, 355.

A—*contd.*

Aldin *v.* Latimer, Clark, Muirhead Co., 668, 669.
Aldrich *v.* Cooper, 348, 523.
Alexander *v.* Alexander, 712.
Alford *v.* Vickery, 655.
Ali Ahmed *v.* Rahamatulla, 353, 365.
—— Akbar *v.* Saltan-ul-mulk, 597.
—— ——— *v.* Dhirja, 417, 449, 756.
—— ——— *v.* Mst. Rasidan, 297.
—— Hossain Miya *v.* Raj Kumar Halder, 115, 116, 194.
—— Husain *v.* Nilla Kanden, 353.
—— Jan *v.* Majiduddin, 421, 423.
—— Mahamud *v.* Aftahuddin, 200.
—— Miji *v.* Unir Ali Sheik, 762.
—— Quadar *v.* Jogendra, 85.
—— Shah *v.* Husain Bakhsh, 246, 253.
Alia Khan *v.* Kanshi Ram, 363.
Aliba *v.* Nanu, 606.
Alikan Daudkhan *v.* Mahammad Khan, 428.
Alimuddin *v.* Hiralal, 178.
Alisahib *v.* Mohidin, 17, 21.
Allah Ditta *v.* Mst. Farz Bibi, 717.
——— ——— *v.* Nazar Din, 389.
——— Yar *v.* Thakar Das, 510.
Allahabad Bank Ltd. *v.* Benares Bank, 521.
Allcard *v.* Skinner, 758, 759.
Allen *v.* Allen, 24.
——— *v.* Anthony, 36.
——— *v.* Seckhan, 39.
Alli Saheb *v.* Sheshp, 560.
Alliance Bank of Simla *v.* Bhai Kahan, 34.
——— ——— ——— *v.* Walsh, 328.
Allibhai *v.* Dada, 93, 114.
Allibhoy *v.* Gordhandas, 690.
Allu Khan *v.* Roshan Khan, 406.
Alokeshi Dass *v.* Harachand. 336.
Altaf Ali *v.* Lalta Prasad, 371.
——— ——— Begum *v.* Brij Narain, 16, 64.
——— ——— Khan *v.* Lalta Prasad, 454.
Altapali Khan *v.* Vgirali Khan, 355.
Alton *v.* Barrington, 269.
——— *v.* Harrison, 274.
Alukmonee Dabee *v.* Banee Madhuli, 214.
Alum Chunder *v.* Mogan, 731.
Alwar Chetty *v.* Jagannatha, 330, 379.
Aman Ali *v.* Asgar. 456.
Amar Krishna *v.* Nazir Hasan, 715, 719, 726.
——— Singh *v.* Bhagwan Das, 488, 499.

A—*contd.*

Amarchand v. Gokul, 264, 272, 273.
——— v. Khila Morar, 380.
——— v. Ram Das, 44.
——— v. Sardar Singh, 567.
Amarchunder Kundu v. Sohi Bhushan Roy, 222.
Amarendra v. Monimunjary, 750.
Amar Krishna v. Nazir Hassan, 721.
Amarnath v. Dwarka Das, 271.
——— Singh v. Har Prasad Singh, 77.
Amatoo v. Sheikh Muksud, 713.
Amba Prasad v. Moonga Ram, 552, 560.
——— ——— v. Wahidulla, 427, 440, 594.
Ambabai v. Bhau, 9, 652, 722.
Ambadas v. Wamanrao, 321.
Ambalal v. Nayaran, 461.
Ambica Pratap v. Dwarka Prasad, 240.
Ambika Charan v. Rangati, 493.
——— ——— v. Sasitara, 160, 757.
Ambrose Summers, *In the matter of*, 387.
Ambu Nair v. Kelu Nair, 397, 405.
American Baptist Mission v. Amalanadhuni, 231.
Amina Bibi v. Mohammad Ibrahim, 267.
——— ——— v. Ram Shanker, 495.
——— ——— v. Saiyid Yusuf, 78.
——— ——— v. Shaikh Muhmmad Ibrahim, 263.
Aminullah v. Emperor, 724.
Amir v. Indar Singh, 357.
——— Hasan Khan v. Muhammad Nazir Hussain, 769, 788.
——— Hussain v. Abdul Samad, 19.
——— Jahn v. Khadim Hassain, 204.
Amirchand v. Bukshi, 538.
——— v. Moti Pande, 594.
Amirthathamal v. Periasami, 301.
Amirudin v. Sobhanadri, 366.
Amirullah v. Rasulbaksh, 469.
Amjad Ali v. Kaderjan, 671.
——— Hussain v. Zaimul Iba, 472.
——— Khan v. Ashraf Khan, 138.
Amlook Chand v. Sarat Chunder, 455.
Ammachukutty v. Ammakutty Haji, 273.
Ammalu Achi v. Ponammal, 167.
Amman Pariyayi v. Pakran Haji, 557, 608.
Ammani v. Jagannatha, 302.
——— Ammal v. Ramaswami, 565.
Ammanna v. Gurumurthi, 456.
Ammayi M. v. C. Sitaramayya, 241.
Ammayya v. Narayana, 244.
Ammiraju v. Seshamma, 758.

A—*contd.*

Ammu v. Ramakrishna Sastri, 710.
Amna Bibi v. Najm-un-nissa, 71.
Amolak Ram v. Chandan, 499.
Amratlal v. Keshavlal, 23, 607.
Amrithamal v. Ponnusamy, 744.
Amritlal v. Kantilal, 256.
——— v. Uttamlal, 693.
Amrit Narayan v. Gaya Singh, 54.
Amrito Lal v. Surnomni (25 Cal. 662), 128.
——— ——— v. Surnomoye (24 Cal. 589), 128.
Amtul Nissa v. Mir Nuruddin, 748.
Amulya v. Kalidas, 157, 180.
Anakaran v. Saidamadath, 358, 360.
Ananad v. Dasarath, 95.
Anand Chandra v. Pran Kisto, 99.
——— Narain v. Lala Murli Manohar, 293.
Ananda v. Gobinda, 9.
——— v. Parbati, 200.
——— Chandra v. Abdullah Hossein, 683.
——— ——— v. Abrahim, 722.
——— Mohan v. Gobinda Chandra, 678.
——— ——— Sah v. Gobind Chandra Ray, 77.
——— ——— Saha v. Gobinda Chandra, 687.
——— Moyee v. Lakhi Chandra Mitra, 720, 724.
——— Sarup v. Punjab Hasan, 658.
——— ——— v. Taiyab Hasan, 719.
Anandamoyee v. Lakhi Chandra, 649.
Anandi Bai v. Rajaram, 54.
——— Devi v. Mohanlal, 749.
——— Ram v. Dur Najaf Ali, 492, 493, 544, 545, 546.
Anandji v. Ahmedbhoy, 505.
Anandram v. Dhanpat Singh, 354.
——— Marwadi v. Dhanpat Singh, 448.
Anandrao v. Durgabai, 544, 784.
——— v. Raoji Dashrath, 367, 506.
——— Purshottam v. Bhikaji, 413.
——— Vinayak v. Administrator-General of Bombay, 110, 156.
Anant Lal v. Bhibute Bhuwan, 640.
——— Teli v. Ramdhan Puri, 637.
Anantapadmanabhaswami v. Official Receiver, 254, 550.
Anantarama v. Yuzzufji, 392, 604.
Anantha v. Nagamuthu, 90, 96, 99, 111, 756.
——— Iyer v. Mittadar, 358.
Anath Nath v. Keshab Chandra, 115.
——— ——— v. Mackintosh, 99.

A—*contd.*

Andi Thevan *v.* Narayanasami, 612, 615.
Andrew *v.* Hancock, 675.
Andrews *v.* Hailes, 67h.
——— *v.* Joakim, 131.
——— *v.* Paradise, 668.
——— *v.* Partington, 143.
Angammal *v.* Aslami Sahib, 676.
——— *v.* Ventaka, 204.
Angel *v.* Jay, 663.
Anglo-Indian Jute Mills Co. *v.* Omademall, 789.
——— Trading Co. *v.* Briorly, 363, 466.
Anjaneyalu *v.* Shri Venugopala, 62, 72.
Annada *v.* Gour Mohan (50 I.A. 239), 54, 55, 56, 211.
——— *v.* Gour Mohan (48 Cal. 536), 54, 55, 56, 211.
——— *v.* Mohim, 720.
-Hait *v.* Khudiram Hait, 433.
Annamalai Chettiar *v.* Malayandi, 238, 239.
Annanda Pandurang *v.* Uttanrao, 421, 551.
Annapurna Co., Ltd., *In re*, 571, 609.
——— Dasee *v.* Sarat Chandra, 245.
Annapurnamma *v.* Akkayya, 409.
Annaswami *v.* Narranaiyan, 466.
Annesley, *Re*, Vaughan *v.* Vanderstegen, 378, 613.
Annirudha *v.* Official Receiver, 65.
Annoda Mohan *v.* Nil Phamari, 198.
Anrudh Kumar *v.* Lachhmi Chand, 764.
Ansar Ali *v.* Grey, 757.
Ansur Subba *v.* Secretary of State, 718.
Antaji Keshav Tambe, *Re*, 761.
Antrobus *v.* Smith, 750.
Anund Coomar Mookerjee *v.* Bissonath Bannerjee, 701.
Anundo Moyee *v.* Dhonendro Chunder, 246.
Anup Kuar *v.* Kameshwar Nath, 542.
Anwarali *v.* Gaimini Lal Roy, 628, 647.
Anwar Khan *v.* Muhammad Khan, 274.
Apaji *v.* Kavji, 560.
Apanna *v.* Venkatasamy, 393.
Aparna Debi *v.* Sree Sree Shiba Prasad, 175.
Appa Pai *v.* Somu, 547, 548.
Appalaraju *v.* Krishnamurthy, 273, 614.
Appana *v.* Yelamarti, 565.
Appasami Naicker *v.* Midnapore Zamindari Co., 61, 62.
——— Thevan *v.* Virappa, 368, 465, 469, 473.

A—*contd.*

Appayya *v.* Rangayya, 346.
——— *v.* Venkataramay, 590.
——— Shetty *v.* Mahammad Beari, 732, 739.
Apu *v.* Narhari, 628.
Arakal *v.* Domingo, 218.
Aravamudhu Ayyangar *v.* Zamindarini Shrinath Abiramvalli Ayah, 610.
Arbuthnot *v.* Norton, 70.
Archaka of a temple—Venkatrayar *v.* Shrinivasa, 70.
Archer *v.* Hudson, 759.
Arden *v.* Pullen, 673.
Ardeshar *v.* K. D. Bros., 192, 680, 681.
Ardeshir *v.* Vajesing, 321, 322.
——— Bejonji *v.* Syed Sirdar Ali Khan, 785.
Ariff *v.* Jadunath, 282, 283, 290, 651.
——— *v.* Jadu Nath (58 Cal. 1235 P.C.), 278, 282.
Ariyapurti *v.* Alamalu, 428.
Ariyaputhira *v.* Muthukomaraswami, 297, 614, 742.
Arjun *v.* Kailas, 391.
——— Singh *v.* Mahesha Nand, 550.
Arnsby *v.* Woodward, 726, 727.
Arseculeratne *v.* Perara, 288.
Aruchandra Singh *v.* Shamsul Huq, 693.
Arumagasundara *v.* Narasimha, 618, 619.
Arumugam *v.* Periasami, 621.
Arunachala *v.* Raja of Kalasti, 454.
——— *v.* Ramasamy, 322.
——— Reddi *v.* Reddy Subba, 774.
——— Velan *v.* Venkatarana, 536.
Arunachallam *v.* Ko Po Yan, 789.
——— Chetti *v.* Ayyavayyan, 465, 473, 474.
——— Chetty *v.* Ayavayya, 368, 670.
——— *v.* Jagannatha Pillai, 379.
——— *v.* Ramasamy Ayyar, 458.
Arunachela *v.* Ramaswami, 319, 320.
Arunachella *v.* Ramiah Naidu, 334, 652.
——— *v.* Rangiah, 334.
——— *v.* Sithayi, 439, 440, 493.
Arunachellam *v.* Subramania, 86, 782.
——— Chettiar *v.* Madaswamy, 779.
——— Chetty *v.* Subramania Chetty, 768, 782.
Arunagiri *v.* Radha Krishna, 489, 532.
Arunchandra *v.* Bhagaban Chandra, 664.
——— Singh *v.* Shamsul Huq, 694.

A—*contd.*

Arura *v.* Bur Singh, 417.
Asa Beevi *v.* Karuppan, 54, 58.
—— Ram *v.* Kishan Chand, 371.
—— Singh *v.* Naubat, 251.
Asad Ali *v.* Haidar Ali, 64, 769.
Asalat *v.* Sambu, 297.
Asanasab Ravuthan *v.* Vamana, 561, 599.
Asgar *v.* Mahomed Medhi Hossein, 85.
Asghari Begum *v.* Maula Baksh, 92.
Ashabai *v.* Haji Tyeb, 750.
Ashburner *v.* Sewell, 311, 343.
Ashburton *v.* Norton, 37.
Ashbury Rly. Carriage & Iron Co. *v.* Riche, 73.
Ashfaq Ahmed *v.* Wazir Ali, 597.
——— Mahomed Khan *v.* Nazir Banu, 64.
Ashforth, *Re*, Sibley *v.* Ashforth, 106.
Ashgar Ali *v.* Delroos, 759.
Ashiq Husain *v.* Chatturbhuj, 25, 27, 32, 33.
Ashraf *v.* Jagannath, 60.
——— Ali *v.* Chandrapal Singh, 406.
Ashurfi Singh *v.* Biseswar, 81.
Ashutosh *v.* Babu Lal, 499.
——— *v.* Chandi Charan, 634.
——— *v.* Doorga, 96.
——— *v.* Nalinakshya, 278.
——— Dhar *v.* Joy Lal Sardar, 691.
——— Roy *v.* Indu Bhusan Sen Gupta, 693.
——— Sikdar *v.* Behari Lal, 415.
Asia Khatun *v.* Nur Jahan Khatun, 417.
Askaran *v.* Goberdhan, 456.
Asrath Narain *v.* Chimabai, 365.
Assanulla *v.* Tirthabashini, 640.
Assanullah *v.* Mohini Mohan Das, 671.
Assudibai *v.* Haribai, 752.
Aston *v.* Exeter (Lord), 702.
Asutosh Roy *v.* Ananta Ram, 241.
Atal *v.* Kedar, 649.
Athakutti *v.* Govinda, 644, 646.
Athan Kutty *v.* Subhadra, 399.
Atherstone *v.* Bostock, 657.
Athill, Athill *v.* Athill, *Re*, 539.
Athinarayana *v.* Subramania, 194.
Atkin *v.* Rose, 727.
Atma Ram *v.* Kehar Singh, 71.
——— *v.* Surjan, 602.
Atmaram *v.* Dayaram, 264.
——— *v.* Doma, 17.
——— Sakharam *v.* Vaman Janardhan, 753.

A—*contd.*

Atmaram Sao *v.* Bhupendranath, 500.
Atrabanessa Bibi *v.* Safatullah Mia, 49, 270.
Attimoolah *v.* Shaikh Saleoollah, 671.
Attorney-General *v.* Donaldson, 3.
——— *v.* Great Eastern Rly. Co., Ltd., 5.
——— *v.* Newman, 3.
Attwater *v.* Attwater, 92.
Atul Kristo *v.* Motilal, 32.
Aubhoyessury Dobee *v.* Gour Sunkur, 610.
Audinatha *v.* Bharathi, 566.
Aughori Kumar Gangooli *v.* Mahomed Mussa, 420.
Aukinedu *v.* Subbiah, 405.
Aulad Ali *v.* Abdul Hamid, 533.
——— *v.* Ali Athar, 92, 114, 194.
——— *v.* Ali Khan, 194.
Auriol *v.* Mills, 680.
Auryaprabhakara *v.* Gummudu, 59.
Austen *v.* Halsey, 140.
Austerberry *v.* Corporation of Oldham, 100, 187, 191.
Austin *v.* Croome, 324.
Autar Singh *v.* Lal Singh, 212.
Autu Singh *v.* Ajudhia Sahu, 777.
Auworth *v.* Johnson, 695.
Avadeesh Kumar *v.* Zokaul Hussain, 319.
Avelyn *v.* Ward, 152.
Avudai Ammal *v.* Ramasami, 572.
Avuthala *v.* Dayumma, 329.
Awadhat *v.* Punjaji, 277.
Ayerst *v.* Jenkins, 73.
Ayimannessa *v.* Panna Lal, 634.
Ayyakutti *v.* Periyaswami, 546.
Ayyanger *v.* Zamindarini Srinath Abiramwalli Ayah, 243.
Ayyanna *v.* Gangayya, 668.
Ayyasami *v.* Kylasam, 390.
Ayyavayyar *v.* Rahimansa, 355, 356, 357.
Azim Sirdar *v.* Ramlall, 688.
Azima Bibi *v.* Shamalanand, 200, 203, 204.
Azim-un-nissa *v.* Clement Dale, 261.
Aziz Ahmad *v.* Chotte Lal, 528.
—— Ahmed *v.* Allauddin, 284.
—— ——— Khan *v.* Chotte Lal, 537, 598.
—— Fatima *v.* Mukund Lal, 250.
Aziz-un-nissa *v.* Suraj Husain, 758.

B.

B. N. R. Employees' Urban Bank *v.* Seager, 776.

B—*contd.*

B. N. W. Railway v. Janki Prasad, 644.
B. Stocking v. Tata Iron & Steel Co., 234.
Baba Ramchandra v. Kondo Jagua, 33.
—— v. Vishvanath, 721.
Babaji v. Magniram, 414, 500.
—— v. Narayan, 635.
Babamiya v. Jehangir, 478, 479.
Baban v. Bishwanath, 565.
Baboo Lal v. Mohmmad Askari, 651.
Babu v. Maruti, 743.
—— Bindeshri v. Mahant Jairam, 319.
—— Brij Ratandas v. Raghunandan, 444.
—— Lal v. Bendhyacharai, 560.
—— —— v. Bhawani, 16.
—— —— v. Ghansham Das, 96.
—— —— v. Noor Mohammad, 214.
—— —— Roy v. Bindhachal Rai, 582, 583.
—— Ram v. Imam Ullah, 610.
—— —— v. Ram Sarup, 388.
Baburam Bag v. Madhab Chandra, 37, 38.
Bachan Singh v. Bijai Singh, 245, 251.
Bachchi Lal v. Debi Din, 757.
Bachchu Lal v. Chaudri Syed Mohammad, 514.
Bachman v. Bachman, 135, 156.
Bachu Upadhya v. Parbhu, 402.
Bachumal v. Vessimal, 96.
Backer Khorasanee v. Ahmed Esmail, 34, 387.
Bacon v. Cosby, 168.
—— v. Proctor, 126, 127.
Badal v. Ram Bharosa, 738.
—— Chandra Sadu Khan v. Debendra Nath Dey, 657.
Badam v. Ganga, 84.
Badan v. Murari Lal, 214, 566.
Badar-ud-din v. Karim Baksh, 591.
Badhawa Ram v. Akbar Ali, 363.
Badier Rahman v. M. A. R. R. M. R. M. Chetty, 456.
Badinath v. Bhajan Lal, 627.
Badri Das v. Besu Singh, 365, 456, 470.
—— —— v. Jivan, 333.
—— —— v. Sunder Das, 135.
—— Parshad v. Babu Murlidhar, 370.
—— Prasad v. Abdul Karim, 18, 19, 390.
—— —— v. Daulat, 620.
—— —— v. Sheodhian, 734.
—— —— v. Sri Thakurji, 592.
—— —— Misir v. Bijai Nand Tewari, 297.
Badruddin v. Sitaram, 417, 418.

B—*contd.*

Bagar Ali v. Nisar Husain, 505.
Bagchi v. Morgan, 647.
Bageshwari Tewan v. Nandoo Singh, 419.
Bageswari Charan v. Kumar Kamakya Narain Singh, 85.
Baghelin v. Mathura Prasad, 371.
Bahadur v. Grattan, 389.
—— v. Raja Moti Chand, 735.
—— Singh v. Mohar Singh, 55.
—— —— v. Nari Mollani, 247.
—— —— v. Ram Bahdur, 57.
—— —— v. Ram Singh, 193.
Bahnoomutty v. Prem Chand, 477.
Bahramkhan v. Saidal Khan, 428.
Bahrat Singh v. Bindacharan, 64.
Bahu Lal v. Jalakia, 592.
Bai Cooverbai v. Mahomed, 258, 261.
—— Devmani v. Ravishankar, 73, 298, 329.
—— Dhanlaxmi v. Hari Prasad, 159.
—— Dhondubai v. Laxmanrao, 761.
—— Diwali v. Patel Bechardas, 219.
—— Dosibai v. Bai Dhanbai, 311, 338.
—— Ganga v. Rajaram Atmaram, 10.
—— Hakumbu v. Dayabhai Ragnath, 263, 266, 276.
—— Kamala v. Revashanker, 141.
—— Kevel v. Madhu Kala, 419.
—— Kushal v. Lakhma Mana, 751, 753.
—— Mamubai v. Dossa, 106.
—— Manigavri v. Narandas Calliandas, 759.
—— Monghibai v. Dongersey, 674.
—— Parvati v. Dayabhai, 57.
—— Rambai v. Bai Mani, 754.
—— Reva v. Vali Mahomed, 616.
—— Ruttonbai v. Fraser Ice Factory, 408.
—— Sona v. Bai Hiragavri, 632.
—— Suraj v. Dalpatram, 12.
—— Vijli v. Nansa Nagar, 148.
Baidya Nath v. Alef Jan, 198, 203, 205.
Baidyanath v. Onkarmal, 647.
Baij Nath v. Kundan Lal, 283, 291.
—— —— Goenka v. Daleep, 621.
—— —— Singh v. Paltu, 298.
Baijnath v. Moheshwari, 10.
—— v. Murlidhar, 567, 572.
—— v. Paltu, 301, 316.
—— v. Parmeshwari Dayal, 67, 329.
—— v. Sheo Shoy, 20, 393.
—— Prosad v. Raghunath Rai, 738.
—— —— v. Harikishan, 442.
—— —— v. Paltu, 327.

B—*contd.*

Baijnath Singh *v.* Mussammat Biraj, 758, 759.
Baikanta Nath *v.* Lakshan Chandra, 634.
Baikantha Nath *v.* Mohesh Chandra, 420, 427, 551.
Baikuntha Nath Dey *v.* Salimulla, 256.
Bailey *v.* Barnes, 202, 481.
Bain *v.* Fothergill, 339, 669.
Bainbridge, *Ex parte* Fletcher, *Re*, 770, 771.
Bairab Chandra Bose *v.* Anath Nath De, 379.
Bajrangi Lal *v.* Ghura Rai, 72.
Bajranji *v.* Manokarinka, 57.
Baker *v.* Holtpzaffel, 672.
Bakhtawar *v.* Barumal, 499.
——— Begam *v.* Husaini Khanum, 408, 433.
——— Ram *v.* Naushad, 301.
Bakshi Das *v.* Nadu Das, 75.
Bakshiram Gangaram *v.* Darku, 438, 439, 488.
Baksu *v.* Govinda, 355.
Bal Mukundas *v.* Moti, 32.
Bala *v.* Shiva, 419.
——— Changiah *v.* Subbaya, 545.
Balagurumurthy *v.* Ramakrishna, 320, 323.
Balaji *v.* Dajiba, 10.
——— *v.* Ganesh, 217.
——— *v.* Gangamma, 18.
——— *v.* Gopal, 654.
——— *v.* Kushalji, 237.
——— *v.* Ramchandra, 736.
——— Narji *v.* Babu Devli, 419.
——— Singh *v.* Gangamma, 4, 5.
——— Sitram *v.* Bhikaji Soyare, 714.
Balakrishna Pramanik *v.* Bhawanipur Banking Corporation, 27.
Balamani Ammal *v.* Rama Aiyar, 618.
Balamba *v.* Krishnayya, 777.
Balambhat *v.* Vinayak, 732.
Balangowda *v.* Bhimangowada, 78.
Balappa *v.* Chenvasappa, 180.
Balaram *v.* Appa, 36, 88.
——— Jairam *v.* Kevalram 278, 287.
Balasidahantam *v.* Perumal, 411, 455, 545.
Balasubramania *v.* Sivaguru, 358, 364, 431, 461.
——— Nadar *v.* Sivaguru, 606.
Balbhadar *v.* Lakshmi Bai, 18.
Balbhaddar *v.* Danpat Dayal, 402.
——— *v.* Kusehar Das, 211, 214.
——— Prasad *v.* Billo, 543.

B—*contd.*

Balbhadra *v.* Bhowani, 754.
Balchand *v.* Ratanchand, 556, 583.
——— Malton *v.* Bulaki Singh, 37.
Baldeo *v.* Baijanath, 528.
——— *v.* Jumna, 75.
——— *v.* Losai, 402.
——— *v.* Miller, 50, 51, 223.
——— Baksh *v.* Jawahir Singh, 421, 423.
——— Das *v.* Sarojini Dasi, 251.
——— Misir *v.* Ram Lagan, 251.
——— Prasad *v.* Mahabir, 618.
——— ——— *v.* Miller, 388.
——— ——— *v.* Uman Shankar, 618.
——— Rai *v.* Murli Rai, 360.
——— Sahai *v.* Baij Nath, 250, 537.
——— Singh *v.* Jaggu Rama, 592.
——— ——— *v.* Muhammad Akhtar, 278.
Bali Ram *v.* Chuha Ram, 441.
Baliaramgiri *v.* Vasudev, 651, 701, 702.
Balkishan *v.* Mst. Bundia, 423.
Balkishen *v.* Legge, 353, 355, 365, 367, 466.
Balkrishna *v.* Govind, 71.
——— *v.* Paij Singh, 64.
——— Muhadshet *v.* Vishbanath, 445.
——— Vamanaji *v.* Jasha Farsi, 631.
Balkuraya *v.* Sankamma, 689.
Ballabh Das *v.* Murat Narain Singh, 740.
Ballam Das *v.* Amar Raj, 414.
Ballard *v.* Shutt, 326.
Ballard's Conveyance, *In re*, 189.
Balli Singh *v.* Raghubar Singh, 114.
Ballin *v.* Ballin, 141.
Ballu Mal *v.* Ram Kishan, 196, 203.
Bally Dobey *v.* Benai Deo, 62.
Balmukund *v.* Bhagvandas, 749, 751.
——— *v.* Motilal, 447.
——— *v.* Tularam, 59.
Balmukundas *v.* Moti, 518.
Balraj Kunvar *v.* Jagatpal Singh, 5.
Balram *v.* Ganga Singh, 85.
Balshet *v.* Dhondo, 359.
Baltazar *v.* Official Assignee, 780.
Balu *v.* Gopal, 391.
Balusami Ayyar, *In re*, 270.
Balusu Veeraraghavalu *v.* Boppana, 744.
Baluswami Iyer *v.* Krishnaswami Iyer, 543.
Balwant *v.* Bira, 335, 336, 338.
——— *v.* Secretary of State, 71.
——— Singh *v.* Clancy, 361.
——— ——— *v.* Joti Prasad, 51, 135.
——— ——— *v.* Roshan Singh, 551.

B—contd.

Balwantrao v. Purushotam, 16.
——— v. Tulsa, 445.
Bama Charan v. Administrator-General, 641.
——— Charn v. Nimai, 506.
——— Sundari Dasi v. Adhar Chunder, 675.
Banamali Satpathi v. Talna Ramhari, 409.
Banarasi Das v. Moti Ram, 517.
——— v. Cantonment Authority, 673.
——— v. Maharani Kuar, 614.
——— v. Ramchander, 17, 296.
——— Prashad v. Ram Narain, 505.
Bandhu Ganda v. Balaram, 640.
Banee Madhub Banerjee v. Joy Krishna Mookerji, 678.
——— Pershad v. Reet Bhujun Singh, 447.
Banga Chandra v. Jagat Kishore, 19, 180, 181, 200.
Banhart v. Greenshields, 37.
Banister, Broad v. Munton, *Re*, 311, 342.
Bank of Bombay v. Suleman, 28.
——— of Chettinad v. C.T.A.C.F. Firm, 591.
——— v. Maung Aye, 555.
——— of Khulna v. Jyoti Prakash Mitra, 362.
——— of Upper India etc. v. Administrator-General of Bengal, 223.
——— v. Arif Husain, 288.
——— v. Fanny Sinner, 86, 296, 384.
——— v. Juggan, 447.
——— v. R. H. Skeineer, 300.
Banka Behari v. Rajkumar, 73.
——— Behary v. Madan Mohan Roy, 693.
Banmali v. Bisheshari, 76.
——— v. Nihal, 227.
——— v. Nihal Singh, 740.
——— Pande v. Bisheshar Singh, 552.
Banoo Begum v. Mir Abed Ali, 138.
Bansedhar v. Sant Lal, 48.
——— Singh v. Chakradhar Prasad, 636.
Bansi v. Girdhar Lal, 408.
——— Das v. Jagdip Narain, 718.
Bansidhar v. Gaya Prasad, 583.
——— v. Gulab Kuar, 64, 93.
——— v. Jagmohan Das, 618.
——— v. Nawal Jahan, 263, 266.
——— v. Ramcharan, 629.
——— v. Sant Lal, 151, 212, 388.

B—contd.

Bansidhar v. Shiv Shingh, 560, 582, 583.
——— Damania v. Kalroo Mandar, 568.
——— Misra v. Burdeshwari Dutt, 700.
——— Sharaff v. Thakur Ashutosh Deo, 62.
Bansilal v. Sawanu, 402.
Bansiram v. Panchami Dasi, 327.
Banti Mst. v. Mandu, 191.
Banvari Das v. Mahommad, 347, 516.
——— Prasad v. Mst. Bigni, 392.
——— Singh v. Sukraj, 511.
Banwari Lal v. Bhag Mal, 273.
——— v. Gopalchandra, 741.
Bapirazu v. Kamarazu, 366.
Bappu v. Venkatachalapathy Ayyar & Co., 454, 559, 565.
Bapu v. Kashiram, 319, 320, 322, 324, 339.
———v. Mahadaji, 618.
———Appaji v. Kashinath Sadoba, 291.
Bapuji v. Satyabhamabai, 222.
———v. Senverji, 355, 367.
Bapurao v. Bulakidas, 424, 764.
Bara Saheb v. Krishna Bayan, 539.
Baraboni Coal Concern, Ltd. v. Deb-Prasanna Mukerji, 371.
Barada Prasad v. Bhupendra Nath, 701.
——— Prosad v. Prosanno Kumar, 635.
Barati Lal v. Salik Ram, 57.
Barbar Maram v. Ramana, 408, 410.
Barhamdeo Prasad v. Tara Chand, 499, 501.
Barhu Mahto v. Jasada Devi, 603.
Barisal Loan Office v. Satesh Chandra, 316.
Barjorji v. Shripat Prasadji, 506, 706.
Barkatunnissa v. Mahbub Ali, 453.
Barker v. Barker, 673, 677, 6[illegible].
——— v. Edgar, 3.
———, *Ex. parte* Gorely, *In re*, 224.
Barnes v. Glenton, 374.
——— v. Racster, 525.
——— v. Rachester, 346.
Barnhart v. Greenshields, 25, 36.
Baroda Charan Dutt v. Hemlata, 61.
Barrington (Viscount) v. Liddell, 127.
Barrow's Case, 211.
Barrow v. Issacs & Son, 733.
Barry v. Nugent, 642.
Bartram v. Whichoote, 745.
Basa Mal v. Tajammal, 499.
Basalingava v. Chinnava, 316.
Basangouda v. Rudrappa, 418.
Basangowda v. Irgowdathi, 49, 57, 93.

B—*contd.*

Basant Lal *v.* Commissioner of Income-tax, 376.
——— *v.* Tapeshri, 371.
——— Mal *v.* Jawahir Singh, 394.
——— Rai *v.* Kanauji Lal, 514.
——— Singh *v.* Burma Railways Co., Ltd., 780.
——— *v.* Mata Baksh, 672.
——— *v.* Rampal Singh, 557.
Basanta *v.* Dhanna Singh, 598.
——— Kumar *v.* Lala Ram, 53.
——— *v.* Secretary of State, 726.
———Kumari *v.* Ashutosh Chuckerbutti, 640.
Basantilal Marwari *v.* Jamuna Prasad, 691.
Basantlal Marwari *v.* Jamuna Prasad, 692.
Basapa *v.* Basapa, 36.
Basappa *v.* Bhimangowda, 236, 239, 250, 256.
——— *v.* Fakirappa, 57.
Basar Khan *v.* Moulvi Syed Leakhat, 213.
Basaraddi Sheik *v.* Enjaddi, 317, 318, 319, 320, 338.
Basarat Ali *v.* Manirulla, 95, 685.
——— Khan *v.* Manirulla, 717.
Basava Sankaran *v.* Anjaneyalu, 10, 212, 299.
Basawan *v.* Natha, 551.
Basdeo Rai *v.* Dwarka Ram, 647.
——— *v.* Jaimongal Rai, 550.
——— *v.* Jhagru Rai, 114, 194, 195, 331.
Bashir Ahmad *v.* Nazir, 330.
——— *v.* Mst. Zubaida Khatun, 297, 305.
———Udin *v.* Waheed Udin, 424.
Basivireddy *v.* Kamaraja, 386.
Baslingava *v.* Chinnava, 327.
Basti Begam *v.* Banarsi Prasad, 272.
Bastin *v.* Bidwell, 670, 711.
Basumati Koer *v.* Harbansi Koer, 605.
Baswannewa *v.* Dadgowda, 531, 616, 618.
Batakrishna Prasad *v.* Apurbo Krishna, 499.
Batchanna *v.* Varahalu, 412.
Bateman *v.* Hotchkin, 126.
Bates *v.* Donaldson, 686.
Batey Krishna *v.* Parsotamdas, 584.
Bath *v.* Standard Mills Co., Ltd., 513.
Bavanna *v.* Balagurivi, 493, 583, 590.
Bawden *v.* London, etc. Assurance Co., 40.
Baxter Abrahall *v.* Browne, 642.
Bayley *v.* Bradley, 629.

B—*contd.*

Baylis *v.* Le-Gros, 724.
Bayly *v.* Leominister Corporation, 711.
Baynes & Co. *v.* Lloyd & Sons, 663.
Baynham *v.* Guys Hospital, 711.
Bayya Sao *v.* Narasinga, 544.
Beard, Reversionary and General Securities, Ltd., *Re v.* Hall, 159, 162.
Beardman *v.* Wilson, 678.
Beattie *v.* Jetha, 429.
Becha *v.* Mothina, 183.
Bechardas *v.* Ahmedabad Municipality, 284, 287.
Bechu *v.* Bhabuti Prasad, 228.
——— Sahu *v.* Arjun, 471.
——— Singh *v.* Kumar Kamakhya Narain Singh, 635.
Bechuanaland Exploration Co. *v.* London Trading Co., 789.
Beckham *v.* Drake, 773.
Begam *v.* Muhammad, 305.
Behari *v.* Tejnarain, 355.
——— Lal *v.* Ram Gholam, 411, 454.
——— Ghose *v.* Sindhubala Dasi, 761.
Beharilal *v.* Bai Rajbai, 183.
Behary Lal *v.* Indra Narayan, 213, 489.
Behram *v.* Sorabjee, 376, 378, 379.
Bejoy *v.* Kally, 638, 639.
———Chand *v.* Kali Prasanna, 654.
———Chandra *v.* Bunku Bihari, 16.
———Chunder Banerjee *v.* Kally Prosonno, 628.
——— Singh Dudhoria *v.* Surendra Narayan Singh, 85.
Bela Bibi *v.* Akbar Ali, 63.
Belaney *v.* Belaney, 713.
Belcher *v.* M'Intosh, 696, 697.
Bellamy *v.* Sabine, 236.
Belo *v.* Parbati, 72.
Benarasi Das *v.* Ali Mahomed, 278.
Benares Bank *v.* Har Prasad, 604.
Benarsi Prasad *v.* Mohiuddin, 498.
Bengal Banking Corporation *v.* Mackertich, 607.
——— Coal Co. *v.* Janardan Kishor, 640, 689.
——— Govt. *v.* Nawab Jaffur Hossein Khan, 634.
——— Nagpur Railway *v.* Bal Mukunda, 729.
——— National Bank *v.* Janaki, 373, 683.
——— *v.* Janaki Nath, 652.
——— *v.* Janaki Nath Roy, 372, 379, 738.

B—*contd.*

Beni *v.* Puran Das, 644.
—— Chand *v.* Ekram Ahmed, 150.
—— Mahdab *v.* Jai Krishna, 77.
—— Pershad *v.* Chaturi Tewary, 671.
—— —— Koeri *v.* Dudh Nath Roy, 634, 639, 712.
—— Prasad *v.* Ganga Singh, 447, 448.
—— —— *v.* Mulchand, 639.
—— —— *v.* Parmeshwar Singh, 447.
—— —— *v.* Rewat Lall, 498.
—— Rai *v.* Natabar Sarkar, 215.
—— Ram *v.* Kundan Lal, 21, 234.
Benode Behary *v.* Nistarini Dassi, 128.
Benoy Krishna Das *v.* Salsiccioni, 653, 707, 736.
Bepin Behari *v.* Kalidas, 675.
—— Krishna *v.* Byomkesh, 248.
—— —— *v.* Priya Brata, 29, 34, 241, 252.
Berhamdeo *v.* Tara Chand, 590.
Berney *v.* Sewell, 375.
Berry *v.* Green, 125.
Berwick & Co. *v.* Price, 41.
Besinath Karumani *v.* Devidoss, 580.
Bessell *v.* Landsberg, 716.
Beti Mahalakshmi *v.* Badan Singh, 610.
Bettyes *v.* Maynard, 480.
Bevan *v.* Ganesh Das, 299.
Bewick, *Re*, Ryle *v.* Ryle, 126.
Beyfus and Masters Contract, *Re*, 343.
Bhabani *v.* Kadambini, 546.
—— *v.* Suchitra, 635.
Bhabataran Pohari *v.* Trailokyanath Bag, 634.
Bhabhi Dutt *v.* Ramlalbyamal, 286, 299.
Bhabhootmal *v.* Mulchand, 773.
Bhag *v.* Ujagar, 245.
—— Mal *v.* Shiromani Gurudwara, 327.
Bhagaban Chandra *v.* Tarak Chandra, 593, 594.
Bhagabati *v.* Kalicharan, 118, 135.
—— Swarnakar *v.* Sazhi, 301.
Bhagat Ram *v.* Mst. Sahib Devi, 183.
Bhagban Das *v.* Bisweswar, 77.
Bhagirath *v.* Naubat, 529, 537.
Bhagirathi *v.* Jokhu Ram, 184.
—— *v.* Raj Kishore, 239, 251.
Bhagwan *v.* Bunyadi, 7.
—— *v.* Hardei, 537.
—— *v.* Mannu, 54, 56.
—— *v.* Nanak Chand, 251.
—— Das *v.* Har Dei, 598.

B—*contd.*

Bhagwan Dei *v.* Murrari Lal, 75.
—— —— *v.* Secretary of State, 450.
—— Din *v.* Muhammad Unus Khan, 210.
—— Lal *v.* Rajendra, 261.
—— *v.* Parmeshwari, 466.
—— Prasad *v.* Hari Singh, 754.
—— Sahai *v.* Narsingh Sahai, 60, 297.
—— —— *v.* Bhagwan Din, 355.
—— Singh *v.* Mashar Ali, 537, 539.
Bhagwana *v.* Shib Sametri, 651, 654.
Bhagwandas *v.* Karam Husain, 537.
—— *v.* Nathu Singh, 237.
Bhagwant *v.* Kedari, 260, 261, 264, 269, 271.
Bhagwantrao *v.* Subhkaran, 488.
Bhagwat Baksh Ray *v.* Sheo Prosad Sahu, 62.
—— Das *v.* Parshad Singh, 407.
—— Dayal Singh *v.* Debi Dayal Sahu, 70, 180.
—— Rai *v.* Gorakh Rai, 19, 200.
—— Sahai *v.* Bepin Behari, 217.
Bhagwati *v.* Banarsi Das, 317, 323.
—— *v.* Hanuman, 634.
—— Prasad *v.* Balgobind, 635.
—— —— *v.* Dullan Singh, 384.
—— —— *v.* Shafaat Muhammad, 531, 534.
Bhaidas *v.* Bai Gulab, 81.
Bhaiji Shamrao *v.* Hajimiya, 598.
Bhairab Chandra *v.* Anathde, 379.
—— —— *v.* Jiban, 746.
Bhairavendra Narain Roy *v.* Rajendra Narain Roy, 77.
Bhairo *v.* Parmeshri, 96, 756.
—— Singh *v.* Ambika Baksha, 95.
Bhairon *v.* Baldeo, 211.
Bhaiya Raghunath Singh *v.* Mt. Hanraj Kunwar, 417.
Bhaiyalal *v.* Ramchandra, 462.
Bhajahari Maiti *v.* Gajendra, 552.
Bhajan *v.* Mushtaq Ahmed, 83.
—— *v.* Mustak, 356.
Bhaju Chowdhury *v.* Chuni Lal, 566.
Bhana *v.* Guman, 54, 55.
Bhandir *v.* Sheik Ismael, 598.
Bhao *v.* Sidu, 355.
Bharat Singh *v.* Bindasharan, 68.
—— Ram *v.* Beni Dutt, 472.
—— Ramanuj *v.* Srinath Chandra, 239, 240.

B—contd.

Bharatpur State v. Gopal, 182, 183.
Bhartu v. Dalip, 420, 430.
Bhaskar v. Shankar, 250, 253.
——— Gopal v. Padam Hira, 296, 299.
Bhau Balaji v. Hari Nilkantrao, 511.
——— Nana v. Benappa Datappa, 461.
Bhawani v. Jang Bahadur, 468, 469.
——— v. Sheo Dihal, 397, 403.
——— Koer v. Mathura Prasad, 254.
——— Kumar v. Mathura Prasad, 617.
——— Prasad v. Saheb Din, 472.
Bhaya Lal v. Mohammed Hakim, 513.
Bhekdhari Mahton v. Radhika Koer, 593, 609.
Bheri v. Maddipatu, 360.
Bhikaji v. Pandu, 16.
——— Daji v. Lakshman, 428.
——— Vishnu v. Ramchandra Krishna, 711, 715.
Bhikari Charan v. Sudhir Chandra, 390.
——— Das v. Dalip Singh, 346.
Bhikhabhai v. Panachand, 271, 273.
Bhiki Mal v. Debi Sahai, 245, 251.
——— Rai v. Udit Narain, 36, 222.
Bhikkam Lal v. Mt. Janhi Dulavi, 465, 467.
——— ——— v. Mt. Janak Dulari, 466.
Bhimapaiya v. Ramchandra, 758.
Bhimram v. Hura Soondery, 649.
Bhimrao v. Sakharam, 505.
Bhoba v. Peary Lall, 160, 757.
Bhobani v. Shibnath, 628.
Bhoboo Sundari v. Rakhal Chunder, 10, 366.
Bhodai Shaik v. Lakshminarayan Dutt, 593.
Bhogilal v. Amritlal, 420.
——— v. Jethalal, 84.
Bhojabhai v. Hayem Samuel, 647, 654.
Bhoje Mahadev v. Gangabai, 182, 237, 609.
Bhola Das v. Bisnath, 381.
——— Nath v. Hira Mohan, 469.
——— ——— v. Raja Durga, 647.
——— ——— v. Supper, 706.
Bholai v. Rajah Bansi, 700.
Bholanath v. Ananda Pershad, 477.
——— v. Bhutnath, 249.
——— v. Raja Durga, 653.
——— v. Sarba Mangal, 605.
——— Das v. Raja Durga Prosad, 680.
——— Khettre v. Kaliprasad, 355.
——— Sen v. Balaram Das, 444.
Bhonu Lal v. W. A. Vincent, 301.

B—contd.

Bhoobun Mohini v. Hurrish Chunder, 757.
Bhoopal Rai v. Shiam Sundar Lal, 71.
Bhopatrao v. Shri Ramchandra, 50, 779.
Bhora Thakar Das v. Collector of Aligarh, 459.
Bhowanee Churn v. Jykishen, 477.
Bhoyrub v. Madhub Chunder, 71.
Bhuban Mohan v. Co-operative Hindustan Bank, 380.
Bhudeb Chandra v. Bhikshukur Palta-Naik, 16.
Bhuggobut Singh v. Doorg Bijoy Singh, 671.
Bhuggobutty v. Gooroo, 131.
——— Dossee v. Samachurn Bose, 414.
Bhugwan Acharjee v. Gobind, 469.
——— Dass v. Parmeshwari, 466.
——— v Nilkanta, 241.
——— v. Parmeshwari, 363, 466.
——— v. Upooch, 197.
Bhullan v. Bachcha, 403.
Bhundal Panda v. Panda Pos Patil, 16.
Bhuneshwari Kuer v. Manir Khan, 557, 608.
Bhup Kuar v. Muhammadi, 356.
——— Singh v. Chedda Singh, 499.
Bhupal v. Jug Ram, 354.
——— Chandra v. Jagad Bhusan, 278.
Bhupati Nath v. Ram Lal, 50, 131, 751.
Bhupendra v. Amarenda, 141, 156.
——— Chandra v. Harihar, 635.
——— Nath Basu v. Musst. Wajihunnissa, 489.
——— v. Mst. Wajihunnissa, 2.
——— v. Pyari, 230, 233.
——— v. Rajeshwar, 85.
——— v. Wajihunnissa, 376, 377.
Bhupkuar v. Mahammadi, 355, 365.
Bhurrut Lal v. Gopal Suran, 576.
Bhushayya v. Suryanarayan, 553.
Bhusi Ram v. Ganesh Rai, 467.
Bhutia Dhondu v. Ambo, 664, 714.
Bhyrab Chandra v. Meer Ameeroodden, 689.
——— ——— v. Baidya Nath, 386.
——— Chunder v. Nuddiar Chand, 538.
Biba Jan v. Kalb Hussain, 132.
Bibee Sahadwa v. Smith, 648.
Bibhuti Bhushan Majmudar v. Mujihar Rahman, 333.
Bibi Haliman v. Bibi Umadatunnissa, 65.

B—*contd.*

Bibi Jan *v.* Sachi, 416, 417, 613.
—— Jawahir *v.* Chatterput Singh, 290.
—— Saira *v.* Bibi Suliman, 263, 273.
—— Samsunchar *v.* Hari Nath, 691.
Bidhubhusan Pal *v.* Umeshchandra, 318.
Bidhumukhi Dasi *v.* Babha Sundari, 617.
—— *v.* Kefyutullah, 652.
Biggs *v.* Hoddinott, 403, 513.
Bihari Lal *v.* Shib Lal, 435, 511, 514.
Bijay Chandra *v.* Howrah Amta Railway, 652, 717, 736.
Bijoy Gopal *v.* Krishna, 630.
—— *v.* Howrah Amta Light Railway, 673, 675, 695, 717, 738.
Bijraj Napani *v.* Parasundari, 81.
Bikhan Singh *v.* Shankar, 406.
Bikkina *v.* Adabala, 10.
Bikrama *v.* Bir, 6.
Bikranjit Tewari *v.* Durga Dayal, 362.
Bilas Kunwar *v.* Desraj Ranjit Singh, 709, 754.
—— Moni *v.* Raja Sheo Prasad Singh, 634.
Bilaso *v.* Munni Lal, 135.
Bimal Jati *v.* Biranja, 405.
Bindeshri *v.* Somnath, 221.
Bindeshwari Singh *v.* Har Narain, 56, 211.
Bingham *v.* Bingham, 338.
Binks *v.* Rokeby (Lord), 326.
Bipin Behary *v.* Tincowri, 290.
Bir Mahomed *v.* Nagoor, 405.
Biraj *v.* Kedar Nath, 641.
Biraja Sundri *v.* Mahamaya Sen, 653.
Birch *v.* Joy, 326.
Bird *v.* Baker, 628.
Birendra Keshri Prasad *v.* Bahuria Saraswati Koer, 598, 599.
—— Narain Saheer *v.* Bahuria Saraswati Kuer, 751.
—— Kishore *v.* Bhubaneshwari, 722.
Bireswar Mookerji *v.* Troilokhya Dasi, 636.
—— Mukerji *v.* Ardha Chunder, 761.
Birinchi Singh *v.* Sarado Prasad, ı
Birmingham *v.* Kirwan, 165, 166.
Bisal Singh *v.* Roshan Lal, 393.
Biscoe *v.* Earl of Banbury, 34.
Biseshwar *v.* Pitambernath, 647.
Bisewar *v.* Kali Charan, 692.
—— Roy *v.* Pitambernath, 655.
Bishambhar Nath *v.* Imdad Ali, 71, 72.
Bishan Chand *v.* Radha, 336.
Bishan Dayal *v.* Manni Ram, 457.
—— —— *v.* Udit Narain, 359, 364.
—— Lal *v.* Banwarilal, 357.
Bishen Dutt *v.* Mathura Prasad, 466.
—— Sarup *v.* Abdul Samad, 664, 724.
Bisheshar Singh *v.* Laik Singh, 459.
Bisheshur Dayal *v.* Ram Sarup, 415, 459, 533, 534.
Bisheshwar *v.* Muirhead, 37.
Dayal *v.* Chodi Singh, 405.
—— Singh *v.* Acchaibar Din, 80.
Bishnu Balkrishna *v.* Sankarappa Wagarali, 578.
Bishonath Mookerjee *v.* Kisto, 346.
Bishop *v.* Howard, 730.
—— of Rochester *v.* Le Fanu, 174.
Bismillah Begam *v.* Tahsin Ali Khan, 262.
Bissen Dass *v.* Sheo Prasad, 617.
Bissesswar Prosad *v.* Lala Sarnam Singh, 556, 567.
Bissesuri Dabea *v.* Baroda Kanta, 699.
Bissonath *v.* Ramasoondry, 128.
—— *v.* Radha Kristo, 246.
Biswanath *v.* Chandra, 20, 393.
—— *v.* Kyastha, etc., Corporation, 391.
—— *v.* Rabija Khatun, 219.
—— Prasad *v.* Chandra Narayan, 301, 302, 303.
Bithal Das *v.* Iqbamlunissa, 740.
Blackburn *v.* Smith, 340.
Blacklow *v.* Laws, 314, 315, 340.
Blackwell *v.* Blackwell, 134, 142, 149.
Blaiberg *v.* Reeves, 342.
Blore *v.* Giulini, 708.
Bloomenthal *v.* Ford, 210.
Bloyes Trust, *Re*, 480.
Blunt *v.* Lack, 172.
Blyth *v.* Dennett, 728.
Board of Revenue *v.* South Indian Railway, 644, 645.
Bodhe Ganderi *v.* Ashloka Singh, 17.
Bodordoja *v.* Ajijuddin, 654, 655.
—— *v.* Ajijuddin Sarkar, 650.
Bohra Bhup Surg *v.* Sakha Ram, 619.
—— Thakur Das *v.* Collector of Aligarh (1906), 529.
—— —— —— *v.* Collector of Aligarh, 529.
Bolding *v.* Strungell, 142.
Bolton *v.* Donald, 673.
—— *v.* London School Board, 315.

B—*contd.*

Bolye Chand v. Moulard, 410.
Bombash v. King, 441.
Bombay Municipal Corporation v. Vasantlal, 680, 682.
Bombay Tramways Co. v. Bombay Municipal Corporation, 297.
Bonner v. Tottenham and Edmonton, etc., Society, 679.
Boochi v. Bohre Nath, 468.
Booth v. Alcock, 666.
——— v. Thomas, 666.
Boraston's Case, 134.
Borlands Trustee v. Steel Bros., 112.
Bostocks Settlement, *In re*, 80.
Bouston v. Williams, 408.
Bowen, *Re*, 129.
——— v. Anderson, 633, 674.
Bowles v. Bowles, 246.
——— v. Round, 311.
Bowser v. Colby, 718.
Boyd v. Kreig, 628, 643.
——— v. Shorrock, 23.
Boys, *Re*, Eades v. Boys, 360.
Brace v. Marlborough (Duchess), 588.
Bradford Corporation v. Pickles, 671.
Bradley v. Atkinson, 650, 652.
——— v. Bayliss, 645.
——— v. Carritt, 404.
——— v. Cartwright, 137.
——— v. Peixoto, 90.
——— v. Riches, 41.
Bragg v. Wiseman, 667.
Brahmadeo v. Harjan, 53.
Brahmamoyee v. Sheikh Munsur, 646.
Brahmaya Lingam v. Kanakamma, 74.
Brajaballav v. Akhoy Bagdi, 301, 303.
Braja Nath v. Joggeswar, 241.
Brajnath v. Ananda Mayi, 122.
Brandon v. Robinson, 102.
Brandt Sons & Co. v. Dunlop Rubber Co., 775.
Brannegan v. Mirbhy, 149.
Bree v. Halbeck, 321.
Brentwood Brick & Coal Co., *In re*, 331.
Brewer and Hankins Contract, *Re*, 211.
Bridgeman v. Daw, 467.
Brice v. Bannister, 775, 782.
Briggs v. Jones, 517.
Briggs v. Oxford (Earl), 126.
Brij Bhukam v. Bhagwan Dutt, 537, 555, 597, 598, 599.

B—*contd.*

Brij Bhukam v. Pandit Bhagwan Datt, 587.
——— Devi v. Shiv Nanda Prasad, 94.
——— Gopal v. Mst. Masuda Begam, 544.
——— Kishore v. Madho Singh, 422.
——— Kumar v. Sheo Kumar, 734.
——— Lal v. Bhawani Singh, 406.
——— ——— v. Inda Kunwar, 181.
——— Raj Kuar v. Ram Dayal, 184, 263, 764.
Brijmohan Singh v. Dukhan Singh, 522.
Brijo Kishore v. Ooma Soonduree, 688.
Britain v. Rossiter, 279.
British India Corporation v. Secretary of State, 667.
Broad v. Selfe, 403.
Brohmo v. Dharmo, 78.
——— Dutt v. Dharmodas, 361.
Brojabashi v. Saratchandra, 739.
Brojendra Coomar v. Woopendra Narain, 671.
Brojo Kishoree v. Meajan Biswas, 239, 242.
——— Lal Roy v. Belchambers, 737.
——— Nath v. Koylash, 197.
——— ——— v. Maheshwar, 89.
Brojonauth v. Gilmore, 702.
Bromley v. Brunton, 762.
Brooke v. Garrod, 163.
———, *Re* Brooke v. Brooke, 478.
Brouard v. Dumaresque, 480.
Broucke v. Sri Panch Rani Chhatar Kumari Devi, 741.
Broughton v. Mercer, 130, 131.
——— v. Snook, 281.
Brown v. Cole, 407.
——— v. Gregson, 166, 169.
——— v. Higgs, 137.
——— v. Sewell, 316.
Brown's Will, *In re*, 150.
Browne v. Flower, 668.
——— v. Ryan, 397.
Browning v. Wright, 744.
Brownlie v. Campbell, 337.
Bruce, *Ex parte*, 378.
Bryant v. Hancock, 678.
Buck v. Robson, 775.
Buckhurst (Lord) v. Fenner, 324.
Buckland v. Papillon, 711.
Buckle v. Mitchell, 258.
Budesab v. Hanmanta, 638, 639.
Budayar Rahman v. Karam Ali, 634.
Budd Scott v. Daniell, 667.
Buddhai v. Sonaullah, 305.

B—contd.

Budhermal v. Verharam, 261.
Budhmal Kevalchand v. Rama Valad Yesu, 421, 460, 536.
Budsu Dubani Lal Mudi v. Raneeganj Coal Association, 234.
Bujrang Sahai v. Mt. Mulla, 636.
Bull v. Pritchard, 141, 142.
Bulmer v. Hunter, 271.
Buneshwar v. Lal Bahadur, 227.
Bunn v. Harrison, 662.
Bunseedhar v. Sujaat, 363.
——— v. Sujaat Ali, 466.
Bunwari v. Ramjee, 32.
——— Jha v. Ramjee Thakur, 593.
Burch v. Farrows Bank, 708.
Burgos v. Nascimento, 788.
Burjorji v. Dhunbai, 275.
Burma Shell Co. v. Official Receiver, 778.
Burma Shell Oil Storage & Distributing Co. of India, Ltd., *In re*, 645.
Burn v. London, etc., Coal Co., 429.
Burnett v. Lynch, 663, 683.
Burrell v. Egremont, 616.
——— *Re*, Burrell v. Smith, 468.
Burroughs v. Oakley, 314.
Burrows v. Molley, 453.
Burton v. Barclay, 712, 713.
Bury v. Thompson, 651.
Buta Singh v. Jhandu, 54.
Butcher v. Stead, 49.
Butler v. Rice, 571.
Butter Estate Company v. Bean, 683.
Butters, *Ex parte*, 274.
Butterworth, *Ex parte*, Russell, *Re*, 264.
Butto Kreosto v. Govindram Marwari, 225.
Byjnath Lall v. Ramoodeen Chowdry, 498, 499, 500.
Bykunt Kyburto v. Shushee Mohan Pal, 688.
Byramji v. Chunilal, 253, 254.

C

C. A. M. K. R. Chettiar v. Ma Kyaw, 292.
C. F. Seaward v. Drew, 655.
C. N. Chandra v. Dwarka Das, 505.
C. Venkatachariar v. Srinivasa, 439.
Caballero v. Henty, 337.
Cairnross v. Lorimer, 196.
Calcutta Landing & Shipping Co. v. Victor Oil Co., 707.
Caledonian Rly. Co. v. North British Rly. Co., 3.

C—contd.

Cally Nath v. Chunder Nath, 125, 127, 137.
Cameron v. Young, 674.
Campbell v. Lewis, 704.
Canadian Pacific Rly. v. The King, 235.
Cannan v. Hartley, 716.
Canning's Will Trust, *In re*, Sknes v. Lyon, 122.
Carlish v. Salt, 310, 311.
Carlisle Corporation v. Graham, 671.
Carnarvon (Earl) v. Villebois, 715.
Carpenter v. Parker, 666.
Carter v. Wake, 452.
Cartwright, Avis v. Newman, *In re*, 695.
Casborne v. Scarpe, 396.
Casperz v. Kader Nath Sarbadhikari, 637.
Caton v. Caton, 281, 285.
Cattley v. Arnold, 633.
Caus, *In re*, Lindeboom v. Camille, 131.
Cavalier v. Pope, 662, 674.
Cavan v. Pulteny, 170.
Cave v. Cave, 42.
Central Bank v. Jawahir Singh, 380.
Central Bank of India v. Nussorvanji, 48, 49, 376.
Ch. Sarfraz Ahmed v. L. Mannilal, 511.
Chabildas v. Dayal, 480.
——— Lallubhai v. Dayal Mowji, 40, 480, 481.
Chadumrai v. Rani Navli, 380.
Chagandas v. Gansing, 528, 537.
Chaganlal v. Indra Koer, 637.
Chahlu v. Parmal, 56, 57.
Chaitan Prakash v. Mumtaz Ahmad, 504.
Chakrapani v. Gayamoni, 210.
Chaladom v. Kakkath, 700.
——— v. Kakkath Kunhambu, 85.
Chalikani Venkatarayanim v. Zamindar of Tuni, 410, 411, 512.
Chama Swami v. Padala, 565.
Chamaru Sahu v. Sona Koer, 94, 98.
Chambers v. Chambers, 754.
——— v. Goldwin, 403.
——— v. Kingham, 713.
——— v. Randall, 189, 190.
Chami v. Anu Pattar, 546.
Champo v. Shankar Das, 261.
Chamyiappa Tarakan v. Rama Ayar, 553.
Chanberlayne v. Brockett, 129.
Chancellor v. Poole, 682.
Chand Mall v. Ban Behari, 474, 536.
Chandan v. Fakirgir, 250.
Chandanmal v. Bhaskar, 50.

C—*contd.*

Chandar Shekhar *v.* Kundanlal Lal, 99.
Chandbhai *v.* Hasanbhai, 598.
Chandi *v.* Anant Bali, 200.
——— *v.* Sat Narain, 17.
——— Charan *v.* Sidheswari, 12, 96, 111.
——— ——— Mitra *v.* Ashutosh Lahiri, 624.
Chandika Singh *v.* Pohkhar, 457.
Chandless-Chandless *v.* Nicholson, 732.
Chandmal *v.* Bachraj, 655.
Chandmall *v.* Ranee Soondery, 65.
Chandra Kanta *v.* Bhagjur, 204.
——— Kant Das *v.* Rama Nath Barman, 690, 693.
——— Kesavulu *v.* Perumal Chettiar, 330.
——— Mohun *v.* Bissesswar, 649.
——— Shekar *v.* Abidalli, 217.
——— Singh *v.* Surat Chandra, 713.
Chandradeo *v.* Mata Prasad, 181.
Chandramma *v.* Seethan, 5ʋ2.
Chandranath Dey *v.* Burroda Shoondury, 461.
Chandrani *v.* Lala Sheo, 19.
Chandrasekaralingam *v.* Nagabushanam, 84.
Chandrawatibai *v.* Valabdas, 322.
Chandri *v.* Daji Bhau, 629.
Chandu *v.* Koaja, 408.
Chandulal *v.* Keshavlal, 658.
Chane E Maung *v.* Ah Til, 290.
——— Yin Sein *v.* Mg. Aung Thein, 602.
Channu Datta *v.* Swami Gyannandji, 59.
Chaplin *v.* Young, 505.
Chapman *v.* Chapman, 378.
——— *v.* Fowner, 642.
Chappel *v.* Gregory, 662, 673.
Chaproniere *v.* Lambert, 279, 281.
Charamudi *v.* Raghavulu, 116.
Charan Singh *v.* Ganeshi Lal, 539, 540.
Charles *v.* Jones, 513.
——— Stuart *v.* Patrick Playfair, 673.
Charu Chandra *v.* Satya Sebak, 652.
——— ——— Ghose *v.* Bankina Chandra Sett, 653, 707.
Chatarbhuj *v.* Chatarjit, 751.
Chathu *v.* Kunjan, 369, 465.
Chatra Mal *v.* Mt. Majidan, 11, 261, 262.
Chatraput Singh *v.* Grindra Chunder, 608.
Chatri *v.* Bahadur Singh, 225.
Chattar Singh *v.* Nand Kishore, 726.

C—*contd.*

Chatterput Singh *v.* Maharaj Bahadoor, 250.
Chatturbhuj *v.* Bennett, 21, 23, 85.
——— *v.* Lachman, 238.
——— *v.* Mansukhram, 31, 190, 191.
Chatturbhujadoss *v.* Rajamanicka, 244.
Chaturbhuj *v.* Bennett, 738.
Chaturbhuja *v.* Gopal Dolai, 737.
Chaturi Singh *v.* Makund Lall, 736.
Chaudhri *v.* Gobardhan, 182, 609.
——— Ahmad *v.* Seth Raghubar Dayal, 420.
——— Mehdi Hasan *v.* Muhammad Hasan, 11.
——— Talib Ali *v.* Mst. Kaniz, 297, 305.
Chauharja Baksh *v.* Ram Harakh, 406.
Chedambara Chetty *v.* Renga Krishna, 784.
Cheddi Lal *v.* Balu Nandan, 398, 441.
Chedi Lal *v.* Saadatunnissa, 474.
Cheekati Zamindar *v.* Ranasooru, 648.
——— *v.* Messrs. Gopichand, 8.
Chela Ram *v.* Walidad, 386.
Chella Kutti Naicken *v.* Vengappa, 382, 398, 399.
Chemminian *v.* Udayavarma, 630, 725.
Chempthoor Raman *v.* Nagalasari, 507.
Chendrasekharalingam *v.* Nagabhushanam, 66, 769.
Chendrayya *v.* Hanumayya, 317.
Chengiah *v.* Pichayya, 408, 453.
——— *v.* Rajah of Kalahasti, 728.
Chennapatnam *v.* Tadakamatta, 363, 370.
Chennapragada *v.* Secretary of State, 230.
Chenvirappa *v.* Puttappa, 240.
Cherukomen *v.* Ismala, 705.
Cherukuri *v.* Shri Krushi Vidyalaya, 545.
Chesham (Lord), Cavendish *v.* Dacre, *Re*, 169, 763.
Cheta Bahira *v.* Purna Chandra, 215, 222.
Chetandas *v.* Gobind, 411.
Chettiappa *v.* Periasami, 518.
Chetti Gaundan *v.* Sundaram Pillai, 352.
Chettiar Firm *v.* Chettiar Firm, 265, 335.
Chettu Kuth *v.* Kunhunni, 95.
Chetty *v.* Chetty, 55.
Chettyar *v.* Chettyar, 525.
Chettyar Firm, K. Y. *v.* Jamila Bibi, 253.
Chhagan Lal *v.* Muhammad Husain, 621.
Chhaganlal *v.* Chunilal, 222, 609.
——— Hiralal *v.* Ismailji, 553.
Chhammu Lal *v.* Bhajan Lal, 440.
Chhathi Lal *v.* Bindeswari, 370, 371.

C—*contd.*

Chhathi Lal Sah *v.* Bindeshwari Prasad, 601.
Chhatra Kumari *v.* Mohan Bikram, 303.
Chhedi Lal *v.* Babu Nandan, 402.
Chhiddu *v.* Sheo Mangal Singh, 734.
Chhita Bhula *v.* Bai Jamni, 508.
Chhotabhai *v.* Dadabhai, 244.
Chhotalal Govindram *v.* Mathur, 407.
Chhote Lal *v.* Bansidhar, 554.
——— *v.* Raja Mahommad Ahmad Ali Khan, 465.
Chhotey Lal *v.* Dharajit, 572, 588.
——— Singh *v.* Surat Singh, 551.
Chhotibai Daulatram *v.* Mansukhlal, 394.
Chhotku Rai *v.* Baldeo, 408, 434.
Chichester Diocesan Fund *v.* Simpson, 129.
Chidambara *v.* Manikka, 670.
——— Chettiar *v.* Vaidilinga, 743, 745.
——— Pillai *v.* Manikka Chetti, 718.
——— Siraprakasa *v.* Veerama Reddi, 637.
Chidambaram *v.* Sami Aiyar, 264, 266, 269, 271, 273.
——— *v.* Sivathasamy, 320.
——— *v.* Srinivasa, 264, 266, 269, 271.
——— Pillai *v.* Doraisami Chetty, 769, 785.
Child *v.* Edwards, 641.
Chimmaji *v.* Sakharam, 419.
Chimmanlal *v.* Bahadur, 371.
China Mal *v.* Gul Ahmed, 261, 263, 275.
Chinakkal *v.* Chinnathambi, 229.
Chinna *v.* Harischendana, 721.
——— Swamy *v.* Krishna, 408.
Chinnapareddi *v.* Venkataramanappa, 770.
Chinnasami Reddiar *v.* Krishna, 301.
Chinnaswami *v.* Darmalinga, 245, 593, 594.
Chinnayya Rawutan *v.* Chidambaram Chetty, 385, 783.
Chinnery *v.* Evans, 532.
Chinniah *v.* A. B. Mirthuraman, 533.
Chinnu Pillai *v.* Venkatasami, 592, 593, 594.
Chinqi Pitchiah *v.* Peda Kotiah, 274.
Chintaman *v.* Dulari, 381.
Chintamanibhatala *v.* Rani of Wadhwan, 181.
Chintamon *v.* Dareppa, 32.
Chiragh Din *v.* Mohammad Usman, 709, 722.
Chiranji Lal *v.* Bhagwan, 444.
——— *v.* Purna, 391.
Chitkale *v.* Mathura, 470.
Chittammal *v.* Ponnuswami Naicker, 274.
Chitu *v.* Charan Singh, 79.
Choakklinga Tambiran *v.* Ramanandan 329.
Chockalingam *v.* Mayandi, 634.
——— Chetty *v.* Seethal Acha, 70.
Choga Lal *v.* Pujari, 74.
Chokkammal *v.* Murugathal, 761.
Cholmondely *v.* Clinton, 599.
Chooni Lal *v.* Nilmadhab, 197.
Chota Nagpur Banking Association *v.* Kamakhya Narayan, 9.
Chotey Lal *v.* Mohanian, 371.
——— Singh *v.* Baldeo, 447.
Chotku Rai *v.* Baldeo, 378, 401.
Chottalal *v.* Gobindram, 406.
Chotte Lal *v.* Sheopal, 443.
Chottelal *v.* Seth Lakmichand, 271.
Chotu Mia *v.* Mt. Sundri, 724, 726.
Chowkidar Ramkumar *v.* Ram Newaj, 70.
Chowne *v.* Bayliss, 771.
Christ Church Inclosure Act, *Re*, 130.
Christian *v.* Field, 553.
——— *v.* Tekaitni, 701.
Christie Taunto *v.* Delmard, Lane & Co., 782.
Christ's Hospital *v.* Grainger, 130.
Christy *v.* Tancred, 702.
Chumman Khan *v.* Mody, 388.
Chundee Churn *v.* Sib Chunder, 59.
Chunder Caunt *v.* Joddoonath, 380.
——— Koomar *v.* Gopee Kristo, 241.
——— Nath *v.* Nilakant, 253.
Chunilal *v.* Abdul Karim, 505.
——— *v.* Bai Jethi, 329.
——— *v.* Bai Muli, 135.
——— *v.* Bai Samrath, 145, 156.
——— *v.* Bomanji, 304.
——— *v.* Fulchand, 346, 524.
——— *v.* Lakshmichand, 555, 556.
——— *v.* Ramchandra, 32, 35.
——— *v.* Srinivasa, 530, 531, 538.
——— *v.* Vithaldas, 378, 379.
Chunna Lal *v.* Anandi Lal, 415.
Chunni *v.* Thakurdas, 447, 448.
——— Bibi *v.* Basanti Bibi, 298, 329.
——— Lal *v.* Abdul Ali, 241, 255.
——— *v.* Chuni Lal, 652.
Churaman *v.* Balli, 16, 32.
Church *v.* Brown, 321, 678, 686, 718.

C—*contd.*

Chutterput Singh *v.* Maharaj Bahadoor, 248, 275.
City Equitable Fire Insurance Co.'s Case, 344.
Clare *v.* Lamb, 321.
Clark *v.* Malpas, 338.
Clarke, *In re*, 107.
——— *v.* Palmer, 517.
——— *v.* Ramuz, 316, 338.
Claydon *v.* Green, 5.
Clayton *v.* Blakey, 651.
——— *v.* Clayton, 325.
——— *v.* Leech, 662.
Clegg *v.* Hands, 684.
Clerk *v.* Wright, 280.
Clermont (Viscount) *v.* Tasburgh, 343.
Climie *v.* Wood, 24.
Clinan *v.* Cooke, 281.
Coaks *v.* Boswell, 332.
Coballero *v.* Henty, 37.
Cobb *v.* Stokes, 649.
Cobbold, Cobbold, *Re v.* Lawton, 157.
Cochrane *v.* Moore, 753.
Cockburn *v.* Smith, 673.
Cockell *v.* Taylor, 385.
Cockerill, Mackaness, *Re v.* Percival, 92.
Codrington *v.* Codrington, 165.
——— *v.* Lindsay, 165, 166.
Coe *v.* Clay, 664.
Coggan *v.* Pogose, 34, 222.
Cohen *v.* Baidyanath, 476.
——— *v.* Bindyanath, 486.
——— *v.* Cohen, 149.
——— *v.* Tannar, 666, 686, 705.
Coleman, *In re*, Public Trustee *v.* Coleman, 122.
Colgan *v.* Administrator-General, 131.
Collector *v.* Hursoondery, 225.
——— of Etawah *v.* Beti Maharani, 360.
——— of Farrukhabad *v.* Kishore, 598.
——— of Gorakhur *v.* Palakdhari, 2.
——— of Mirzapur *v.* Bhagwan Prasad, 392, 604.
——— of Moradabad *v.* Muhammad Hidayet Ali, 595.
——— of Ratnagiri *v.* Vyankatrav, 757.
——— of Salem *v.* Rangappa, 760.
——— of Thana *v.* Hari Sitaram, 16.
——— ——— *v.* Krishnanath, 16.
Collyer *v.* Isaacs, 51, 207, 388.
Colonial Bank *v.* Whinney, 767.

C—*contd.*

Colonial Sugar Refining Co. *v.* Irving, 4.
Coltman, Coltman, *In re v.* Coltman, 73.
Coltman, *Re*, 362.
Colyer *v.* Finch, 30.
Commercial Bank of India *v.* Sabju Saheb, 255.
Commissioner of Public Works, (Cape Colony) *v.* Logan, 4
Commissioners of Income Tax *v.* Pemsel, 129.
——— of Inland Revenue *v.* Lord Hatherton, 639.
——— of Work *v.* Hull, 685.
Compton *v.* Bagley, 344.
Conquest *v.* Ebbets, 698.
Cook *v.* Guerra, 225.
——— *v.* Jackson, 280.
——— & Co. *v.* C. L. Phillips, 677, 716, 723.
Cooke *v.* Turner, 149, 155.
Cooper *v.* Cooper 166, 167, 169, 170, 763.
Co-operative Hindustan Bank *v.* Surendra Nath, 387, 388.
Coote *v.* Mammon, 41.
Cooverji *v.* Bhimji, 191.
——— Plumber *v.* Vasant, etc., Society, Ltd., 278.
Corbett *v.* Plowden, 447.
Corelli, *In re*, 129.
Corlett *v.* Radcliffe, 269.
Cornish *v.* Cleife, 696.
——— *v.* Searell, 714.
Cornwall *v.* Henson, 335.
Corporation of Calcutta *v.* Arunachandra Singha (60 Cal 1470), 461, 463.
——— ——— *v.* Arunchandra Singh (61 Cal. 1047), 608, 609, 610.
Cory *v.* Bristow, 645.
Costa Rica Republic *v.* Erlanger, 10.
Cottage Club Estates *v.* Woodside Estates Co., 773.
County Hotel and Wine Co. *v.* London and N. W. Rly., 65.
Court of Wards *v.* Venkata Surya, 761.
Couturier, *Re*, Couturier *v.* Shea, 125, 133, 137.
Coward *v.* Gregory, 698.
Cowasji *v.* Rustomji, 106, 111.
——— Jehangir *v.* Tyabji, 517.
Cowdry *v.* Day, 402.
Cox and Neves Contract, *In re*, 189.
——— *Re*, Cox *v.* Edwards, 127.
——— *v.* Bent, 736.

C—*contd.*

Cox *v.* Bishop, 679, 683.
Cox's Trusts, *In re*, 176.
Crabtree *v.* Bramble, 172.
Craknall *v.* Janson, 571.
Crawford *v.* Spooner, 3.
Crawley *v.* Price, 715, 718.
Crichton's Settlement, *Re*, Sweetman *v.* Batty, 106.
Cricklewood Property and Investment Trust *v.* Leighton's Investment Trust, 672.
Cricklewood Property and Investment Trust Ltd. *v.* Leighton's Investment Trust Ltd., 694.
Cripps *v.* Wolcott, 146, 147.
Croft *v.* Lumley, 686, 719, 725, 726, 728.
Crosby *v.* Wadsworth, 17.
Crowley *v.* Vitty, 641.
Crusoe d. Blencoe *v.* Bugby, 686.
Cuban Land Co., *Re*, 404.
Cunard *v.* Autofyre, Ltd., 674.
Cunniah *v.* Gopala Chettiar, 86.
Cunningham Reid *v.* Public Trustee, 688.
Curling *v.* Austin, 343.
Curryer's Will Trusts, *In re*, Wyly *v.* Curryer, 121.
Cursetji *v.* Rustomji, 97.
Cutenho *v.* Souza, 717.
Cutting *v.* Derby, 654.
Cutts *v.* Brown, 355.

D.A.V. College Reg. Society *v.* Umrao, 33, 203.
Dada *v.* Bahiru, 283, 292, 743.
Dadachanji *v.* Ratanbai, 142.
Dadoba *v.* Krishna, 641.
——— Arjunji *v.* Damodhar, 590, 592.
Dagdu *v.* Bhana, 338.
——— *v.* Vanji, 769.
Dagger *v.* Shepherd, 653.
Dahya Bhai *v.* Maharaj Bahadur, 115.
Dakhina Mohan Roy *v.* Saroda Mohan Roy, 557.
Dakkata *v.* Sasnapari, 353, 359.
Dakshinamurthi *v.* Dhanakhoti, 281.
Dalganjan Singh *v.* Kalka Singh, 193.
——— ——— *v.* Pitam Singh, 502, 503.
Dalibai *v.* Gopibai, 181, 199.
Dalichand *v.* Lotu, 390, 391.
Dalip Narain *v.* Chait Narayan, 521, 522.

D—*contd.*

Dalip Rai *v.* Birnaik, 568.
——— Singh *v.* Bahadur Ram, 353, 364.
Dal Singh *v.* Pitham Singh, 545, 546.
——— ——— *v.* Sunder Koer, 473.
——— ——— *v.* ——— Kunwar, 494.
Dalthamman *v.* Amardeo, 402.
Daluchand *v.* Appi, 462.
Dambar Singh *v.* Jawitri, 197, 199.
——— ——— *v.* Kalian Singh, 495.
Dames and Wood's Contract, *Re*, 343.
Dammar Singh *v.* Nazir-ud-din, 250, 255.
Damodar *v.* Allabux, 69.
——— *v.* Atmaram, 387.
——— *v.* Miller, 243.
——— *v.* Radhabai, 487.
——— *v.* Rama Row, 443.
——— *v.* Vamanrao, 444, 494.
——— Coal Co. *v.* Harmook Marwari, 673.
——— Das *v.* Girdhari Lal, 296.
——— Prasad *v.* Lachmi Prasad, 699.
——— Sami *v.* Govindarajalu, 527, 599, 617.
Damodara *v.* Somasundara, 32, 517.
——— Shambhogue *v.* Chandappa Pujary, 455.
Damodarswamy *v.* Govindrajalu, 539.
Danappa *v.* Yamnappa, 530, 537, 600.
Daniels *v.* Davison, 36.
——— *v.* Trefusis, 281.
Danks, *Ex parte*, 410.
Dann *v.* Spurrier, 708.
Dantaluri *v.* Kanjuburi, 318.
Daolat Rai *v.* Sheikh Chand, 405.
Daragahi Lal *v.* Rafiqunnissa, 402.
Darbari Lal *v.* Khetra Chandra, 376.
——— ——— *v.* Raniganj Coal Association, 656, 676.
——— ——— *v.* Ranigunj Civil Association, 657, 658.
Darga Churn *v.* Chandra Nath, 595.
Darlington *v.* Hamilton, 341.
Darpan *v.* Kedar Nath, 316.
Darshan Singh *v.* Hanmant, 360.
Dasain Sahu *v.* Mst. Ramdulari, 447.
Dasarathi Kumar *v.* Sarat Chandra, 737.
Dassorathy *v.* Rama, 718.
Daso Pillai *v.* Narayan Patro, 618.
Dattambhat Rambhat *v.* Krishnabhat, 370, 380, 381.
Dattaram *v.* Gungaram, 368.
——— *v.* Vinayak, 494.

D—*contd.*

Dattatraya *v.* Shridhar, 234.
Dattatreya *v.* Gulsabai, 183.
Datto *v.* Babasahib, 638.
——— *v.* Vithu, 353.
——— Dudheshvar *v.* Bithu, 364.
Dattoo *v.* Ramchandra, 355.
Datubhai Ebrahim *v.* Abubaker, 358.
Dau Bhairoprasad *v.* Juqulprasad, 607.
Daud Bahadur *v.* Deonandan, 531.
Daulat *v.* Sankhata, 181.
——— Ram *v.* Ghulam Fatima, 271, 272.
——— ——— *v.* Haveli Shah, 704.
——— ——— *v.* Inderjeet, 330.
Davaramani *v.* Padda Bhinaka, 231.
Davenport *v.* Smith, 705.
——— *v.* The Queen, 717, 726.
Davey *v.* Durrant, 480.
David *v.* Sabin, 321, 324, 783.
——— Payne & Co. *In re*, 40, 42.
Davis & Co. *In re*, *Ex parte* Rawlings, 56.
——— *v.* Duke of Marlborough, 70.
——— *v.* Eyton, 678, 723.
——— *v.* Kazee Abdool, 698.
——— *v.* Symons, 402.
Davies *v.* Davies, 695.
——— *v.* Fisher, 134, 140.
——— *v.* Foots, 663.
——— *v.* Sear, 39.
Davy, *Re*, 121.
Daw *v.* U Bah, 610.
——— Yai *v.* U Men Sin, 16.
——— Kyin *v.* Ko Ba Tin, 463.
——— Yei *v.* Jhaung Po Saung, 278.
Dawal *v.* Dharma, 45, 292, 301.
Dawson *v.* Dyer, 670.
v. Oliver Massey, 148, 149.
Day *v.* Singleton, 339.
Dayabhai Dipchand *v.* Dullabhram Dayaram, 773.
Dayaram *v.* Bechardas, 55.
——— *v.* Thakuri, 74.
Daya Ram *v.* Nadir Chand, 265.
——— ——— *v.* Sita Ram, 301, 303.
Dayal *v.* Jivraj, 222, 378.
——— Singh *v.* Indar Singh, 304.
Dayalji Pragji *v.* Karachi Electric Supply Corporation, 387.
D'Eyncourt *v.* Gregory, 22, 23.
De Beers Consolidated Mines *v.* British South Africa Co., 399.
De Marmey, *In re*, 51.
De Nicholls *v.* Saunders, 174, 224, 225.

D—*contd.*

De Souza *v.* Vaz, 143, 157.
Deans *v.* Richardson, 387.
Deb Das Lala *v.* Abdul Ghani, 707.
——— Nath Moral *v.* Sashi Bhusan Moral, 212.
Debendra *v.* Behari, 391.
——— *v.* Rup Lal, 17.
——— *v.* Syama Prosanna, 652.
——— Chandra *v.* Behari Lal, 392, 604.
——— Lal *v.* Cohen, 696, 732, 733.
——— Mohan *v.* Sona, 542.
——— Narain *v.* Ramtaran, 591.
——— ——— *v.* Ramtaran Banerjee, 552.
——— Narayan Roy *v.* Ramratan Banerjee, 595.
——— Nath *v.* Mirza Abdul, 422, 499.
——— ——— *v.* Pashupati, 637.
——— ——— *v.* Syama Prosanna, 647, 648, 652.
Debendranath *v.* Trinayani, 423, 605.
Debi Lal *v.* Nand Kishore, 184.
——— Pershad *v.* Mst. Aklio, 219.
——— Prasad *v.* Golap Bhagat, 180.
——— ——— *v.* Kedar Singh, 544.
——— ——— *v.* Sheo Narain, 469.
——— Sahai *v.* Narayan Sahai, 548.
——— Saran *v.* Nandlal, 747, 754.
——— Shankar *v.* Nand Kishore, 152.
——— Singh *v.* Bansidhar, 754.
Debiruddi *v.* Abdur Rahim, 722.
Decharms *v.* Horwood, 688.
Deighton's and Harris's Contract, *Re*, 343.
Deivanayaga *v.* Muthu Reddi, 72, 73.
Deivsi *v.* Jivraj, 313.
Delhi and London Bank *v.* Bhikari, 467, 569, 596.
——— Cloth & General Mills Co. *v.* Income Tax Commissioner, 4.
Delroos Banoo *v.* Nowab Syud Asgur, 759.
Denby *v.* Moore, 675.
Dendy *v.* Nicholl, 727.
Dening *v.* Ware, 750.
Dennett *v.* Atherton, 323, 666, 744.
Deno Nath *v.* Adhar, 23.
Deo d. Manvers (Earl) *v.* Mizam, 654.
——— Dat *v.* Ram Autar, 232, 546, 549.
——— Kuar *v.* Man Kuar, 759.
——— Nandan *v.* Meghu, 624, 649.
——— ——— *v.* Meghu Mahton, 641, 648, 650.

D—contd.

Deo Nandan Pershad v. Meghu Mahton, 625, 630.
—— Narain v. Kakar Bind, 3, 389, 752.
—— Saran v. Deoki Bharthi, 747, 750, 753.
Deojit v. Pitamber, 359, 360.
Deokali v. Ramdevi, 275.
Deoki Koer v. Sheo Prasad Singh, 692.
—— Nandan v. Dhian Singh, 648, 677.
Deokinandan v. Aghorenath, 499.
—— Prasad v. Aghorenath Banerji, 82.
Deolie Chand v. Nirban Singh, 488.
Deputy Commissioner of Partabgarh v. Ram Sarup, 170.
—— —— of Rae Barelli v. Lal Rampal Singh, 381.
Deputy Lal v. Reoli Prasad, 672.
Desa v. Girdharilal, 773.
Desai Lallubhai v. Mundas, 590, 592.
Detillin v. Gale, 492.
Dev Das Bela v. Abdul Gani, 653.
Devendra Prasad Sukul v. Surendra Prasad Sukul, 161.
Deverges v. Sandeman Clark & Co., 387.
Devi Dayal v. Ghasita, 93.
—— Pershad v. Mst. Aklio, 202.
—— Prasad v. Lewis, 59.
Devianayaga v. Muthu Reddi, 75.
Devichand v. Chintaman, 612.
Devshunker v. Motiram, 131.
Dewar v. Maitland, 171.
Dhada Saheb v. Muhamad Sultan, 339.
Dhakeshwar Prasad v. Harihar, 528.
Dhakeswar Prasad v. Harihar Prasad, 536, 537, 598, 600.
Dhana Koeri v. Ram Kewal, 467, 596.
—— Mohammad v. Nastulla, 392.
Dhanaji v. Gulabchand, 69.
Dhanal Soorma v. Rangoon Indian Telegraph Association Ltd., 695.
Dhaniram v. Bholanath, 651.
Dhanjibhai v. Navajbai, 184.
Dhanna Mal v. Moti Sagar, 637.
Dhanpat v. Raja Pasput, 84.
Dhanrajgirjee v. Tata Sons Ltd., 339.
Dhanrajmal v. Hazarmal, 284.
Dharamdas v. Ramoomal, 391.
Dharm Chand v. Mauji Sabu, 774.
Dharma Das v. Amulyadhan, 229, 232.
—— Narain v. Labh Singh, 665.
Dharmakarta of a temple—Subbarayudu v. Kottaya, 70.

D—contd.

Dharmodas v. Nistarini Dasi, 754.
Dharnikota v. Dudharazu, 415.
Dharwar Bank v. Mahomed Hayat, 184.
Dhayabhai v. Bapalal, 256.
Dheraj v. Dinanath, 242.
Dhiraj v. Bikramjit, 75.
—— Singh v. Dina Nath, 239.
Dhirendra Nath v. Charusashi, 252.
—— —— Roy v. Bhabatarini Debi, 691.
Dholidas v. Fulchand, 75.
Dhond Shet v. Ravji, 12.
Dhondi v. Lakshman, 10.
Dhondiram v. Taba, 88.
—— v. Taba Savadan, 454.
Dhondo Balkrishna v. Raoji, 516.
—— v. Balkrishna, 492.
—— v. Bhikaji, 462.
—— v. Ravji, 27.
Dhoorjati v. Dhoorjati, 54, 56.
Dhora Kairi v. Ram Jewan, 722.
Dhunpat Singh v. Gooman Singh, 635.
—— —— v. Mahomed Kazim, 669, 690.
Dhup Nath v. Ram Charitra, 64.
Dhuramsey v. Ahmedbhai, 672.
Dhurrumtola Properties Ltd. v. Dhunbai, 730, 731.
Dial Singh v. Gurdwara Sri Akal Takht, Amritsar, 3.
Dibble v. Bowater, 641.
Dicker v. Augerstein, 481.
Dickinson v. Barrow, 281.
—— v. Burrell, 66.
Digambar v. Hari, 59.
—— v. Jhari, 652.
Digambari Debi v. Dhan Kumari, 183.
Digamber Das v. Harendra Narain, 411, 537, 599.
—— —— v. Nishibala Debi, 323.
Digamburee v. Eshan, 237.
Digbijoy Roy v. Shaikh Ata Rahman, 682.
Digby v. Atkinson, 738.
Dildar v. Shukrullah, 413.
Dillon v. Parker, 165, 171, 172.
Din Dayal v. Gursaran Lal, 347.
Dina v. Nathu, 32, 524.
—— Moyee v. Bon Behari, 391.
—— Nath v. Lachmi Narain, 459, 532, 591.
—— —— v. Matimala, 742.
Dinanath v. Lachmi Narayan, 413.
—— v. Manbodhi, 202.

D—contd.

Dinanath Kundu v. Janaki Nath, 634, 644, 707.
———— Rai v. Rama Rai, 412.
Dinendronath Sannyal v. Ramcoomar Ghose, 2, 10.
Dingapada Karnakar v. Nrishinghchandra Nandi Chaudhri, 278.
Dinkar Rao v. Ayub, 315, 326.
Dinkarrao v. Narayan, 114, 194.
Dinobundhoo Chowdhry v. Dinonath Mookerjee, 688.
Dinobundhu Shaw v. Jogmaya Dasi, 556, 559, 560, 566, 571, 573, 574, 612, 615.
Dinonath v. Adhar, 85.
———— v. Auluck, 36.
———— v. Shama Bibi, 237, 238, 253.
———— Ghose v. Shama Bibi, 241.
Dio Chand v. Imam Din, 54.
Dip Narain v. Nageshar, 471.
———— Singh v. Nageshar, 44, 72, 74.
Dirgopal Lal v. Bolakee, 593.
District Board of Tippera v. Sarafatali, 653.
Ditcham v. Miller, 51.
Diwali v. Appaji, 64, 93.
Diwan Chand v. Manakchand, 211.
Dixon v. Clarke, 411.
——— v. Muckleston, 31, 376, 378, 518.
——— v. Winch, 41, 385, 783.
Dnyanu Laxumon v. Fakira, 441.
Dodd v. Acklom, 715, 716.
Dodds v. Tuke, 611.
Dodey Ram v. Gulkando, 236.
Dodhu v. Madhavrao, 649. 721.
Doe v. Bevan, 96.
—— v. Bramlling, 1.
—— v. Spiller, 650.
—— v. Stone, 443.
—— dem Seebkristo v. The East India Co., 671.
—— d. Ambler v. Woodbridge, 728.
—— d. Aslin v. Summerset, 654.
—— d. Bailey v. Foster, 649.
—— d. Baker v. Jones, 728.
—— d. Bennett v. Long, 720, 722.
—— d. Bennett v. Turner, 648.
—— d. Birmingham Canal Co. v. Bold, 654.
—— d. Boscawen v. Bliss, 728.
—— d. Bradford v. Watkins, 654.
—— d. Brierly v. Palmer, 730.
—— d. Brooks v. Fairclough, 649.
—— d. Bryan v. Bancks, 717, 718.
Doe d. Bullen v. Mills, 710.
—— d. Buros v. Lucas, 655.
—— d. Calvert v. Frowd, 721.
—— d. Carlisle v. Woodman, 654.
—— d. Chandless v. Robson, 719.
—— d. Cheny v. Batten, 730.
—— d. Cornwall v. Matthews, 627.
—— d. Cox v. Roe, 650.
—— d. Davies v. Thomas, 630.
—— d. Davis v. Elsam, 719.
—— d. Digby v. Steel, 730.
—— d. Edney v. Benham, 640.
—— d. Egremont v. Forwood, 653.
—— d. Elliot v. Hulme, 654.
—— d. Gatehouse v. Rees, 726.
—— d. Gibbons v. Pott, 489.
—— d. Gill v. Pearsen, 92.
—— d. Godsell v. Inglis, 730, 737.
—— d. Goodbehere v. Bevan, 686, 723.
—— d. Gorst v. Timothy, 652.
—— d. Graves v. Wells, 721.
—— d. Gray v. Stanion, 719, 720.
—— d. Griffith v. Pritchard, 726.
—— d. Halcomb v. Johnson, 652.
—— d. Henniker v. Watt, 717.
—— d. Horgan v. Church, 649.
—— d. Hull v. Wood, 630.
—— d. Jacobs v. Phillips, 648.
—— d. Jones v. Jones, 630.
—— d. Kindersley v. Hughes, 654.
—— d. Lewis v. Cawdor, 722.
—— d. Lord v. Crago, 737.
—— d. Luster v. Goldwin, 654.
—— d. Macartney v. Crick, 654.
—— d. Mitchinson v. Carter, 678, 686, 723.
—— d. Monck v. Geekie, 641, 715.
—— d. Morecraft v. Meux, 728.
—— d. Morris v. Williams, 654.
—— d. Muston v. Gladwin, 719, 723, 728.
—— d. Nash v. Birch, 717, 727.
—— d. Neville v. Dunbar, 655.
—— d. Newman v. Rusham, 257.
—— d. Otley v. Manning, 257.
—— d. Palk v. Marchetti, 734.
—— d. Parry v. Hazell, 652.
—— d. Patrick v. Beaufort (Duke), 629.
—— d. Pearson v. Ries, 642.
—— d. Phillip v. Benjamin, 642.
—— d. Pitt v. Laming, 718.
—— d. Price v. Price, 630, 625.
—— d. Prior v. Ongley, 654.

D—*contd.*

Doe d. Robertson *v.* Gardiner, 654.
—— d. Rodd *v.* Archer, 649.
—— d. Sheppard *v.* Allen, 728.
—— d. Shore *v.* Porter, 630.
—— d. Simpson *v.* Butcher, 712.
—— d. Spencer *v.* Godwin, 718.
—— d. Spicer *v.* Lea, 652.
—— d. Vickery *v.* Jackson, 697, 700.
—— d. Waithman *v.* Miles, 649.
—— d. Walker *v.* Groves, 642.
—— d. Webb *v.* Dixon, 708.
—— d. Wetherall *v.* Bird, 696, 697.
—— d. Whitehead *v.* Pittman, 720.
—— d. Williams *v.* Pasquali, 720.
—— d. Williams *v.* Smith, 650.
—— d. Williams and Jeffery *v.* Cooper, 719.
—— d. Worcester Trustees *v.* Rowlands, 696, 698.
—— d. Wyndham *v.* Carew, 718.
Dol Singh *v.* Khub Chand, 93.
Doma *v.* Govind, 273.
Donaghey *v.* Weatherdon, 672.
Donganna *v.* Jammanna, 377.
Donisthorpe *v.* Porter, 616.
Donkangowda *v.* Revanshedappa, 632.
Doolabhdas *v.* Chhabildas, 478.
Doolee Chand *v.* Omda Khanum, 511.
Dooli Chund *v.* Birj Bhookun, 207.
Dooly Chand *v.* Ramashwar, 508.
Doongersey *v.* Keshavji Meghji, 694.
Doorga *v.* Baney Madhub, 26, 31.
———Pershad *v.* Brindabun, 678.
Dorab Ally *v.* Abdool Azeez, 321.
Dorappa *v.* Kundukuri, 407.
Doraiswami Mudaliar *v.* Doraiswamy Aiyangar, 772, 774.
Dorasami *v.* Venkateshayyar, 431, 461.
Dose Thimana *v.* Krishna Sashtri, 247.
Dost Muhammad *v.* Mani Ram, 223.
—— ——— *v.* Sanjad, 318.
Dottie Karan *v.* Lachmi Prasad, 20, 393.
Doucett *v.* Wise, 477.
Dougal *v.* McCarthy, 736.
Doughty *v.* Bowman, 191.
Douzelle *v.* Girdharee, 668.
Dover *v.* Prosser, 646, 669.
Downes *v.* Grazebrook, 480.
Dowson *v.* Jenkin's Contract, *Re*, 478.
Doyle *v.* Ross & Wife, 663.
Drake *v.* Gray, 190, 324.
——— *v.* Mitchell, 417, 613.

D—*contd.*

Draper *v.* Crofts, 702.
Driscoll *v.* Battersea Borough Council, 643.
Drummond, *In re*, 108.
Dryden *v.* Frost, 325, 492.
Duber *v.* Ram Sahai, 554.
Dubo Misser *v.* Srinabas, 61.
Dubri *v.* Ram Naresh, 472.
Ducasse *v.* Cohen, 686.
Dudley *v.* Folliott, 667.
Duffield *v.* Duffield, 142.
Dugappa *v.* Tirthasami, 702.
Dugdale *v.* Robertson, 450.
——— *Re* Dugdale *v.* Dugdale, 756.
——— *In re*, 102.
Duho Misser *v.* Srinivas, 70.
Dukhina Mohun Roy *v.* Kureemoolah, 636.
Dulari *v.* Vallabhdas, 75.
Dulhin Hamlapali *v.* Jogeshar, 573, 581, 582, 583.
——— Lachhanbati *v.* Bodh Nath, 713.
——— Sonakuer *v.* Manail Ahmad, 580.
Dulia Singh *v.* Bela Singh, 7.
Dulli Chand *v.* Meherchand, 726, 728, 731.
Dundaya *v.* Chenbasappa, 32, 36.
Dungannon *v.* Smith, 109.
Dungariya *v.* Nand Lal, 199.
Duni Chand *v.* Gurmukh Singh, 71.
Dunia Lal *v.* Mst. Nowratan, 472.
——— Seal *v.* Gopi Nath, 676.
Dunk *v.* Hunter, 642.
Dunlop, *Re* Dunlop *v.* Dunlop, 539, 541.
Duraiswamy Pillai *v.* Venkata Reddy, 507.
Durby's Estate, *In re*, 532.
Durga *v.* Jhinguri, 74.
——— Bibi *v.* Chanchal, 61.
——— Charan *v.* Ambica Charan, 474, 557.
——— ——— *v.* Khundkar, 217.
——— ——— *v.* Poresh, 408.
——— Chunder *v.* Koilas Chunder, 66, 769.
——— Churn *v.* Pandub, 649.
——— Das *v.* Muhammad Ismail, 215.
——— Din *v.* Suraj Baksh, 18, 391.
——— Mohun *v.* Rakhal Chandra, 636, 652.
——— Nath *v.* Rajendra Narain, 655.
——— Pershad *v.* Raghunandan Lal, 153
——— Prasad *v.* Chunni, 423.
——— ——— *v.* Dukhi Roy, 406.
——— ——— *v.* Gangadin, 245.

D—contd.

Durga Prasad v. Madho Prasad, 239, 250.
——— ——— v. Narain, 56.
——— ——— v. Shambhu, 61.
——— ——— Singh v. Rajendra Narain Singh, 641, 664.
——— ——— v. Rajendra, 694.
——— Singh v. Bisheshar Dayal, 82.
——— ——— v. Kesho Lal, 772.
——— v. Naurang, 234, 508.
——— ——— v. Naurang Singh, 439, 440.
——— ——— v. Nawab Mirza Muhammad Raza, 402.
——— Shankar v. Ganga Sahai, 515.
Durgadut v. Rameshwar, 64.
Durgawati v. Jagannath, 18.
Durgi v. Gobordhan Bose, 657.
——— Nikarini v. Gobordhan, 9.
——— ——— v. Gobordhan Bose, 632, 738.
Durgozi Row v. Fakeer Sahib, 228, 230.
Durham Bros. v. Robertson, 786.
Durshan Singh v. Arjun Singh, 617, 618.
Duthy and Jesson, *In re*, 316, 325.
Dutton v. Morrison, 274.
——— v. Thompson, 759.
Dwaika Halwai v. Sitha Prasad, 196.
Dwarika Nath Roy v. Mathura Nath, 686, 72[illegible].
Dwarka v. Ali Muhammad, 565.
——— Das v. Ruttun Singh, 444.
——— Nath v. Kali Chunder, 654.
——— ——— v. Mathura Nath, 724.
——— Pershad v. Sheoamber, 545.
——— Prasad v. Nazir Ahmed, 55, 210, 211.
——— ——— v. Ulfat Rai, 462.
——— Ram v. Jhulai, 181.
Dwarkanath v. Burroda, 131.
——— v. Mritunjoy, 462.
——— v. Tafazar, 1.
——— Mitter v. S. M. Sarat Kumari, 379.
Dwijendra Nath v. Gopiram, 75.
Dyal Das v. Harkishan Singh, 330.
Dynevor (Lord) v. Tenant, 712.
Dyson v. Forster, 186, 683, 684.

E—contd.

E. B. Society v. Abarupammal, 480.
Earnest Clarence O'Brien, *Re*, 102.
East India Distilleries & Factories v. Mathias, 672, 695.
Eastern Mortgage Agency Co. v. Muhammad Fuzlul, 321, 337.
——— Telegraph Co. v. Dent, 719, 733.
Easton v. Penny, 654.
Eaton v. Jacques, 680, 683.
Eavestaff v. Austin, 152.
Ebbett's Case, 763.
Ebbetts v. Conquest, 698.
Ebbs v. Boulnois, 3.
Ebrahim Haji v. Official Trustee, 379.
Ebrahimbhai v. Fulbai, 267.
——— Pir Mahomed v. Cursetji, 654.
Ecclesiastical Commissioners for England, *Re*, 324.
Economic Life Assurance Society v. Osborne, 613.
Edathil v. Kopashon, 383.
Edge v. Boileau, 670.
——— v. Worthington, 378.
Edwards v. Edwards, 145.
——— v. Hammond, 136, 141.
——— v. Wickwar, 714.
——— Wood, *Re, Ex parte* Mayou, 271.
Egerton v. Brownlow, 148, 162, 756.
——— v. Jones, 735.
Egmont (Earl) v. Smith, 315, 316.
Eichholz v. Bannister, 746.
Ekabbar Sheikh v. Hara Bewa, 722.
Ekambara Ayyar v. Meenatchi Ammal, 624.
Ekkavi Ghose v. Sedeshwar Ghose, 275.
Elaya Nayur v. Krishna Pattar, 789.
Elias Meyer v. Manoranjan, 89.
Elizabeth May Toomey v. Bhupendra Bose, 376.
Ellapa v. Sivasubramanian, 413.
Ellard v. Llandaff (Lord), 332, 687.
Ellenborough, *Re*, 58.
Elliot v. Joicey (Lord), 103.
——— Kelly, *In re* v. Elliot, 92.
——— Public Trustee, *In re* v. Pinder, 127.
Ellis v. Ellis, 760.
——— v. Glover & Hobson, 450.
——— v. Goulton, 343.
——— v. Rowbotham, 176.
——— v. Tarrington, 66.
Ellison v. Ellison, 748, 750.
Ellokassee Dassee v. Durponarain, 147.
Elphinstone (Lord) v. Monkland Iron & Coal Co., 689.
Elumalai v. Bala Krishna, 17, 86, 296, 380.
Elwes v. Maw, 22.
Emanual v. Dane, 744, 745.

E—*contd.*

Emperor *v.* Haji Gulam, 630.
——— *v.* Sherif Dadumiyaji, 644.
Empress *v.* Burah, 7.
——— *v.* Chimanlal, 7.
——— *v.* Joggessur Mochi, 742.
Endar Lala *v.* Lallu Hari, 647.
Engell *v.* Fitch, 339.
English & Scottish Mercantile Investment Co. *v.* Brunton, 29.
Enumalai *v.* Balakrishna, 86.
——— William Adams *v.* Mrs. Gray, 140, 156, 158.
Errington, *Re,* Errington-Turbutt *v.* Errington, 125.
——— *Re, Ex parte,* Mason, 467.
Erskine *v.* Adeane, 672.
Erusappa Mudaliar *v.* Commercial & Land Mortgage Bank, 415.
Eshan Chander *v.* Monmohini, 16.
——— Kishor *v.* Haris Chandra, 74.
Eshaq Lal *v.* Bulla, 209.
Espin *v.* Pemberton, 39, 40.
Essa *v.* Dayabhai, 332.
Esther *v.* Martu, 380.
Ethirajulu Naidu *v.* Ranganatham Chetti, 702.
Etizad Husain *v.* Bani Bahadur, 230, 234.
Eton College (Provost) *v.* Winchester (Bishop), 745.
Evans & Bettell, *In re,* 349.
——— *v.* Bicknell, 30.
——— *v.* Davis, 718, 724, 728.
——— *v.* Edith, 641.
——— *v.* Rival Granite Quarries Ltd., 606.
——— *v.* Vaughan, 666.
Evers *v.* Challis, 121.
Ewaz Ali *v.* Firdaus Jahan, 281, 282, 285.
Eyre *v.* Hughes, 512.
——— *v.* Marsden, 127.
Ezra *v.* Gubbay, 735.
——— Meyer Aaron Cohen *v.* Kumar Debendra, 696.

F. W. Woolworth and Company *v.* Lambert, 699.
Fadu Jhala *v.* Gour Mohan, 16.
Fagg *v.* Dobie, 683.
Faiyaz Husain Khan *v.* Prag Narain, 237, 239, 240, 250, 417.
——— *v.* Nilkanth, 92.
Faiyazunnissa *v.* Bajranj, 675.
Faiz Ali *v.* Harkuar, 263.

F—*contd.*

Faiz-un-nissa *v.* Hanif-un-nissa, 298.
Fajrat Husain *v.* Liaqat Ali, 84.
Faki Abas *v.* Faki Nurudin, 598.
——— Ibrahim *v.* Faki Gulam, 37.
Fakir *v.* Emambuksh, 63.
——— Chand *v.* Babu Lal, 420, 421.
——— Lal Goswami *v.* Bonnerji, 690.
——— Mahammed *v.* Ali Sherkhan, 515.
Fakira *v.* Majho, 267, 271.
Fakiraya *v.* Gadigaya, 534, 539.
Fakruddin Saib *v.* Ramayya Sethi, 198, 201.
Fala Krishna Pal *v.* Jagannath Marwadi, 627, 679.
Faloke *v.* Scottish Imperial Insurance Co., 445, 557.
Falcon *v.* The Famous Players Film Co., 4.
Falkrishna Pal *v.* Jagannath Marwari, 372, 373, 455.
Fanindra *v.* Administrator General, 131.
——— Deb *v.* Rajeswar, 761.
Fanny Skinner *v.* Bank of Upper India, 87, 296, 384.
Faqueer Soonra *v.* Mst. Khunderson, 84.
Faqir Bakhsh *v.* Murli Dhar, 712.
——— Bux *v.* Thakur Prasad, 263, 265, 266.
Faquir Chand *v.* Aziz Ahmad, 527, 528, 537, 538.
Faridunnissa *v.* Mukhtar Ahmad, 759, 760.
Farman Bibi *v.* Tasha Haddal, 726.
Farquharson Bros. *v.* King, 198.
Farrar *v.* Farrars, 480.
Farrence *v.* Elkington, 651.
Farrow *v.* Orttawall, 654.
——— *v.* Rees, 30.
Farrows Bank Ltd., *Re,* 686.
Farzand Ali *v.* Mirza Saddiq, 494, 507.
——— *v.* Motilal, 649.
Fasey, *In re, Ex parte* Trustees, 269.
Fateh Ali *v.* Gehena, 621.
——— *v.* Muhammad, 305.
——— Din *v.* Kishen Lal, 468, 471.
——— Singh *v.* Prithi Singh, 743.
——— *v.* Thakur Rukmini, 57.
Fatehchand *v.* Indian Cotton Co., 461.
Fati Chand Sahu *v.* Lilambar Sing Das, 304.
Fatima *v.* Abdul Ghaffar, 357.
——— Begam *v.* Bansidhar, 553.
Fatmabibi *v.* Advocate-General, 132.
Fatteh Mahomed *v.* Ram Dayal, 402.
Faujadar Khan *v.* Abdul Samad, 399, 402.

F—*contd.*

Fawcett & Holmes' Contract, *In re*, 320, 343.
Fayj Dhali *v.* Aftabuddin Sirdar, 722.
Fazal Ahmed *v.* Har Prasad, 81.
—— Din *v.* Milka Singh, 474.
—— Hussain *v.* Jivan Shah, 19, 200.
—— —— *v.* Muhammad Kazim, 201, 203.
—— Karim *v.* Mohd. Karim, 8.
—— Rab *v.* Manzoor, 566.
Fazulbhoy *v.* Credit Bank of India, 763.
Fekna Mahto *v.* Bahilal Sahu, 500.
Fellows *v.* Clay, 1.
Felly *v.* Rogers, 666.
Fenn d. Mathews & Lewis *v.* Smart, 705.
Fenner *v.* Blake, 641.
Fernando *v.* Gunatillaka, 207.
Feroz Shah *v.* Sobhat Khan, 368.
Festing *v.* Allen, 141.
Fida Ali *v.* Ismailji, 381.
Field *v.* Curnick, 696.
Filliter *v.* Phippart, 695.
Finch *v.* Miller, 736, 738.
—— *v.* Underwood, 711.
Finlay *v.* Bristol & Exeter Rly. Co., 738.
Finley, *In re*, 734.
Firdos Jehan *v.* Mahomed Yunus, 285.
Firm Bhagat Amirchand *v.* Bibi Fatima, 200.
—— Schwebo *v.* Subbiah, 270, 271.
—— S.M.A.R.A.L. *v.* R.M.M.A. Firm, 18, 19.
—— V.E.A.R.M. *v.* A.K.R.M.M.K. Firm, 376.
Fischer *v.* Kamala Naicker, 69.
Fisher *v.* Calvert, 775.
—— *v.* Dixon, 24.
Fleetwood *v.* Green, 314.
—— *v.* Hull, 684.
Flight *v.* Bentley, 705.
—— *v.* Booth, 311, 320, 343.
Flint *v.* Howard, 346, 524, 525.
Flower *v.* Hartopp, 343.
Fludyer *v.* Cocker, 314, 326, 328.
Flureau *v.* Thornhill, 339.
Follesatha *v.* Md. Rashiuddin, 410.
Foodeni Sah *v.* Azhar Hussain, 495.
Fool Kumari Dasi *v.* Khirod Chandra Das Gupta, 274.
Foorster, *In re*, 129.
Forbes *v.* Ameeroonissa Begum, 365, 542.
—— *v.* Jackson, 553, 561.

F—*contd.*

Forbes *v.* Meer Mahomed Tuquee, 63, 757, 758.
—— *v.* Moffatt, 566, 612, 614, 615.
— *v.* Ralli, 234, 639.
Ford *v.* Hill, *In re*, 314.
Formby *v.* Barker, 189.
Fortescue *v.* Barnett, 778.
Foster *v.* Baker, 772.
—— *v.* Mackinnon, 759.
—— *v.* Pierson, 667.
Fotick Chunder *v.* Foley, 608, 610.
Fowel *v.* Tranter, 708.
Fowler *v.* Secretary of State, 89.
Fox *v.* Fox, 142.
—— *v.* Mackreth, Pitt *v.* Mackreth, 332.
Frank Warr & Co. *v.* London County Council, 646.
Frederick Peacock *v.* Madan Gopal, 550.
Freeman *v.* Pope, 267.
Freme *v.* Wright, 342.
Freme's Contract, *In re*, 349.
Freshfield *v.* Reed, 18.
Frin Man Singh *v.* B. N. Sinha, 272, 276.
Fry *v.* Porter, 161.
Fryer *v.* Ewart, 686.
Fullers Theatres *v.* Rofe, 727.
Furnivall *v.* Grove, 716.
Furzund Ali *v.* Aka Ali, 230.
Fuzludin *v.* Fakir, 36.

Gadadhar Mullick *v.* Official Trustee of Bengal, 144.
Gadigeppa *v.* Balangowda, 78, 199.
Gafoor Khan *v.* Baldeo, 620.
Gafur Imam *v.* Amir Isab, 599.
Gagasi Ram *v.* Sahabuddin, 93.
Gahi Mal *v.* Shera, 368.
Gajadhar *v.* Khula Kunwar, 182.
—— *v.* Mulchand, 591.
—— *v.* Sibananda, 383.
—— Agarwalla *v.* Sibananda, 456, 473, 602.
—— Misir *v.* Bachan Chamar, 278.
Gajanand *v.* Rani Prayag Kumari, 469.
Gajapathi *v.* Alagia, 321.
Gajapati *v.* Suryanarayana, 608.
Gajendra *v.* Ashraff, 290.
Gajraj *v.* Indarpal, 89.
—— Singh *v.* Mahraj Munnu Lal, 401.
Gambhiraya *v.* Sakharam, 226.
Games, *Ex parte*, *Re* Bamford, 269.

G—*contd.*

Gamu *v.* Nathu, 263.
Ganapa Putta *v.* Hammad Saiba, 322.
Ganda Singh *v.* Secretary of State, 664.
Gandy *v.* Jubber, 633, 674.
Ganendro Mohun Tagore *v.* Rajah Juttendro Mohun Tagore, 150, 156.
Ganesh *v.* Bapu, 361.
——— *v.* Kashinath, 243.
——— *v.* Raghu, 599.
——— *v.* Rajaram, 550.
——— *v.* Shamnarain, 84.
——— *v.* Shankar, 61.
——— *v.* Vasadeo, 385.
——— Das *v.* Jamuna Das, 652.
——— ——— *v.* Maya Ram, 469.
——— Lal *v.* Charan Singh, 460.
——— Prasad *v.* Bhanjalal, 300.
——— Singh *v.* Debi Singh, 474.
——— ——— *v.* Sujhari, 469.
Ganesdas Ramgopal *v.* Jamuna, 633.
Ganeshdas Bhiwraj *v.* Suryabhan, 750.
Ganeshi Lal *v.* Charan Singh, 540.
——— Lal *v.* Rohni Rukumdhuj, 542, 623.
Ganeshnath *v.* Raghu, 561.
Ganga *v.* Shiam Sunder, 18.
——— Baksh *v.* Jagat Bahadur, 760.
——— Das *v.* Ananda Chandra, 651.
——— Dei *v.* Badam, 677.
——— Din *v.* Jagat, 212.
——— ——— *v.* Piyare, 66.
——— Narayan *v.* Kali Churn, 303.
——— Prasad *v.* Chandrawati, 777.
——— ——— *v.* Chunilal, 386.
——— ——— *v.* Hardei, 565.
——— ——— *v.* Ishri Pershad, 18.
——— ——— *v.* Land Mortgage Bank, 371.
——— ——— *v.* Mt. Raghubansa, 210.
——— ——— Sao *v.* Dulan Saran Singh, 602.
——— ——— Sar *v.* Dalan Saran Singh, 499.
——— Rai *v.* Kitharath Rai, 430.
——— Ram *v.* Natha Singh, 363, 412, 454.
——— Sahai *v.* Kishan Sahai, 10, 366.
——— ——— *v.* Tulsi Ram, 500.
——— Singh *v.* Ragho Ram, 744.
Gangabai *v.* Baswant, 210, 489.
——— *v.* Kalapa, 635, 641.
——— *v.* Pagubai, 248.
——— *v.* Sonabai, 81.
Gangadas *v.* Jogendra, 533.
——— Bhattar *v.* Jogendra Nath, 592.
Gangadhar *v.* Lakshman, 593.
——— *v.* Rachappa, 231, 232, 233.
——— Shikdar *v.* Ayimuddin, 636.
Gangadhara *v.* Sivarama, 559, 572.
Gangamma *v.* Bhommakka, 709, 739.
——— *v.* Veerappa, 273.
——— Narayandas Teli, *In re*, 640.
Gangaram *v.* Laxman, 291.
Gange *v.* Lockwood, 697.
Ganges Manufacturing Co. *v.* Smt. Radharani, 192.
Gangi *v.* Govinda, 300, 333.
——— Reddi *v.* Tammi Reddi, 751.
Gani *v.* Sitaram, 266.
Ganoo *v.* Shri Dev, 649.
Ganpat *v.* Adarji, 378, 379.
——— *v.* Bhangi, 550.
——— *v.* Sarupi, 88.
——— Bhujanga *v.* Hanmangauda Shidagauda, 456.
——— Putaya *v.* The Collector of Kanara, 3.
Raoji *v.* Abdulji Chandi, 407.
Ganpatji *v.* Saadat Ali, 487.
Ganpatrao *v.* Anant Rao, 71.
Ganu Dadu *v.* Panditrao, 694.
Garbhoya Bhimji *v.* Deodatta Behari, 240.
Gardiner, *Re*, Gardiner *v.* Smith, 127.
Gardner *v.* Ingram, 714.
——— *v.* London Chatham and Dover Rly., 457.
——— *v.* Lucas, 4.
Garnett *v.* Bradley, 3.
Garrad *v.* Tuck, 630.
Gascoigne *v.* Gascoigne, 73.
Gaskell *v.* Gosling, 485.
Gauhar Khan *v.* Ajudha Singh, 364.
Gaur Narayan Mazumdar *v.* Braja Nath, 563.
Gaureenath *v.* Modhoomanee, 74.
Gauri *v.* Mangla, 506.
——— Nath *v.* Fateh Singh, 505.
——— Shankar *v.* Bahadur Singh, 616.
——— ——— *v.* Bhairon, 445.
v. Gopal Das, 278.
- Singh *v.* Bechu Singh, 474.
Gaurishankar *v.* Chinamaya, 79, 211, 213.
Gava Din *v.* Haz Karan, 430.
Gawri Shankar *v.* Munnu, 318.
Gaya *v.* Ramjiawan Ram, 634.
——— Din *v.* Gajadhar, 406.
——— ——— *v.* Kashi, 212, 213.

G—*contd.*

Gaya Din *v.* Syed Mumtaz Husain, 92.
——— Prasad *v.* Baijnath, 631.
——— ——— *v.* Murlidhar, 271.
——— ——— *v.* Rachpal, 406.
——— ——— *v.* Salik Prasad, 534, 616, 617.
Gedges *v.* Matson, 581.
Geetaranee De *v.* Narendra Krishna De, 29.
Genda Singh *v.* Secretary of State, 8.
Gendmal *v.* Laxman, 205, 244.
General Finance, etc., Co. *v.* Liberator, etc. Society, 207.
Genu *v.* Narayan, 401.
Geresh Chunder *v.* Mussamut Bhuggobutty, 759.
Gerimal *v.* Raghunath, 68.
German *v.* Chapman, 700.
Ghafur Hasan *v.* Muhammed, 536.
Ghafur-ud-din *v.* Hamid, 304.
Ghanashyam Misser *v.* Gobinda, 487.
Ghanaya *v.* Pandit Chhajju, 559.
Ghansam Das *v.* Uma Pershad, 246.
Ghansham *v.* Badiya, 181.
Ghanshyam Das *v.* Ragho Singh, 243.
Ghanashiyamdas *v.* Sahu, 789.
Ghasi Khan *v.* Kishori, 460, 532.
——— Ram *v.* Bhola Nath, 508, 509.
Ghasiran *v.* Kundanbai, 182.
——— *v.* Kundandas, 605.
——— *v.* Raja Mohan Bhikram, 466.
Ghasitey *v.* Gobind, 251.
Ghatwal-Narain *v.* Badi Roy, 70.
Ghisulal *v.* Gambhirmal, 68.
——— Ganeshilal *v.* Gambirumal Pandya, 772.
Gholam Mohiuddin *v.* Khairan, 654.
——— Sidique *v.* Jogendra Nath, 196, 203, 205.
Ghosh *v.* Rohini, 298.
Ghousiah *v.* Rustumjah, 314.
Ghulam Fatima *v.* Gopal Din, 198.
——— *v.* Gopal Devi, 517.
——— Fatma *v.* Kachore Singh, 33.
——— Hazrat *v.* Gobardhan Das, 529.
——— Husain *v.* Dina Nath, 553.
——— ——— *v.* Muhammad Husain, 699.
——— Jilani *v.* Imdad, 324.
——— Mohammad *v.* Rajeshwar, 504, 505.
——— ——— *v.* Sansar Chand, 253.
——— Muhammad *v.* Mirza, 31.
——— ——— *v.* Tekchand, 297.
Ghulam Nabi *v.* Niazunnissa, 357.
Ghumna *v.* Ramchandra, 72, 74, 148.
——— *v.* Ramchandra Rao, 756, 758.
Ghunsham *v.* Uma Pershad, 268, 269.
Ghura *v.* Shitab Kuar, 447.
Gian Singh *v.* Atma Ram, 533.
Gibbon, *Re*, Moore *v.* Gibbon, 615.
Gibson *v.* Kirk, 631.
——— *v.* Seagrim, 524, 525.
Gifford *v.* Yarborough (Lord), 671.
Gilchrist, *Ex parte, In re*, Armstrong, 46.
Giles *v.* Hutchin, *In re*, Hunter's Lease, 704.
Gill *v.* Newton, 479.
Girdaridoss *v.* Ponna Pillai, 672, 695.
Girdhar *v.* Motilal Champalal, 86.
——— Das *v.* Ram Autar Singh, 566, 612, 615.
——— Lal *v.* Alaya Hasan, 497, 499.
——— ——— *v.* Bholanath, 433.
Girdharlal *v.* Liladhar, 250.
——— Parashram *v.* Firm Molital, 296.
Girdharadoss & Co. *v.* Appadurai, 732.
Girdhari *v.* Ahmed Misra Beg, 68.
——— *v.* Kantoo Lall, 181.
Girdharilal *v.* Purnendu Narayan, 650.
Girendra Narayan *v.* Ganga Narayan, 679.
Girendro Coomar *v.* Kumud, 376.
Girhi Rani *v.* Chandra Lal, 753.
Giribala *v.* Kedar Nath, 634.
——— Dasi *v.* Dwarka Nath Mistri, 739.
Giridhari Lal *v.* Dhirendra, 223.
——— Singh *v.* Meghlal Pandey, 82, 85, 626.
Girija Kanta *v.* Mohin Chandra, 217.
——— Nandan *v.* Hanuman Das, 1, 18.
Girijanand *v.* Sailajanand, 70, 71.
Girindra *v.* Bejoy, 18, 358.
——— Chandra Pal *v.* Sreenath Pal, 688.
——— Nath *v.* Bejoy Gopal, 361.
Girish Chandra *v.* Kishore, 655.
——— *v.* Sirish Chandra, 699.
——— Chunder *v.* Chhatradhar Ghose, 688.
——— *v.* Juramoni De, 427, 551.
Girjaprasad *v.* Purshottam, 752.
Girjesh Dutt *v.* Data Din, 103, 120.
Girjoji *v.* Keshav, 505.
Girraj *v.* Saukatha Prasad, 275.
Girwar Singh *v.* Thakur Narain, 370, 382.
Gitabai *v.* Balaji, 56.
Glanvill *v.* Glanvill, 137.
Glasdir Cooper Mines Ld., *In re*, 223.

G—*contd.*

Glasscock *v.* Balls, 86.
Glegg *v.* Bromley, 66, 70, 264.
Glenwood Lumber Co. *v.* Phillips, 645.
Gloag and Miller's Contract, *Re*, 315.
Glubb, *Re*, Bamfield *v.* Rogers, 759.
Gnana Sundaram *v.* Vulcan Insurance Co., 224.
Gnanaprakasam *v.* Vaz, 650.
Gnanasambanda *v.* Velu, 61.
Gnanesha *v.* Ganasikamani, 356, 357.
Gobardan *v.* Ritu Roy, 73.
Gobardhan *v.* Gokal Das, 365.
——— *v.* Raghubir Singh, 773.
——— Das *v.* Afzal Hussain, 317, 320.
Gobind *v.* Chanan Singh, 58.
——— *v.* Harihar, 462.
——— *v.* Kailash, 461, 539.
——— Chunder *v.* Doorgapersaud, 25.
——— ———*v.* Guru Churn, 241, 253.
——— Lal *v.* Hemendra, 627.
——— —— *v.* Ramjanam, 592.
——— —— Roy *v.* Ramjan Rajah Misser, 501.
—— Ram *v.* Chhogmal, 261, 272.
—— —— *v.* Sunder Singh, 457.
—— Rao *v.* Bhagirathi, 176.
—— Sahai *v.* Sibdut, 498.
—— Sarup *v.* Kaldup Singh, 616.
· Singh *v.* Baldeo Singh, 181.
Gobinda *v.* Debendra, 61.
——— *v.* Dwarkanath, 49, 359.
——— *v.* Kailash, 461.
——— Chandra *v.* Dwarka Nath, 88, 182, 604, 652, 655, 657.
——— Narayan *v.* Sham Lal, 85.
Gobindrao *v.* Anaji, 405.
Goburdhun Bysack *v.* Sonatun, 477.
Godai Mahto *v.* Debu, 178.
——— Molla *v.* Aminuddi Howladar, 690.
Godfrey *v.* Musammat Parbati Paluni, 72, 75.
——— *v.* Poole, 267.
——— *v.* Watson, 444, 494, 508.
Gogan *v.* Janokee, 75.
Goggan *v.* Warwicker, 629.
Gokalchand *v.* Rahiman, 358, 360.
Gokal Das *v.* Eastern Mortgage and Agency Co., 377.
Gokaldoss *v.* Rambux, 615, 617.
Gokul *v.* Shrimal, 470.
——— Chand *v.* Shib, 649, 655.
——— ——— *v.* Shib Charan, 629, 725.
Gokul Chand Das *v.* Debi Prasad, 386.
——— Dass *v.* Eastern Mortgage & Agency Co., 34, 222, 376, 380, 385.
——— Doss *v.* Kirpa Ram, 364, 366.
——— Kalwar *v.* Chandar Sekhar, 547, 548.
——— Nath *v.* Issur Lochun, 96.
——— Prasad *v.* Goitri Prasad, 401.
——— Singh *v.* Brijlal, 10.
Gokuldas *v.* Puranmal, 558, 561, 563, 570.
Gol Daji *v.* Dod Luxman, 721.
Golabi *v.* Raghunath, 9.
Golak Nath *v.* Mathura, 686.
——— *v.* Mathura Nath, 96, 723.
——— Roy *v.* Mathura Nath, 685.
Golam Ali *v.* Kali Krishna, 671.
——— Mohiuddin *v.* Parbati, 16.
Golden Bread Co. *v.* Hemmings, 316.
Goldsmith *v.* Russell, 273.
Goldstain *v.* Sanders, 686.
Goluck *v.* Nubo, 677.
——— Chunder *v.* Mohan Lall, 509.
Goluckmonee *v.* Nabungo, 544.
Goluk Nath Misser *v.* Lalla Premlal, 588, 617, 621.
Gomaji *v.* Subbarayappa, 394.
Gomathi Ammal *v.* Alagappa, 474.
Gomm's Case, 194.
Gomti Singh *v.* Anari Kuar, 92.
Good, *In re*, Harington *v.* Watts, 129.
Goodman *v.* Saltash Corporation, 130.
Goodright & Hall *v.* Richardson, 628, 632, 707.
———d Nicholls *v.* Mark, 708.
———d Walter *v.* Davids, 726.
Goodtitle *v.* Whitby, 134.
——— d Luxmore *v.* Saville, 719.
Goodwin, Ainslie, *Re v.* Goodwin, 151.
Goolam Hoosein *v.* Bank of Bombay, 29.
Goold *v.* Birmingham Banking Co., 342.
Gooroo Das *v.* Sarat Chunder, 156.
——— Doss Roy *v.* Issur Chunder Bose, 671.
Gooswami Maheshpuri *v.* Ramchandra, 603.
Gopal *v.* Bhutnath, 740.
——— *v.* Desai, 371.
——— *v.* Parsotum, 353.
——— Chandra *v.* Chowdhury Krishna, 664.
——— ——— *v.* Khater Karikar, 735.
——— Chunder *v.* Herembo, 620, 621.

G—*contd.*

Gopal Das *v.* Durga of Singh, 528.
——— Devi *v.* Ghulam Fatma, 560.
——— ——— *v.* Lachhmi Shankar, 553.
——— Jaywant *v.* Shriniwas, 721.
——— Krishna *v.* Venkatarasa, 184.
——— Lal Seal *v.* F. J. Marsden, 64.
——— Ram *v.* Dhakeswar Pershad, 723.
——— ——— *v.* Lachmi, 221.
——— ——— Mohuri *v.* Dhakeshwar, 654.
——— Sahoo *v.* Gunga, 614.
——— Saran *v.* Sita Devi, 748.
——— Singh *v.* Thakar Singh, 33.
Gopala *v.* Juvappa, 637.
——— *v.* Ramaswami, 68.
——— *v.* Saminathayyan, 524.
- Dasu *v.* Rami, 211.
Gopalasami *v.* Arunchela, 363, 464, 466, 470, 471.
Gopaldas *v.* Hemandas, 152.
Gopaljee Jha *v.* Upendranarain Jha, 410.
Gopalkrishna Iyer *v.* Gopalakrishna, 778, 780, 785.
Gopalrao *v.* Kishor, 649.
——— *v.* Mahadevrao, 639.
——— Ganesh *v.* Kishor Kalidas, 721.
Gopalu Pillai *v.* Kothandarama Ayyar, 589.
Gopanund Jha *v.* Lalla Gobind, 665, 693, 694.
——— ——— *v.* Lalla Gobind Pershad, 669.
Gopee Krist *v.* Gangapersaud, 753.
——— ——— Gossain *v.* Gunga Pershad, 184.
Gopeshwar Pal v. Jiban Chandra, 4.
Gopi *v.* Mst. Jaldhara, 218.
——— Koeri *v.* Mst. Raj Rupp, 172.
——— Lal *v.* Abdul Hamid, 8, 228, 439.
——— Narain *v.* Bansidhar, 581, 590.
——— Nath *v.* Ishur Chundra, 608.
——— ——— *v.* Rup Ram, 210.
——— Ram *v.* Durjan, 743.
——— ——— *v.* Jeot Ram, 114.
Gopichand *v.* Jodhraj, 267.
Gopikishan *v.* Mankuar, 466.
Gopikrishna *v.* Ram, 501.
Gopinath *v.* Jandhu, 61.
Gordhandas *v.* Bai Ramcoover, 750.
——— *v.* Mohanlal, 35.
Gordhanlal *v.* Purnendu Narayan, 635.
——— *v.* Thakur Radha, 511.
Gordon *v.* Graham, 521, 642.

G—*contd.*

Gore *v.* Lloyd, 642.
Gorringe *v.* Irwell, 777.
Gorton Local Board *v.* Prison Commissioners, 3.
Gosavi Shivgar *v.* Rivett Carnac, 128, 137.
Gosling *v.* Gosling, 125, 134, 137.
Gostho Behari *v.* Rohini, 300, 301.
Goswami Mahashpuri *v.* Ramchandra Sitaramji, 605.
Gott *v.* Gandy, 673.
Goudoin *v.* Venkatesa, 97.
Gould, *Ex parte*, *Re* Walker, 102.
Gour Charan *v.* Jinnut Ali, 394.
——— Gopal *v.* Gosta Behari, 178.
Gourhari Kaiburto *v.* Bhola Kaiburto, 671.
Gourishankar *v.* Chinumaya, 361.
Gourlay *v.* Somerset, 297, 298.
Goverdhana Doss *v.* Veerasami, 590.
——— ——— *v.* Veerasami Chetty, 591.
Government Stock Co. *v.* Manila Rly. Co., 606.
Governor-General in Council *v.* Joyaram, 789.
Govind *v.* Bhau, 390.
——— *v.* Dillar Jung, 411.
——— *v.* Narayan, 417.
——— *v.* Ramkrishna, 61.
——— Baba *v.* Jijibai, 246, 247.
——— Bhikaji *v.* Bhau Gopal, 391.
——— Kuar *v.* Lala Kishen Prasad, 73.
——— Monee *v.* Dino Bundhoo, 671.
——— Padayachi *v.* Lokanatha Aiyar 565, 571.
——— Prasad Shaha *v.* Charusheela Dasee, 676.
——— Rao *v.* Gopal Rao, 225.
——— Swami Naickar *v.* Pukhraj, 481.
Govinda *v.* Chowakkram, 78.
——— *v.* Jesha Premaji, 355.
——— *v.* Lokanatha, 564.
——— *v.* Marugesa, 565, 571.
——— Chandra *v.* Dwarka Nath, 737.
——— ——— *v.* Parsa Nath, 571.
——— ——— Pal *v.* Dwarka Nath Pal, 604.
——— Kurup *v.* Chowakkaram, 625, 626.
Govindammal *v.* Gopalachariar, 298, 301.
Govindan *v.* Nagayyan, 385.
——— Nayyar *v.* Ammadu, 398.
Govindappa *v.* Hanumanthappa, 241.
Govindarajulu Naidoo *v.* Ranga Rao, 769, 788.

G—*contd.*

Govindarajulu Naidoo *v.* Gopal Swami, 507.
Govindasami *v.* Ethirajammal, 676.
——— *v.* Palaniappa, 675.
——— Tevan *v.* Dorasami, 568.
Govindasamy *v.* Palaniappa, 717.
Govindaswami *v.* Ramaswami, 66, 629, 737.
Govindraju *v.* Mangalam Pillai, 157.
Govindrao *v.* Annaji, 402.
——— *v.* Raoji, 359, 519.
——— *v.* Rukmanand, 594.
——— Deshmukh *v.* Ragho, 419.
Gowan *v.* Christie, 640.
Graham *v.* Johnson, 782.
Grant *v.* Munt, 311.
Gray *v.* Bompas, 730.
——— *v.* Owen, 716.
——— *In re,* Todd *v.* Taylor, 129.
Great Northern Rly. Co. and Sanderson, *In re,* 349.
——— ——— Rly. *v.* Arnold, 332, 712.
——— Western Rly. *v.* Fisher, 311.
——— ——— Co. *v.* Smith, 734, 735.
Green *v.* Eales, 674.
——— *v.* Palmer, 628, 712.
——— *v.* Wynn, 553, 561.
Green's Case, 726.
Greenaway *v.* Adams, 626.
Greender Chander *v.* Mackintosh, 39.
Greg *v.* Planque, 674.
Gregson *v.* Aditya, 358.
——— *v.* Udoy Aditya Deb, 79.
Gregson's Trust Estate, *Re,* 146.
Grenfell *v.* The Deans & Canons of Windsor, 70.
Greswold *v.* Marsham, 614.
Gretton *v.* Howard, 169.
Greville *v.* Parker, 711.
Grey *v.* Friar, 708.
——— *v.* Pearson, 3.
Grierson *v.* National Provincial Bank, 518.
Griffin, *Re,* 776.
——— *v.* Tomkins, 728.
Griffith, *Re,* Carr *v.* Griffith, 175.
Griffiths *v.* Hatchard, 325.
——— *v.* Vere, 125.
Grimman *v.* Legge, 716.
Grimwood *v.* Moss, 727.
Grish Chandra *v.* Kashisauri Debi, 784.
——— Chundra *v.* Ishwar, 593.
Grissel *v.* Swinhoe, 170.
Grove *v.* Portal, 626, 718.

G—*contd.*

Guardian Assurance Co. *v.* Evonmore, 495.
Guduri *v.* Rapaka, 394.
Guest *v.* Hemfray, 302.
Gujadhar *v.* Rambhau, 669.
Gulab *v.* Lalta, 301.
——— Chand *v.* Ram Kumar, 504.
——— Kuar *v.* Bansidhar, 64, 93.
Gulabchand *v.* Dhondi, 237, 255.
Gulam Mohiuddin *v.* Dayabhai, 629, 702.
Gulbaji & Co. *v.* Rustomji, 156.
Gulzar Ali *v.* Fida Ali, 444.
Gulzari Lal *v.* Ali Ashan, 540.
——— *v.* Aziz Fatima, 560, 565, 571.
——— Mal *v.* Meghi Mal, 329.
Gumani Singh *v.* Chakkar Singh, 551.
Gunga Narain *v.* Kali Churn, 301, 302.
——— Narayan Doss *v.* Sharoda Mohun Roy, 688.
——— Pershad *v.* Land Mortgage Bank, 401.
Gungaparsad *v.* Gogun, 643.
Gungava *v.* Konhor, 634.
Guni Mahomed *v.* Moran, 177, 688.
Gunindra Prasad *v.* Baijnath, 616.
Gunnam Dorayya *v.* Vadapalli, 508.
Gunomoni *v.* Bussunt, 37.
Gunoo Singh *v.* Latafut, 354.
Gupta *v.* Administrator-General, 383.
Gupte Shwar *v.* Radha Mohan, 545.
Gur Dayal *v.* Karam Singh, 328, 604, 609.
——— ——— *v.* Kaunsilla, 184.
——— ——— Singh *v.* Karam Singh, 329.
——— Narain *v.* Shadi Lal, 567, 572.
——— Narayan *v.* Sheo Lal Singh, 420, 452.
——— Prasad *v.* Hansaraj, 648.
——— ——— *v.* Mehdi Husain, 677, 700.
Guran Ditta *v.* Ram Ditta, 184.
Gurbakhsh Singh *v.* Sardar Singh, 11.
Gurbhaj *v.* Lachman, 54.
Gurdas Mal *v.* Punjab Sindh Bank, Ltd., 8, 44, 375.
Gurdeo Singh *v.* Chandrikah, 538, 556, 571, 580.
Gurdevi *v.* Sham Lal, 719, 721.
Gurdial Singh *v.* Central Board and Local Committee, Amritsar, 3, 4.
Gurdit Singh *v.* Hakumat Rai, 616.
Gurney *v.* Seppings, 385.
Gursaram *v.* Shib Singh, 418.
Guru Basappa *v.* Santhappa, 245, 300.
——— Din Saha *v.* Badu, 635.
Gurunath *v.* Yamanava, 356.

G—*contd.*

Gurusami v. Sivakami, 141.
Gurushantappa v. Mallaya, 685.
Gusto Behari v. Shibo Nath, 499, 501.
Guthrie v. Walrond, 763.
Gutteridge v. Munyard, 696, 697.
Gya Prasad v. Gur Dayal, 494.
Gyannessa v. Mobarakannessa, 9, 49, 89, 742.

H

H. N. Low & Co., Ltd. v. Jyoti Prasad Singh Deo, 640.
H. R. M. Firm v. Ma E. Nyo, 18.
H. V. Low & Co., Ltd. v. Jyotiprasad Singh, 85, 626.
———— v. Pulin Beharilal Sinha, 2, 51, 427, 460, 606.
Habib Ahmed v. Mt. Keoli Koer, 726.
Habibullah v. Jugdeo, 593.
———— v. Nakched Rai, 389, 392.
Hadden, *In re*, Public Trustee v. More, 129.
Haddington Island Quarry Co. v. Hudson, 480, 481.
Hadu Maharana v. Ramdulal Ghosh, 658.
Haedicke and Lipskis Contract, *In re*, 312.
Haibat Shaha v. Bhora Tarachand, 460.
Haidar Ali v. Mohamed Safiuddin, 457.
Haidri v. Nathu, 722.
———— Begum v. Nathu, 649.
Haig v. Homan, 679.
Haji Abdul v. Haji Noor Mahomed, 411.
———— ———— Rahman v. Haji Noor Mahomed, 482, 513, 548.
———— Ali Mahomed v. Anjuman-i-Islamia, 61, 70.
———— Essa v. Dayabhai, 308, 311, 312.
———— Mahomed v. Hyderabad Municipality, 631.
———— ———— Mitha v. Musaji Esaji, 311.
Hakeem Muhammad v. Shaik Daud, 382.
———— Patte v. Shaik Davood, 365, 398, 601.
Hakim Ali v. Dalip Singh, 567.
———— Lal v. Moosahur Sahu, 264, 275.
———— ———— v. Ram Lal, 421, 460, 499, 535.
———— Mohmd. Fazilzaman v. Anwar Hussain, 649, 664, 709.
———— Singh v. Charan Das, 237.
Hakim-un-nissa v. Deonarain, 767, 784.
Haldane v. Johnson, 690.
———— v. Newcomb, 697.
Hale, *Re*, Lilley v. Foad, 486.

H—*contd.*

Hales v. Cox, 526.
Halford v. Hatch, 679, 681.
Halifax v. Wilson, 135.
———— Joint Stock Banking Co. v. Gledhill, 272.
Halima Bee Bee v. Khairunnissa, 20.
Halkett v. Dudley (Earl), 311, 338.
Hall v. Burnell, 335.
———— v. Hall, 759, 760.
———— v. Heward, 420, 429.
Halphyde v. C. A. Saldanha, 130.
Halsanad Madappya v. Mahabala Rao, 583.
Hamad Yar Khan v. Shankar Das, 467.
Hamerton v. Stead, 642.
Hamida Bibi v. Ahmed Husain, 416, 422.
Hamidmiya Sarfudin v. Nagindas Jivanji, 19.
Hamiduddin Khan v. Ramani Kant Roy, 28.
Hamidunnissa v. Nazirunnissa, 271.
Hamilton v. Hamilton, 169.
———— v. Royse, 29, 347.
Hammond v. Messenger, 771.
Hancock, *Re*, Hancock v. Berry, 754.
Hand v. Blow, 487.
———— v. Hall, 628.
Hanifa Bibi v. Punnamma, 266, 269, 273.
Hanif-un-Nissa v. Faiz-un-Nissa, 298.
Hankey v. Clavering, 724.
Hanmant Anant v. Shidu, 417.
Hanmanta v. Mir Ajmodin, 301.
Hanmantappa v. Dundappa, 67.
Hanmantram Sadhuram v. Bowles, 453.
Hans Nath v. Ragho Prasad, 247, 251.
Hanson v. Graham, 134, 140.
Hansraj v. Mst. Somni, 228, 230, 232.
Hanumaithaiyan v. Meenatchi Naidu, 580.
Hanuman v. Hanuman, 322.
———— Das v. Gursahay Singh, 208, 215.
———— Prasad v. Deo Charan, 77, 678.
Hanumantha Goundan v. Doraiswami Pillai, 691.
Hanwant Rai v. Chandi Prasad, 191, 323, 324.
———— Raj v. Ram Harakh, 618.
Har Baksh Singh v. Mahabir Singh, 408.
———— Chand v. Kishori Singh, 339.
———— Chandi Lal v. Sheoraj Singh, 620.
———— Chandra Roy v. Mahomed Husain, 460.
———— Dayal v. Lal Nauratan, 96.

H—*contd.*

Har Dayal *v.* Pirthisingh, 545.
—— —— Singh *v.* Raja Ram Singh, 402.
—— Kuar *v.* Udam Singh, 466.
—— ——*v.* Har Prasad, 572.
—— Lal *v.* Muhamadi, 327.
—— Narain *v.* Ashiq Husain, 201.
—— Nath *v.* Mohar Singh, 736.
—— Pershad Lal *v.* Dalmardan Singh, 593.
—— Prasad *v.* Bhagwan Das, 617.
—— —— *v.* Fazal Ahmed, 82.
—— —— *v.* Mahomed Usman, 262, 268.
—— —— *v.* Raghunandan, 537.
—— —— *v.* Raghunandan Prasad, 597.
—— —— *v.* Ramchandra, 358, 406, 435.
v. Sheo Gobind, 74, 76, 467.
—— Shankar *v.* Shew Gobind, 242, 253, 254, 552.
—— Shyam *v.* Shyam Lal, 569.
Hara Kumari *v.* Eastern Mortgage and Agency Co., 532.
Haradhan *v.* Bhagbati, 231.
—— *v.* Hargobind, 489.
—— Gossamee *v.* Ram Newaz, 688.
Haranandan Das *v.* Muhammad Kalim, 217.
Harbans Lal *v.* Maharaja of Benares, 677.
Harbin *v.* Masterman, 90.
Harcharan Lal *v.* Nurul Hasan, 318.
Hardat Singh *v.* Mt. Damodar, 510.
Hardei *v.* Ram Lal, 750.
Hardeo Baksh *v.* Deputy Commissioner, 408, 433, 494.
—— Prasad *v.* Ganga Sahai, 510.
Harding *v.* Harding, 750, 775.
Hardwar Bhagat *v.* Sita Ram, 456, 493, 507.
Hare *v.* Burgess, 711.
Hardy *v.* Metropolitan Land Co., 362.
Hare *v.* Elms, 732.
Harendra Kumar *v.* Din Dayal, 538.
—— Lal *v.* Hari Dasi, 19, 20, 393.
Harga Lal *v.* Gobind Rai, 593.
Hargobind *v.* Tula Ram, 406.
Hargovind Prasad *v.* Babu Ambika Dutt Ram, 201.
Hari *v.* Mahadaji, 641.
—— *v.* Mst. Tapai, 461.
—— *v.* Shridhar, 508.
—— *v.* Vishnu, 407.
—— Bajunji *v.* Bhaga Sadhu, 309, 335.
—— Chand Rai *v.* Moti Ram, 274.
—— Charan *v.* Kaula Rai, 39.
—— Kishen *v.* Kasi Prasad, 19, 200.

H—*contd.*

Hari Kishun *v.* Tilukdhari, 178.
—— Kisore Barna *v.* Barada Kisore, 701.
—— Kissen *v.* Veliat Hossein, 421, 460, 535.
—— Krishna *v.* Gajendra Nath, 510.
—— Laxman *v.* Secretary of State, 673.
—— Mahadaji *v.* Balambhat, 406.
—— Mohan *v.* Grish Chandra, 223.
—— Mohun Misser *v.* Surendra Narayan, 701, 741.
—— Narayan *v.* Sriram, 85.
—— Nath *v.* Raj Chandra, 9, 678.
—— Pada *v.* Anath Nath, 85.
—— —— *v.* Elokeshi Devi, 286.
—— —— *v.* Nirod Krishna, 290, 743.
—— Prasad *v.* Hanmantrao, 278, 293.
—— —— *v.* Harihar, 326.
—— —— *v.* Kodo Marya, 69.
—— —— *v.* Ramchandar, 406.
—— Raj *v.* Ahmaduddin Khan, 527, 537.
—— Ram *v.* Denapat Singh, 329.
—— —— *v.* Indraj, 417.
—— —— *v.* Minakshi Rani, 619.
—— —— *v.* Sheodial, 360.
—— Tiwari *v.* Raghunath, 745.
Haribans Rai *v.* Sri Niwas, 474.
Haridas *v.* Baroda Kishore, 64, 769.
—— *v.* Jagannath, 395, 470.
—— *v.* Narayana, 84.
—— *v.* Upendra, 652.
Harihar Baksh *v.* Luchman Singh, 413.
—— Banerji *v.* Ramsashi Roy, 649, 650, 654, 655.
—— Pershad *v.* Bholi Pershad, 409.
—— Prasad *v.* Siri Gurugranth, 50, 751.
—— Singh *v.* Kamla Prasad, 191.
Hariharayyar *v.* Ahmadunni, 217.
Harilal *v.* Gordhan, 228, 229, 230.
—— *v.* Mulchand, 27, 35, 310, 319, 337.
Haripada *v.* Anath Nath, 380.
—— *v.* Ananda, 390.
Haris Paik *v.* Jahuruddi, 115, 338, 405.
Harjas Rai *v.* Naurang, 606.
—— —— *v.* Rameshar, 416.
Harkishore Barua *v.* Gura Mia, 789.
Harkisondas *v.* Dwarkadas, 19.
—— Bhagwandas *v.* Bai Dhanu, 114.
Harlal *v.* Lala Prasad, 238.
—— *v.* Muhamdi, 329.

H—*contd.*

Harman *v.* Ainslie, 718.
Harmer *v.* Bean, 705.
——— *v.* Jumbil (Nigeria) Tin Areas Ltd., 669.
Harmongal Narayan *v.* Ganaur Singh, 18.
Harnam Singh *v.* Jiwan, 251, 252.
——— ——— *v.* Mahomed Akbar Khan, 606.
Harnaman *v.* Dasondhi, 231.
Harnandun Singh *v.* Jawad Ali, 222.
Harnath Kuar *v.* Indar Bahadur, 52, 54.
——— Singh *v.* Maiya Ambica Devi, 368.
Harnett *v.* Maitland, 695.
Harprasad *v.* Hanmantrao, 285.
Harris *v.* Brown, 135, 136.
——— *v.* Goodwyn, 683.
——— *v.* Jones, 696.
Harrison *v.* Edwards, *In re,* Smiths' Mortgage, 492.
Harrison *v.* Foreman, 155.
——— *v.* Harrison, 168.
——— Ainslie & Co. *v.* Muncaster, 666, 669.
——— Ainslie Co. *v.* Lord Muncaster, 669.
Harro Kumari *v.* Purna Chandra, 692.
Harrods Ltd. *v.* Stanton, 272.
Hart *v.* Tara Prasanna, 415.
——— *v.* Windsor, 662.
Hasan Ali *v.* Nazo, 760.
Hasha *v.* Ragho, 12.
Hashakhand *v.* Jesha Premaji, 355.
Haslam and Hier-Evans, *Re,* 759.
Hassan Abbas *v.* Razia Begam, 271.
Hassanbhai *v.* Umaji, 552, 591, 594.
Hatch *v.* Hatch, 759.
Hathasanan *v.* Parmeswaram, 421.
Hathisingh *v.* Kuvarji, 222.
Hatimullah *v.* Mahomed Arju, 720.
Hattikudur *v.* Andar, 208, 210.
Haudhana *v.* Sailabala, 194.
Havu *v.* Ganapati, 706, 714.
Hawkins *v.* Gathercole, 3.
——— *v.* Rutt, 690.
Hawtrey *v.* Beaufort Ltd., 629.
Haydon *v.* Bell, 314.
Hayes *v.* Bickerstaff, 667.
Haynes *v.* Forshaw, 570.
Haywood *v.* Brunswick Permanent Benefit Building Society, 100, 101, 188, 191.
Hazara Singh *v.* Bube Khan, 251, 252.
Hazarimull *v.* Monahar, 588.
Heap *v.* Hartley, 644.

H—*contd.*

Hearle *v.* Greenbank, 167, 168.
Hearn *v.* Baker, 146.
Heartley *v.* Nicholson, 750.
Heathcote, *Re,* Heathcote, *v.* Trench, 127
Hechle *v.* Tellery, 697.
Hedayet *v.* Kamalanand, 740, 741.
Heera Lal Chowdhri *v.* Janokeenath, 498.
——— Lall *v.* Syud Oozeer, 553, 561.
Pal *v.* Neel Monee Pal, 714.
Heeramonee *v.* Gunganarain, 734.
Heiniger *v.* Droz, 644.
Hem Ban *v.* Behari Gir, 461.
——— Chunder Ghose *v.* Radha Pershad, 649.
Hemadri Nath Khan *v.* Ramani Kanta Roy, 217.
Hemangini *v.* Srigobinda, 649, 652.
——— Dassi *v.* Ashutosh Das, 677.
Hemant Kumari Debi *v.* Safatulla Biswas. 711.
Hemanti *v.* Midnapur Zamindari Co., 642.
Hemchand *v.* Azam Sakarlal, 6.
Hemchunder *v.* Kali, 355.
——— Ghose *v.* Thakomoni, 499.
Hemchandra Roy Choudhari *v.* Suradhani Debya, 362.
Hemendra Nath *v.* Kumar Nath, 640.
Hemeshwar *v.* Pal Chandra, 290.
Henderson *v.* Arthur, 690.
——— *v.* Astwood, 441, 480.
——— *v.* Squire, 701, 702.
——— *v.* Thorn, 698.
Heng Moh *v.* Lim Saw Yean, 377.
Henley *v.* Lyme Corporation, 70.
Henry Pound, Son and Hutchins, *Re,* 486.
Henshall *v.* Porter, 4.
Heppenstall *v.* Jackson, 769.
Heranya Bhusan *v.* Gouri Dutt, 248.
Herumbo Nath Banerjee *v.* Satish Chandra, 223.
Hercules Insurance Co., Brunton's Claims, 783.
Hersey *v.* Gilbert, 711.
Het Ram *v.* Shadi Lal, 33, 416, 592.
Hetsingh *v.* Behari Lal, 411, 412, 542.
Hewanchal *v.* Jawahir, 408.
——— Singh *v.* Jawahir Singh, 412, 544, 546.
Hewitt *v.* Loosemare, 27.
Heywood *v.* Mallalieu, 311.
v. Tallalieu, 314.
Hickson *v.* Darlow, 479, 481.

H—*contd.*

Higgins v. Nobin Chander, 632, 634.
——— v. York Building Co., 450.
Hikmatulla v. Imam Ali, 369, 383.
Hill v. Barclay, 697, 733.
—— v. Boyle, 65.
—— v. Crook, 760.
—— v. Kirwood, 479, 481.
—— v. Saunders, 693.
—— v. Simpson, 29.
—— v. Wilson, 749.
Hillaya Subbaya v. Narayanappa, 443.
Himmat Sahai v. Md. Moin, 423, 424.
Himalaya Bank v. Quarry, 375, 376.
Hind v. Poole, 478.
Hippolite v. Stuart, 97.
Hira Bibi v. Ramdhan Pal, 392.
—— —— v. Ram Hari Lal, 392.
——Kuar v. Gambhir Singh, 403.
——Mani v. Anmol Singh, 752, 753.
——Singh v. Afzal Khan, 197.
—— —— v. Jai Singh, 555, 556, 574, 577, 578.
Hirachand v. Abdal, 528, 538.
———— v. H. H. Hammond, 643.
———— v. Jayagopal, 314, 318.
———— v. Kashinath, 33.
———— v. Nemchand, 65.
-Babaji v. Bhaskar, 613.
Hiralal v. Collector of Surat, 637, 643.
——— v. Fattehchand, 275.
——— v. Gavrishankar, 89, 286, 748, 753.
——— v. Ghasitu, 465, 471.
——— v. Gokul, 18, 391.
——— v. Narsilal, 406.
——— v. Shankar, 286, 287.
——— Singha v. Tripura Charan Ray, 788.
Hiramoti v. Annoda Prasad, 9, 77.
Hiran Bibi v. Sohan Bibi, 49, 58, 93.
Hiranand v. Mahia, 342.
Hiranandhan Ojha v. Ramdhar Singh, 717, 731.
Hiranya Bhusan v. Gouri Dutt, 236, 240.
Hirday Narain Singh v. Jugal Prasad Singh, 788.
Hirendra Nath v. Hari Mohan Ghosh, 713.
———— —— Dutt v. Hari Mohan Ghosh, 9.
Hitendra Singh v. Maharaja of Darbhanga, 81.
Hobart v. Abbot, 386.
Hobson v. Bell, 314, 340.
——— v. Gorringe, 23, 24.

H—*contd.*

Hobson v. Tulloch, 700.
Hockley v. Bantock, 378.
Hodges Legacy, *In re*, 158.
Hodgson v. Halford, 162.
———— Nowell v. Flaunsy, *In re*, 749.
Hodson v. Deans, 480.
Holgate v. Kay, 664, 691.
Holland v. Hodgson, 22, 23.
———— *In re* Gregg v. Holland, 267.
Hollaway v. Berkeley, 627.
Hollis v. Palmer, 88, 454.
Holroyd v. Marshall, 51, 207, 388, 755.
Hoole v. Smith, 479.
Hoorbai v. Aishabai, 196.
Hooseinbhai v. Haji Ismail, 263.
Hope Mills Ltd. v. Cowasji, 405, 513.
Hopkins v. Hopkins, 47.
Hopkinson v. Rolt, 521.
Horay Krishna v. Sashi Bushan, 454, 544.
Hormusji v. Dadabhoy, 102.
————Jamshedji v. Maneklal Mansuklal, 658.
———— v. Maneklal, 278, 285.
———— v. Mankuverbai, 27, 38.
————Irani, *In re*, 626.
————Manekji v. Keshav, 303, 304.
Horn v. Baker, 23.
—— v. Beard, 225.
Hornby v. Matcham, 316, 412.
Horsfall v. Thomas, 210.
Horsefall v. Mather, 695.
Hosain Ali v. Abid Ali, 7.
Hossain Ali v. Naro, 58.
Hossainara v. Rahimanessa, 409.
Howard v. Fanshawe, 731.
———— v. Maittland, 669.
———— v. Shaw, 629, 631.
Howe v. Smith, 335, 336, 342.
Howell v. Richards, 666.
Hriday Narain v. Kali Charan, 712.
Hughes v. Chatham Overseers, 646.
——— v. Jones, 317.
Huguenin v. Baseley, 759, 760, 762.
Hukam Chand v. Radha Kishan, 358.
——— Singh v. Babu Lal, 548.
Hukimchand v. Pioneer Mills Co., 358.
Hukumchand v. Hiralal, 298.
————— v. Radhakishen, 357, 358.
Hukum Singh v. Babu Lal, 513.
————— v. Lallanji, 591.
Hume v. Bentley, 341.

H—*contd.*

Hume v. Pocock, 342.
Humphrey v. Tayleur, 755.
Humphreys v. Harrison, 450.
Hundaldas v. Bulak Khan, 456, 601.
Hunooman Persaud v. Mst. Babooe, 179, 181, 354.
Hunsraj v. Bejoy Lal Seal, 678, 680, 685, 718.
——— v. Nathoo, 770, 774, 781.
——— Morarji v. Nathoo Gangaram, 773.
Hunt v. Luck, 29, 37.
Hunter v. Damodhar, 283.
——— v. Damodar Das, 743.
——— v. Daniel, 410.
——— v. Hopetown (Earl), 711.
——— v. Walters, 39.
Hunter, Liquidator Bank of Upper India v. Nisar Ahmed Chaudhari, 182, 605, 609.
Hurish Chunder Roy v. Sree Kalee, 680.
Hurlal Singh v. Jorawun Singh, 62.
Hurlbatt, *In re*, Hurlbatt v. Hurlbatt, 127.
Hurmuzi Begam v. Hirdaynarain, 16.
Hurnundan Singh v. Jawad Ali, 304.
Hurnuns v. Petam, 505.
Hurprashad v. Sheo Dyal, 88.
Hurrogobind Raha v. Ramrutno, 757.
Husaini Begum v. Sultani Begum, 281.
——— Khanum v. Husain Khan, 408.
Hussain Ali Shah v. Sardar Ali Shah, 371.
——— Khan v. Nateri, 96, 757.
Husseinali v. Dinbai, 75.
Hussenbhoy v. Ahmedbhoy, 128, 137.
Hussey v. Horne-Payne, 342.
Hussonally v. Tribhowandas, 320, 339.
Huthasanan v. Parameswaran, 427, 551.
Hyam v. Gubbay, 336.
Hyatt v. Griffiths, 736, 738.
Hylton v. Hylton, 759.

I

Ibn Hasan v. Brijbhukan, 530, 536, 538, 598.
——— Hussain v. Ramdai, 537, 538.
Ibrahim Hussein Khan v. Ambika Persad Singh, 520.
Ibrahim v. Jiwan Das, 261, 271.
——— v. Muni Mir, 63.
——— v. Rangasami, 223.
Ibrahimbhai v. Fletcher, 336, 338.
Icharam Singh v. Nilmony, 638.

I—*contd.*

Iggulden v. May, 711.
Ikbal Begum v. Gobind Prasad, 300, 301.
Ikkotha v. Chakkiamma, 415.
Ilingworth v. Holsworth, 606.
Imam v. Balamma, 182.
Imam Ali v. Baijnath, 421, 460, 535, 536.
——— Din v. Bhag Singh, 318.
——— v. Natha Singh, 721.
Imambandi v. Kamleswari Pershad, 693, 716.
Imambundi Begum v. Kamleshwari Pershad, 714.
Imamuddin v. Ramzan, 301, 303.
Imamwalad Ibrahim v. Bhau Appaji, 50.
Imbichi Kandan v. Thamburath, 722.
Imbichi v. Achampat Avukoya Haji, 606.
Imdad Hasan v. Badri Prasad, 371, 434, 496.
——— Khatun v. Bhagirath, 84, 677.
Immani Seshayya v. Dronamraju, 370, 515.
——— ——— v. Dronamraju Lakshminarasimha, 433, 434.
Immudipatiam Thirugnana v. Peria Dorasami, 48, 49, 89, 300.
Imperial Bank of India v. Bengal National Bank, 87, 88, 89, 770.
——— ——— ——— v. Rai Gyaw Thu, 48, 522.
——— ——— ——— v. U Rai Gyaw, 30, 31, 222, 376, 588, 601.
——— ——— ——— v. Bengal National Bank (58 Cal. 136), 296, 487, 606, 607, 767.
——— ——— ——— v. Bengal National Bank (59 Cal. 377 P.C.), 789.
Income Tax Commissioner v. Kamaksha Narain, 626, 640.
——— ——— v. Visheshwar Singh, 634, 635.
Indar v. Raghubir Singh, 67.
——— Prasad v. Nowrang Kuar, 528.
——— Sen v. Naubut Singh, 47, 353.
Inder Singh v. Dyee Singh, 304.
Inderdawan Pershad v. Gobind Lal, 524, 525, 621.
——— v. Gobind, 32, 483, 485.
Indian Cotton Co. v. Raghunath, 78, 632, 711.
——— ——— v. Ram Charan Lal, 254.

I—*contd.*

Indian Hotels Co. *v.* Phiroz, 644.
Indoji Jethaji *v.* Kothapalli, 270.
—— —— *v.* Kothapath Rama Charchi, 49.
Indra Bibi *v.* Jain Sardari, 35.
—— Narain *v.* Badan Chandra Das, 342.
—— —— *v.* Mohammad Ismail, 611.
—— Narayen *v.* Tarini Prosad, 617.
Indu *v.* Atul, 671.
—— Bhusan *v.* Chowdhury Moazam Ali, 662, 667, 668, 669, 698.
—— —— *v.* Moazam Ali, 665.
Indubala *v.* Manmatha, 171.
Indurjeet Kooer *v.* Mst. Pootee, 254.
Ingle *v.* Vaughan, 713.
Injad Ali *v.* Mohini, 322.
Inuganti Venkatarama Rao *v.* Sobhanadi Appa Rao, 299, 393.
Inukhan *v.* Naimudin, 422, 427, 459, 532.
Iqbal Husen *v.* Nand Kishore, 21.
Ireland *v.* Bircham, 664.
Iron Trades Employers' Insurance Association Ltd. *v.* Union Land and House Investors Ltd., 447, 448.
Irons *v.* Smallpiece, 753.
Irpan Ali *v.* Jogendra, 298, 329.
Irrawady Flotilla Company *v.* Bhugwandass, 2.
Irwin, *In re* Irwin *v.* Parkes, 80.
Isabali Tayabali *v.* Mahadu Ekoba, 724.
Ishan Chunder *v.* Bishu, 267, 270.
—— —— *v.* Shama Churn, 722.
—— —— *v.* Sujan Bibi, 353.
Ishrappa *v.* Krishna, 216.
Ishri Prasad *v.* Gopi Nath, 222.
Ishwar *v.* Gopal, 416.
—— *v.* Dattu, 252.
—— *v.* Devar, 263, 275.
—— Chunder *v.* Ram Krishna Dass, 177.
Ismail Dada *v.* Bai Zuleikabai, 653.
—— Haji *v.* Umar Abdulla, 152.
—— Hasan *v.* Mehdi Hasan, 513.
—— Kani Rowthan *v.* Nazarali Sahib, 21, 676.
—— Khan *v.* Kali Krishna, 27, 655.
—— —— Mahomed *v.* Asmatulla Sareng, 636.
—— —— —— *v.* Broughton, 635, 702.
—— —— —— *v.* Jaigun Bibi, 234, 635, 652, 676.
Ismail Khan Mahomed *v.* Srimutty Mrinmoyi, 574.
—— Shah *v.* Saleh Muhammad, 743.
Isri Prasad *v.* Jagat Prasad, 540.
—— Prosad *v.* Rai Ganga, 536.
Iswara *v.* Ramappa, 675, 704, 705.
Iswarayya *v.* Subbamma, 394.
Itcharam Dayaram *v.* Raiji Jaga, 563.
Iyatharai *v.* Kuppamuthu, 597.
Izon *v.* Gorton, 672.
Izzat-un-nissa Begam *v.* Kunwar Partab Singh, 318, 334, 338, 467.

J

J. C. Galstaun *v.* Prudential Insurance Co., 487.
J. D. Jones & Co., Ltd. *v.* Ranjit Roy, 607.
J. G. Wakefield *v.* Sayeeda Khatoon, 278.
J. H. Tod *v.* Lakhmidas, 773.
J. Lyons & Co. Ltd. *v.* Knowles, 682.
Jabedali *v.* Prassanna, 208.
Jacks & Co. *v.* Joosab Mahomed, 648, 738.
Jackson's and Haden's Contract, *Re*, 343.
Jacob *v.* Seward, 625.
Jacob's and Steadman's Contract, *In re*, 318.
Jacobs *v.* Morris, 27.
—— *v.* Revell, 343.
Jadam Janpura Bai *v.* Jinki Siddapa, 399.
Jadooshat *v.* Kadumbinee Dassee, 688.
Jadu Bans *v.* Sheojit Singh, 215.
—— Lal *v.* Janki Koer, 305.
—— Nath *v.* Rup Lal, 73, 89.
Jadunandan *v.* Surajdeo, 19, 390, 391.
Jafar Hasan *v.* Ranjit Singh, 380, 381.
—— Meher Ali *v.* Budge Budge Jute Mills Co., 63, 68, 72, 73, 74, 770, 773, 779.
Jafri Begam *v.* Syed Ali, 93, 99.
Jag Mohan *v.* Jugal Kishore, 537.
—— *v.* Sita Raj, 210.
—— Sahu *v.* Mst. Ram Sakhi, 370, 381.
Jagad Bhusan *v.* Panna Lal, 278.
—— Bhushan *v.* Pauna Lal, 287.
Jagadamba Loan Co. *v.* Raja Shiva Prosad, 679, 682.
—— *v.* Shiba Prasad, 353, 374.
—— Pande *v.* Ram Khilawat, 262.
Jagadish Chandra *v.* Bisweswari, 634.
—— —— *v.* Lal Mohan, 740.

J—*contd.*

Jagadish Chandra Deo *v.* Bisheswar Lal, 644.
Jagan Mohan Sarkar *v.* Brojendra Kumar, 627.
Jagan Nath *v.* Abdulla, 561, 600.
——— *v.* Dibbu, 54.
Jaganath *v.* Gangi, 516.
Jagannada *v.* Prasad Rao, 56.
Jagannadhan *v.* Narsimhan, 402.
——— *v.* Official Assignee, 394.
Jagannath *v.* Bajrang, 390, 391.
——— *v.* Dibbo, 208, 210.
——— *v.* Gauri Shankar, 367.
——— *v.* Jagjivan, 493, 494.
——— *v.* Jamnaballabh, 66.
——— *v.* Raoji, 391.
——— *v.* Sripathibabu, 505.
——— Kunwar *v.* Jaipal, 427, 435.
——— Marwari *v.* Kalidas, 67.
——— Prasad *v.* Surajmal, 465.
Jagannatha *v.* Lakshminarayana, 304.
——— *v.* Muthia Pillai, 641.
——— Charry *v.* Rama, 699.
Jagapatti of Reju *v.* Sri Rajah Sadrusannamma, 529.
Jagappa *v.* Latchappa, 394.
Jagarao *v.* Chinnaya, 240.
Jagarnath Prasad *v.* Chunilal, 559.
Jagatchandra De *v.* Abdul Rashid, 593.
Jagatdhar *v.* Brown, 360, 556, 571.
Jagat Kishore *v.* Kulakamini Dasya, 269.
——— Mohan *v.* Pratab Udai Nath, 85.
——— Narain *v.* Kutub Husain, 528, 537.
——— *v.* Sheonarain Marwadi, 507, 508.
——— Tarini *v.* Naba Gopal, 409, 411, 513, 548.
Jagdam Sahay *v.* Rupnarain, 57.
Jagdeo Baksh *v.* Jwala Prasad, 98.
——— Sahu *v.* Mahabir Prasad, 543, 555, 565, 569, 571.
——— Singh *v.* Ram Saran Pande, 16, 61.
Jagernath *v.* Mt. Dhanpati, 210.
——— *v.* Msst. Mohra Kuer, 462.
——— Singh *v.* Mst. Mohra, 349.
Jageswar Mandal *v.* Sridhar Lal, 591.
Jaggarnadham *v.* Official Assignee, 379.
Jagger *v.* Jagger, 125.
Jaggeswar Dutt *v.* Bhuban Mohan, 550.
Jaggi Lal *v.* Sir W. E. Cooper, 711.
Jagjivan *v.* Shridhar, 245, 477, 479, 481.
Jagjivandas *v.* Imad Ali, 62.
Jagjivandas *v.* Narayan, 628.
Jaglal Rai *v.* Makhna Kuar, 243.
Jagmohan *v.* Harbans Singh, 424, 458.
——— *v.* Sri Nath, 81.
Jago *v.* Arjun, 599.
Jahan Begam *v.* Munney Mirza, 598.
Jahangir *v.* Ram Harakh, 439.
Jahar Lal Bhutra *v.* Bhupendra Nath, 237, 250.
Jai Gobind *v.* Abhai Raj, 427.
— Karan Singh *v.* Sheo Kumar Singh, 414, 500, 507.
— Kishen Das *v.* Arya Prithi, 339.
——— Joshi *v.* Budhanand, 597.
— Narain *v.* Rashik Behari, 529.
——— *v.* Gokul Singh, 407, 432.
— Narayan *v.* Kishun Dutta, 65, 67, 769.
— Pragash *v.* Rup Manjari, 572.
Jaijit Rai *v.* Gobind Tiwari, 434, 507, 511, 514, 515.
Jaikissondas Gangadas *v.* Zenabai, 487.
Jaimal Singh *v.* People's Bank of Northern India, 380.
Jaipal Singh *v.* Lachman Singh, 430, 431.
Jairam *v.* Kuverbai, 137.
Jaisukh *v.* Sayad Mahomed, 394.
Jaitha Bhima *v.* Haji Abdul, 378.
Jalasutram *v.* Bommadevara, 641.
Jalesar Sahu *v.* Raj Mangal, 740.
Jamal *v.* Mahomed, 508.
Jambad, *In re*, Coal Syndicate Ltd., 281.
James *v.* Couchman, 759.
——— *v.* Dean, 630, 725.
——— *v.* Lichfield, 37.
——— Smith & Sons (Norwood) Ltd. *v.* Goodman, 680.
Jamil-un-nissa *v.* Pitambar, 560.
Jamini Mohan *v.* Debendra, 715.
Jamna *v.* Nain Sukh, 181.
——— Das *v.* Ram Autar, 395, 467.
——— *v.* Uma Shankar, 196, 197.
Jamnabai *v.* Dattatreya, 262.
——— *v.* Dharsey, 128.
——— *v.* Khimji, 131.
Jamnabhai *v.* Bala Krishna, 182, 184.
Jamsed *v.* Soonabai, 131.
Jamsedji *v.* Lakshmiram, 731.
Jamsetji *v.* Kashinath, 180.
Jamshed *v.* Burjorji, 315, 344.
Jamshedji *v.* Dorabji, 202.
Jamuna Devi *v.* Mangal Das, 251.

J—*contd.*

Janardan *v.* Anant, 431, 435, 605.
——— Sadashiv *v.* Madanlal Mangalal, 580.
Janaki Ammal *v.* Narayanasami, 54.
——— Nath *v.* Dina Nath, 580, 628, 634, 639.
——— ——— Roy *v.* Pramatha Nath Malia, 584.
Janakiram *v.* Nargamony, 219.
Jang Bahadur *v.* Bhagatram, 16.
——— ——— *v.* Rai Raja, 77.
Janga Venkata *v.* Jamal Ahmed, 320.
Jangi Ram *v.* Sheoraj, 440.
——— Singh *v.* Chander Mal, 363, 466.
Janglimal *v.* Pioneer Flour Mills, 68.
Jani Begam *v.* Jehangir Khan, 784.
Janki *v.* Ambalavasi, 345.
——— *v.* Girjadat, 305.
——— *v.* Kanhaiyalal, 278, 630, 648.
——— *v.* Sheodhar, 84, 677.
——— Das *v.* East Indian Railway Co., 753.
——— ——— *v.* Gulzar, 273.
——— Kuar *v.* Sarup Rani, 610.
——— Pershad *v.* Kishen Dat, 32, 33.
——— Saran *v.* Mohammad Ismali, 467, 471.
——— Singh *v.* Sheomangal Singh, 470.
Janhabi *v.* Balbhadra, 181.
Janhari Singh *v.* Ganga, 409.
Janoji *v.* Janoji, 513.
Janson *v.* Doriefontein Consolidated Mines Ltd., 75.
Jaques *v.* Miller, 339.
Jarrah Timber and Wood Paving Corporation *v.* Samuel, 397.
Jasodha *v.* Kali, 459.
Jasuddin *v.* Sakhram, 63.
Jatadhari *v.* Shamsul, 690.
Jat Mal *v.* Hakam Mal Tani, 776.
Jatendra *v.* Rangpur Tobacco Co., 2.
Jati Kar *v.* Mukemda Bastia, 386, 390.
——— ——— *v.* Mukunda Deb, 9, 16, 395.
Jatindra Nath Roy Chowdhury *v.* Narayan Das Khettry, 82.
——— ——— *v.* Udoy Kumar, 693.
Jauhari *v.* Tunde, 599.
——— Singh *v.* Ganga Sahai, 458.
Javammal *v.* Muktabai, 10.
Javerbai *v.* Kablibai, 122.
Jawahir Mal *v.* Indomati, 49, 182, 354, 359, 604.
——— ——— *v.* Udai Ram, 618.

J—*contd.*

Jawahir Singh *v.* Someshwar, 381.
Jayanti *v.* Alamelu, 184.
——— *v.* Upendra, 648.
Jaynal Abedin *v.* Hyderali Khan, 247, 252.
Jayram *v.* Narayan, 62.
Jeewanbai *v.* Manordas, 12.
Jenkins *v.* Jackson, 669.
——— *v.* Jones, 479, 480, 481.
——— *v.* Price, 686.
——— *v.* Quinchant, 137.
Jennings *v.* Jordan, 430.
——— *v.* Ward, 403.
Jerman Gomez *v.* Ram Kumar Kaibarta, 654.
Jerup Teja & Co. *v.* Peerbhoy, 478, 479.
Jervis *v.* Tomkinson, 628.
Jesa Ram *v.* Ghulaman, 201.
Jetha Nand *v.* Udho Das, 682.
Jethalal *v.* Lalbhai, 230.
Jethibai *v.* Putlibai, 378.
Jeuna Bahu *v.* Parmeshwar, 455.
Jeut Koeri *v.* Mathura Koeri, 406.
Jewan Ram *v.* Ratanchand, 65.
Jhabbu Ram *v.* Girdhari, 470, 471.
Jhagru Mian *v.* Raghunath, 712.
Jhanda Singh *v.* Sheikh Wahiduddin, 356.
Jharoo *v.* Raj Chunder, 253.
Jharu Mondal *v.* Mahatabuddin, 722.
Jhaverbai *v.* Kabhai, 67.
Jhum Lal *v.* Sham Naranjan, 551.
——— ——— *v.* Sham Narayan, 597.
Jhuman *v.* Dulia, 7.
Jhummun *v.* Dinoonath, 61.
Jhunku Singh *v.* Chhotkan Singh, 472.
Jiban Krishna *v.* Sripati, 71.
Jibanti Nath *v.* Gokool Chunder, 713, 714.
Jinguri *v.* Durga, 74.
Jiva Ram *v.* Khem Koer, 549.
Jivandas *v.* Framji, 378, 614.
Jivraj Gopal *v.* Atmaram, 631, 657.
——— *v.* Lalchand & Co., 774, 776.
Jiwan *v.* Tahal Singh, 406.
——— Lal *v.* Gokul Das, 79.
Jiwandas *v.* Theraj, 430.
Jiyao Singh *v.* Jageshar Singh, 297.
Jnanendra Bala Debi *v.* Official Assignee of Calcutta, 274.
——— Nath *v.* Sashi Mulch, 610.
Job *v.* Banister, 711.
Jodh Ram *v.* Lajja Ram, 389, 392.

J—*contd.*

Jodhi Rai *v.* Basdeo Prasad, 50.
Jogadamba Prasad *v.* Anandi Nath, 278.
Jogendra *v.* Ful Kumari, 238, 240, 250, 251.
——— *v.* Salamat Khan, 198.
——— Krishna *v.* Kurpal Harshi, 290.
——— ——— *v.* Sahasangi Dassi, 635.
——— Lal *v.* Mohesh Chandra, 690, 693.
——— Nath *v.* Debendra Nath, 250, 251.
——— *v.* Nitai Churn, 391.
Jogendranath *v.* Raj Narain, 414, 508.
Jogendro *v.* Dwarka Nath, 656.
——— Chunder *v.* Dwarka Nath, 27.
Jogamma *v.* Pothanna, 283.
Jogesh Chandra *v.* Asaba Khatun, 190, 191.
——— ——— *v.* Asalia Khatun, 115.
——— ——— *v.* Emdad Meah, 664.
——— ——— *v.* Makbul Ali, 634.
——— ——— Roy *v.* Emdad Meah, 693, 694.
——— ——— ——— *v.* Mokbul Ali, 95, 685.
Jogeshuri *v.* Mahomed Ibrahim, 727.
Jogeshwar *v.* Janki Bai, 230.
——— *v.* Punch Kauri, 75.
Jogeswar *v.* Ram Chand, 748.
——— *v.* Nitaichand, 466.
——— Narain *v.* Ram Chund Dutt, 218, 751.
Joginee Mohun *v.* Bhoopnath, 393, 394.
Jogini Mohan *v.* Bhut Nath, 20.
Jogmaya *v.* Tulsa, 195.
Joharmal *v.* Eknath, 181.
Johnson *v.* Crook, 156.
——— *v.* Diamond, 769.
——— *v.* Evans, 420, 549.
——— *v.* St. Peter's Hareford Churchwardens, 705.
——— and Tustin, *In re*, 344.
Johnston, *Re*, 134.
Johnstone *v.* Gopal Singh, 184.
——— *v.* Hudlestone, 714.
Johoory Lall *v.* Bullab Lall, 689.
Johurra *v.* Sreegopal, 184.
Jokhu *v.* Mehdi, 197.
——— Bhunja *v.* Sitla Baksh, 407.
Joliffe *v.* Baker, 320, 337.
Jolland *v.* Stainbridge, 25.
Jones *v.* Administrator-General, 130.
——— *v.* Carter, 727.
——— *v.* Consolidated Anthracite Collieries, Ltd., 668.
Jones *v.* Flint, 21.
——— *v.* Foley, 629, 630.
——— *v.* Gibbons, 384, 768.
——— *v.* Humphreys, 772.
——— *v.* Mills, 720.
——— *v.* Ogle, 176.
——— *v.* Phipps, 654.
——— *v.* Ryde, 746.
——— *v.* Skinner, 47.
——— *v.* Smith, 26, 27, 29, 30, 36.
——— *v.* Westcombe, 153.
——— *v.* Williams, 29, 519.
Joseurn Boid *v.* Pirlhichand Lal, 322.
Joshi *v.* Joshi, 516.
Joshua *v.* Alliance Bank, 27, 32, 49, 257, 261, 262.
——— Stubbs Ltd., *Re*, Barney *v.* Joshua Stubbs, 486.
Jotilal Shahu *v.* Seni Madho, 56.
Joti Lal *v.* Sheodhyan, 417.
——— Prasad *v.* Aziz Khan, 443.
Jotindra Mohun *v.* Emam Ali, 714.
——— ——— *v.* Gudadhur, 500.
——— ——— *v.* Guru Prosunno, 539.
Jotoni Chowdhurani *v.* Amorkrishna, 499.
Jounada Sayi *v.* Jounada Subbamma, 286.
Jowand Singh *v.* Sawan Singha, 470.
Jowitt, *Re*, Jowitt *v.* Keeling, 175.
Joy Chandra *v.* Sreenath, 200, 244.
——— Sankari *v.* Bharat Chandra, 499.
Joykishen Mookerjee *v.* Collector of East Burdawn, 62, 758.
Joyner *v.* Weeks, 698.
Joyram Chandra *v.* Bisnu Charan, 665, 692.
Juan Chandra *v.* Rajani Kanta Pal, 291.
Judah *v.* Abdool, 257, 261.
——— *v.* Judah, 131.
——— *v.* Mirza Abdool, 206.
Judoonath *v.* Schoene Kilburn & Co., 734.
———Ghose *v.* Schoene Kilburn & Co., 714.
Judu Lal *v.* Janki Koer, 63.
Jugal Kishore *v.* Banwari Lal, 318.
——— ——— *v.* Kartic Chunder, 551, 593.
——— *v.* Kedar Nath, 460, 535.
——— *v.* Lakshmandas, 131.
——— *v.* Ram Narain, 617.
——— *v.* Ram Sahai, 381.

J—contd.

Jugal Kishore Shau *v.* Kedarnath, 423, 493.
Jugat Singh *v.* Behari Lal, 423.
——— Tarini *v.* Naba Gopal, 410.
Jugdeo *v.* Habibullah, 533.
——— Singh *v.* Habibulla, 539, 592.
Juggernath *v.* Kishen, 61, 70.
Juggut Mohini *v.* Sokheemoney, 131.
Juggo *v.* Harihar Prasad, 334.
Juggomohan *v.* Manickchund, 662.
Jugjeewandas *v.* Ramdas, 362, 375.
Jugmohandas *v.* Pallonjee, 180.
Jugut Chunder *v.* Eshan Chunder, 701.
Jull *v.* Jacobs, 152.
Juthan *v.* Parasnath Singh, 240.
Jwala Prasad *v.* Harihar Prasad, 689.
Jyoti Prakash *v.* Mukti Prakash, 460, 610.
——— Prasad *v.* Bhargava, 262.
——— ——— *v.* Chandra Kanta, 209.
——— ——— *v.* Dasrath, 635.
——— ——— *v.* Har Prasad, 678.
——— ——— Sing *v.* Samuel Harry Seddon, 80, 683.
Jyotiprasad *v.* H. V. Low & Co., 319.
——— Sing *v.* H. V. Low & Co., 312, 663.
Jyotish Chandra *v.* Ramanath, 640.

K. K. Das *v.* Amina Khatun, 227.
K. S. P. Subbiah Naidu *v.* Ram Sabad, 523.
K. V. Galliara *v.* U. Thet, 35, 200.
K. Y. K. M. Chetty Firm *v.* S. N. V. R. Chetty Firm, 298.
Kabil Sardar *v.* Chunder Nath, 649.
Kadakam Vallei *v.* Mokkath, 419.
Kadarbhai *v.* Fatmabai, 19.
Kadir *v.* Bhavani, 4.
———Mohideen *v.* Muthu Krishna, 254.
———Moidin *v.* Nepean, 7, 493, 510, 512.
Kasima *v.* Muhammad Ali, 474.
Kadumbinee *v.* Kasheenath, 665.
——— *v.* Kashinath Biswas, 669.
———Dossia *v.* Kasheenath Biswas, 669, 690.
Kaharsingh *v.* Jahangir Singh, 251.
Kailas Ayyar *v.* Sundaram Pattar, 457.
Kailash Chandra *v.* Bejoy Kant, 707.
——— ——— *v.* Fulchand, 238.
——— ——— Pal *v.* Hari Mohan Das, 77.

K—contd.

Kailash Rai *v.* Mst. Jaga Kuer, 419.
Kaisar Khan *v.* Abdul Ghani, 591.
Kaiser Beg *v.* Sheo Shankar, 525, 532.
Kakerlapoody *v.* Vutsavoy, 365.
Kaki Subbanadri *v.* Muthu Rangayya, 644.
Kalabhai *v.* Secretary of State, 354.
Kalachand *v.* Jatindra Mohan, 109, 115, 303.
Kalagayya *v.* Yandamma, 560.
Kalanand *v.* Gunput, 727.
Kalappa *v.* Shivaya, 414, 500, 507.
Kalee Pershad *v.* Rai Kishore, 363, 466.
Kali Baksh *v.* Ram Gopal, 759, 760.
——— Das *v.* Kanhya Lal, 754.
——— Din *v.* Madho, 31, 320.
——— Kishen *v.* Golam, 652.
——— ——— Tagore *v.* Golam Ali, 721.
——— Krishna *v.* Fuzle Ali, 726.
——— ——— *v.* Golam Ally, 721.
——— Prashad *v.* Ram Golavi, 53.
——— Prasanna *v.* Dhananjai Ghose, 693.
——— ——— *v.* Mathura Nath Sen, 668.
——— Prosonno *v.* Kamini Soondhuri, 534.
Kalian Singh *v.* Fazal Din, 324.
Kalidas *v.* Kanahya Lal, 12, 80, 83.
Kalimuddin *v.* Baidyanath, 612, 615, 618.
——— *v.* Reazuddin, 115.
Kalipada *v.* Fort Gloster Jute Manufacturing Co., 291.
——— Mukerji *v.* Basanta Kumar, 417.
Kaliram *v.* Dularam, 301.
Kalka *v.* Chandan, 17.
——— Prasad *v.* Bankey Lal, 217.
——— ——— *v.* Bhuiyan Din, 357.
——— ——— *v.* Chandan Singh, 778, 780.
——— Singh *v.* Himayat Ally, 474.
——— ——— *v.* Namdar Khan, 320.
——— ——— *v.* Paras Ram, 363, 466.
Kallan *v.* Jawahar Singh, 731.
——— Khan *v.* Mardan Khan, 422, 427.
Kallapa *v.* Balwant, 182, 609.
Kallawa *v.* Parappa, 248, 252.
Kallingal *v.* Secretary of State, 658.
Kallu *v.* Diwan, 713.
——— *v.* Ganesh, 439, 504.
——— *v.* Ram Das, 329.
Kally Das Ahiri *v.* Monmohini Dassee, 94, 627, 628, 681, 719, 722, 739.
Kalsum Begam *v.* Md. Ismail, 199.
Kalu *v.* Randhir, 264, 265.
——— Singh *v.* Hansraj, 551.

K—*contd.*

Kalusa *v.* Madhorao, 68.
Kalyan *v.* Desrani, 297.
——— Das *v.* Jan Bibi, 2, 229.
Kalyanasundaram *v.* Karuppa, 3, 286, 750, 752, 753, 761.
Kalyani *v.* Krishnan Nambiar, 38.
Kamakshya Narain *v.* Ramjan Ali, 421.
——— Narayan Singh *v.* Ram Raksha Singh, 634, 638, 737.
Kamal Krishna Sanyal *v.* Madhusudan Chaudhuri, 677.
——— Kumar Datta *v.* Nanda Lal Dule, 636, 637.
——— Kumari *v.* Narendra Nath, 167.
——— Nayan *v.* Ram Nayan, 369, 466.
Kamala Chunder *v.* Sushila Bala Dasee, 64.
——— Devi *v.* Gur Dayal, 75.
——— Kant *v.* Abdul Barkat, 501.
——— Nayak *v.* Ranga, 683.
——— *v.* Ranga Rau, 678.
Kamalambal *v.* M. Purushotam Naidu, 465, 468, 478.
Kamalammal *v.* Peeru Meera, 3.
Kamaraju *v.* Venkatalakshmipathi, 55.
Kamar-un-Nessa Bibi *v.* Hussaini Bibi, 11.
Kamawati *v.* Digbijai Singh, 759.
Kamaya *v.* Devapa, 411, 493, 496.
Kamayya *v.* Yarakota, 360.
Kameshwar Pershad *v.* Run Bahadoor, 180.
Kameshwaramma *v.* Sitaramanuja, 195.
——— *v.* Venkatta Subba Row, 271.
Kaminee Dasee *v.* Krishna Chandra, 759, 760.
Kamini *v.* Hiralal, 271.
——— Debi *v.* Ramlochan Sircar, 414, 415.
Kamla Prasad *v.* Bamdeo, 511.
——— ——— *v.* Nathuni, 208, 912.
Kamlapat *v.* Union Sugar Mills, 504.
Kammara Peda *v.* Kararna Chennapa, 371.
Kammaran Nambiar *v.* Chindan Nambiar, 722.
Kamod *v.* Raja Raghoji, 453.
Kamta Prasad *v.* Ram Jag, 251.
——— Singh *v.* Chaturbhuj Singh, 347, 394, 528.
Kana Kanma *v.* Krishnamma, 278.
Kanai Lal *v.* Rasik Lal, 675.
——— ——— Ghosal *v.* Kumar Purnendu Nath Tagore, 118, 141, 142, 143, 144, 145, 749, 754.

K—*contd.*

Kanailal *v.* Nitai Chand Shah, 631.
——— Biswas *v.* Nitai Chand Saha, 629.
Kanala Prasad *v.* Bandeo, 514.
Kanaram *v.* Kuttooly, 399.
Kanaylal *v.* Pyarabai, 367.
Kanchidilal *v.* Kanhai, 200, 202.
——— *v.* Jabbarsha, 19.
Kunchilhapatham *v.* Palamalai, 330.
Kandarpa *v.* Jogendra Nath, 230.
Kandasami *v.* Nagalinga, 200.
——— *v.* Ramasami, 687.
——— *v.* Venkata, 560.
——— Pillai *v.* Ramasami Mannadi, 627, 664.
Kandhiya Lal *v.* Chander, 178.
Kandula Venkiah *v.* Donga Pallaya, 365, 382, 398, 399, 601.
Kangaya *v.* Kalimuthu, 363, 370, 380.
Kanhai *v.* Tilak, 467.
——— Lal *v.* Brij Lal, 57.
——— ——— *v.* Jwala Dei, 457.
Kanhaiya Lal *v.* Gulab Singh, 620, 621.
——— ——— *v.* Ikram Fatima, 580, 615.
——— ——— *v.* Jangi, 549.
——— ——— Prasad *v.* Mt. Hamidan, 456.
Kanhaya Lal *v.* Tulsi Prasad, 430, 431.
Kanhayalal *v.* Narhar, 399.
——— *v.* National Bank of India, 405, 477.
Kanhia Lal *v.* Muhammad, 359.
Kanhu Lal *v.* Palu Sahu, 201.
——— ——— *v.* Ram Singh, 203.
Kaniz Fatima *v.* Narain Singh, 275.
Kanji & Mulji Bros. *v.* Shanmugam, 21, 278.
Kankala Kunta *v.* Mandlen Guraviah, 290.
Kanna Karup *v.* Sankara, 383, 390.
Kannu *v.* Natesa, 453.
——— Mal *v.* Indar Pal, 445, 507, 548.
Kannyan Baduvan *v.* Alikutti, 705, 706.
Kannye Lollsett *v.* Nistoriny, 679.
Kanshi Ram *v.* Jaimal Singh, 319.
Kantheppa *v.* Sheshappa, 629.
Kanti *v.* Gajraj Tiwari, 283.
Kanti Chandra *v.* Ali Nabi, 56, 57.
——— ——— *v.* Brojendra Mohan, 290.
——— Ram *v.* Kutubuddin, 16, 221, 245, 359, 595, 596.

K—*contd.*

Kanwar Ram *v.* Ghugi, 7.
Kanyhalal *v.* Khutermoney, 410.
Kapadvanj Municipality *v.* Ochhavlal, 334.
Kapari Sahu *v.* Mathura Das, 497, 499.
Kapini Goundan *v.* Saranganapani, 273.
Kapura *v.* Madu Sudan Das, 93, 197.
Karaima in a temple—Keyake *v.* Yaddatil, 70.
Karam Chand *v.* Amar Nath, 709.
——— ——— *v.* Shera, 368.
——— Ilahi *v.* Sharf-ud-Din, 755.
——— Singh *v.* Mst. Rupwanti, 156.
Karamat Ali *v.* Gorakhpur Bank, 493.
——— ——— Khan *v.* Ganeshi Lal, 371, 506.
——— Khan *v.* Sami-ud-din, 198.
Karamath Khan *v.* Latchmi Atchi, 290.
Karamsi Madhowji *v.* Karsandas, 761.
Karan Singh *v.* Budh Singh, 234.
——— ——— *v.* Ishtiaq Husain, 501.
Karar Hassan *v.* Mustafa Hassan, 71.
Karasinga *v.* Narsaila, 54.
Karim Baksh *v.* Natha Singh, 632.
——— ——— *v.* Phula Bibi, 193.
——— Buksh *v.* Mt. Rahiman, 58.
——— Khalesan *v.* Narendra Nath, 339.
Karium-un-nissa *v.* Phul Chand, 17.
Karnam Kandaswamy *v.* Chinappa, 301.
Karnam—Kumari Pillai *v.* Orr, 70.
Kairndan *v.* Megraj, 454.
Karsandas *v.* Gopaldas, 336.
——— *v.* Maganlal, 274.
Karson Champsi *v.* Meghji Asana, 505.
Kartak Singh *v.* Mst. Mehr. Nishan, 201.
Karuppan *v.* Sakuth, 564, 565.
Karuppiah Pillai *v.* T. R. Hari Row, 330.
Kasheeshuree *v.* Greesh Chunder, 64.
Kashi *v.* Durga, 713.
——— Chandra *v.* Priya Nath, 461.
——— Gir *v.* Jogendro Nath, 644.
——— Lal *v.* Shaikh Nurul Huq, 472.
——— Pershad *v.* Jamuna, 454.
——— Prasad *v.* Bed Prasad, 285.
——— Ram *v.* Het Singh, 537, 597.
Kashidas *v.* Chaithru, 298.
Kashinath *v.* Chimnaji, 110.
——— *v.* Harrihar, 355.
——— *v.* Makchhed, 285.
Kashiram *v.* Maheshwar, 418.
——— *v.* Sardar Singh, 369, 381.
Kashirao *v.* Zabu, 321, 322.
Kashirao *v.* Zabu Ponde, 323.
Kasinath Roy *v.* Nowcowry, 355.
Kastur Chand *v.* Jakkia, 355, 356, 357.
Kasturi *v.* Venkatachalapathi, 516.
Kasumunissa *v.* Nilratna, 247, 551.
Katar Sing *v.* Bishambar Sahai, 52.
Kate Baksh Sing *v.* Ram Gopal Singh, 760.
Katereddi *v.* Shivram Reddi, 278.
Kateswar Estate *v.* Muhammad Amir, 98.
Kathamuthu *v.* Subramaniam, 317, 319.
Kathari *v.* Bhupati, 301, 303.
Kathijakutti *v.* Kuthussa, 649.
Kathir *v.* Maremadissa, 240.
Kathisa-Bi *v.* Venkateswara Iyer, 523.
Katie Graham *v.* The Colonial Government of British Guiana, 675.
Kattick Ramunni *v.* Udayamangalath, 774.
Katwara *v.* Ram Adhin, 17.
Katyayani Debi *v.* Udoy Kumar, 664, 368, 691, 692, 699.
Kauleshar Prasad *v.* Abadi, 298.
Kaur Ram *v.* Chaman Lal, 285.
Kausalia *v.* Gulab, 84.
——— Ammal *v.* Sankara Muthia, 28.
Kavanagh *v.* Gudge, 718.
Kaveri *v.* Ananthayya, 10.
Kaveriamma *v.* Lingappa, 225.
Kawtikabai *v.* Bachraj, 461.
Kayastha Pathshala, Allahabad *v.* Musst. Bhagawati Devi, 123.
Keda Nath *v.* Bhagwant Prasad, 616.
Kedar *v.* Bidhu, 393.
——— *v.* Madhu Sundan, 635.
——— Nath *v.* Bankey Behari Lal, 245, 251.
——— ——— *v.* Emperor, 297, 742.
——— ——— *v.* Govinda, 677.
——— ——— *v.* Madhusudan, 665.
——— ——— *v.* Naipal, 76.
——— ——— *v.* Shankar Lal, 644.
——— Prosanna *v.* Girindra Prasad, 594.
Kedarnath *v.* Hari Shanker, 379.
——— *v.* Kali Churn, 416.
——— Dutt *v.* Shamloll Khettry, 379.
Kedarwali *v.* Radhey Lal, 266.
Keech *v.* Hall, 447, 629.
Kehar Singh *v.* Jahangir, 245.
Keily, *Re*, 541.
Keith Prowse & Co. *v.* National Telephone Co., 729.
Kekewich *v.* Manning, 748.

K—contd.

Kelsey v. Dodd, 728.
Kelu v. Ammad Kully, 648.
—— v. Chakkara Cheffan, 552.
—— v. Chekkara Cheppan, 564.
—— Kurub v. Paru Amma, 515.
—— Nedungadi v. Krishnan, 383.
Kemalooti v. Muhamed, 720, 732, 739.
Kenak Singh v. Gujraj Singh, 406.
Kenchadi Lal v. Jabarsha, 734.
Kendall, *Ex parte*, 524.
Kennedy v. De Trafford, 480.
—— v. Green, 43.
Kensington (Lord) v. Bouverie, 505.
—— *Ex parte*, 376.
Kent v. Fittal, 645.
Ker v. Wauchope, 166, 169.
Kerakoose v. Serle, 788.
Kerwick v. Kerwick, 184.
Kesar Chand v. Uttam Chand, 473.
—— Kunwar v. Kashi Ram, 407.
Kesarbai v. Rajabhan, 739.
Kesari Ram v. Musafir Tewari, 467.
Keshab Panda v. Bhobani, 1.
Keshav v. Vinayak, 16.
Keshava v. Keshava, 353, 383.
Keshavarao v. Bhavanji, 477.
Keshavlal v. Maganlal, 679, 681.
Keshavram v. Ranchod, 431, 596.
Keshavrao v. Nanabhai, 416.
Kesho Das v. Jivan, 326, 330.
—— Ram v. Ram Lal Saha, 508.
—— Prasad v. Upper India Bank Ltd., 183.
Keshrimal v. Sukan Ram, 89.
Keshwar Mahton v. Sheonandan, 303.
Kesri Mal v. Mubarak Husain, 565.
—— Umrao Singh v. Tansukh Rai Kedar Nath, 606.
Kettlewell v. Watson, 41.
Ketu Das v. Surendra Nath Sinha, 710.
Kevaldas v. Nagindas, 316, 327.
Keyake Ilata v. Yadattil, 61.
Keys v. Williams, 378.
Khagendra v. Sonatan, 290.
Khairulla v. Sett Dhanrupmal, 243.
Khaja Eanetoolah v. Kishen Sunder, 630.
Khaman Lal v. Sant Lal, 776.
Khan Gul v. Lakha Singh, 78.
Khanakar v. Ali Hafez, 355, 356.
Khanderao v. Romer, 325.
Khandu Lal v. Fazal, 368.

K—contd.

Kharag Narain v. Janki Rai, 209.
Khas Mehal v. Administrator-General of Bengal, 759.
Khashaba v. Chandrabhagabai, 750.
Khasim v. Carlier, 71.
Khater Mistri v. Sadruddi Khan, 722.
Khatu Bibi v. Madhuram, 300, 301.
Khatun Fatima v. Shib Singh, 202.
Khemamoyee v. Sushee Bhoosun, 702.
Khemchand v. Hemandas, 65.
—— v. Malloo, 392, 604.
—— v. Mulchand, 250.
Khemji Bhagwandas v. Rama, 606.
Kherodamoyi Dasi v. Habib Shaha, 460.
Kherodemoney v. Doorgamoney, 180.
Khetra Mohan v. Biswa Nath Bora, 68.
—— Das v. Biswa Nath Bora, 65.
—— Nath v. Sheikh Baharali, 95, 654.
Khetter Chander v. Hari Das, 61.
—— Mohan Mullick v. Gunga Narain, 160.
Kheyali v. Mullick, 305.
Khiali Ram v. Himmata, 393, 431.
—— v. Nathu Lal, 735.
—— v. Raghunath Prasad, 96.
—— v. Taik Ram, 597.
Khiarajmal v. Daim, 414, 415, 416.
Khimji v. Morarji, 118.
—— v. Pioneer Fibre Co., 676.
Khirode Sundari Dasya v. Chunilal Chaudhuri, 49, 270.
Khitish Chandra v. Bhikan, 627.
Khobari Singh v. Ram Prosad Roy, 51.
Khodija Bibi v. Shah Muhammad Zahir, 273.
Khondakar Abdul v. Mohini Kant, 672.
Khondiba v. Nana, 36.
Khonmon Bibi v. Shah Mali, 324.
Khoshdeb Biswas v. Satar Mondol, 784.
Khub Chand v. Kalian Das, 359, 592, 596.
—— Singh v. Ramji Lal, 761.
Khubsurat Koer v. Saroda, 487.
Khuda Baksh v. Abid Husain, 738.
—— Bakhsh v. Alimunissa, 371, 431, 434, 435, 472.
—— v. Ata Mahomed, 561.
—— v. Sheo Din, 631, 657.
Khudda Mal v. Kunji, 394.
Khudhai v. Sheo Dayal, 422, 614.
Khudiram Bhakat v. Shomnath Banerji, 66.

K—*contd.*

Khulwa Shukra *v.* Laharsai, 278.
Khuni Lal *v.* Maddan Mohan, 368.
Khunni Lal *v.* Govind Krishna, 49, 58, 93, 742.
Khursedji *v.* Pestonji, 754.
Khusalchand *v.* Mahadevgiri, 131.
Khushal *v.* Punamchand, 559.
Khwaja Afzal *v.* Md. Saheb, 204.
——— Muhammad *v.* Muhammad Ibrahim, 198, 203.
——— Saiyed Kazi Husain *v.* Debi Dayal, 510.
Kidar Nath *v.* Mathu Mal, 227, 232.
——— ——— *v.* Ramendra Nath, 707.
Kidd and Gibbons Contract, *Re*, 217.
Kidney *v.* Coussmaker, 171.
Kiernander *v.* Benimadhab, 246, 553.
Kikabhai *v.* Kalu, 651, 652.
Kilpin *v.* Ratley, 753.
King *v.* David Allen & Co., 646.
——— *v.* Jones, 321.
——— *v.* King, 363.
——— *v.* Smith, 443, 450.
——— *v.* Wilson, 344.
Kingsmill *v.* Millard, 671.
Kinhi *v.* Ahmed, 254.
Kinnaird *v.* Trollope, 467, 596.
Kinsman *v.* Kinsman, 237.
Kinu Ram Das *v.* Mozaffer, 557, 608.
Kinuram *v.* Nitya Chand, 367.
Kiram Chandra *v.* Dutt, 448.
Kiranchandra *v.* Dutt & Co., 225, 250.
Kirat *v.* Debi Singh, 515.
——— Singh *v.* Ramsaran, 512.
Kirkland *v.* Briancourt, 727.
Kirklinton *v.* Wood, 708.
Kirkwood *v.* Thompson, 480.
Kirpa Ram *v.* Jowanda, 441.
——— Shankar *v.* Janki Prasad, 631.
Kirpal Singh *v.* Sheoambar, 401, 408.
——— ——— *v.* Sheoambar Singh, 357.
Kirti Narayan *v*, Surendra Mohun, 471.
Kishan Chand *v.* Ramsukhi Das, 524.
——— Lal *v.* Ganga Ram, 359, 477, 604, 609.
——— Dayal *v.* Mahabir, 344.
——— Singh *v.* Nathu Ram, 408.
Kishawar Nath *v.* Kali Shankar, 698.
Kishen Gopal *v.* Abdul Latif, 555.
Kishenlal *v.* Chunna Lal, 422, 427.
——— *v.* Gangaram, 353, 364.
——— *v.* Kinloch, 320.

K—*contd.*

Kishore *v.* Ram Nandan, 406.
Kishori *v.* Ganga Bhau, 366.
——— Dubain *v.* Mundra Dubain, 219.
——— Lal *v.* Krishna Kamini, 2, 627, 678.
——— Mohan *v.* Nund Kumar, 594, 649, 652.
——— Mohun *v.* Ganga Bhau, 441.
Kishundayal Bhagat *v.* Mahabir Bhagat, 504.
Kishunddayal *v.* Mahabir, 371.
Kishun Lal *v.* Hira Lal, 511, 512, 514.
Kisondas *v.* Dhondu, 75.
Kissen Gopal *v.* Bavin, 776.
Kitchien, *Re*, *Ex parte* Punnett, 489.
Kitton *v.* Hewitt, 336.
Kittu Hegadthi *v.* Channamma, 636.
Knight, *Re*, *Ex parte* Voisey, 640.
Knightsbridge Estates Trust, Ltd. *v.* Byrne, 408.
Knill *v.* Prowse, 772.
Ko Aung Bye *v.* Ko Po Kyaing, 461, 462.
— Kywetnee *v.* Ko Koung, 387.
— Po Kun *v.* C. A. M. L. A. L. Firm, 612, 617.
— Ma *v.* Maung Lin Kin, 278.
— Shway Aung *v.* Strang Steel & Co., In the matter of, 387.
— Thine *v.* Ismail Cassim, 422.
— Yan *v.* Ma Mai, 303.
Kocharlakota Venkata *v.* Ravu Venkata Kumara, 326.
Kodi *v.* Moidin, 210.
——— Sankara *v.* Moidin, 489.
Kodulal *v.* Beharilal, 16, 626.
Koegler *v.* Yule, 699.
Kola Venkatanarayana *v.* Vuppala, 358.
Kolathu Ayyar *v.* Ranga Vadhyar, 115.
Kolli Valappil *v.* Valia, 507.
Kondayya *v.* Veeranna, 60, 297.
Konarmal *v.* Nabin Chandra, 276.
Konchadi *v.* Shiva, 376.
Kondiba *v.* Nana, 38.
Kondu *v.* Mahadev, 439.
——— *v.* Vishnu, 301.
Konjeti Veerasawmy *v.* Varada Veerasawmy, 774.
Konormal *v.* Nabin Chandra, 300, 301.
Konwar Doorganath *v.* Ramchandra, 72.
Koopmia *v.* Chidambaram, 570.
Koragalva *v.* Jakri Beary, 728.
Kora Nayar *v.* Ramappa, 544, 545.
Korapalu *v.* Narayana, 706, 724.

K—*contd.*

Kosuru Ademma *v.* Chevuru Subbamna, 276.
Kota Balabadra *v.* Khetra Doss, 216.
Kotappa *v.* Raghavayya, 560.
——— *v.* Vallur, 361.
Kotayya *v.* Annapurnamma, 354, 360.
——— *v.* Kotappa, 557, 608.
Kottal Uppi *v.* Edavalath, 731.
Kovillamma *v.* Nedungadi, 573.
Koylash Chunder *v.* Sonatun, 5.
Kreglinger *v.* New Patagonia Meat & Cold Storage Co., Ltd., 374, 404.
Kripa Ram *v.* Bishen Dass, 284.
——— Sindhu *v.* Annanda Sundari, 548.
Kripendra Kumar Bose, *Re*, 72.
Krishan Das *v.* Nathu Ram, 181.
Krishendra Nath *v.* Kusum Kumari, 635.
Krishna *v.* Akilanda, 16.
——— *v.* Hari, 369, 381.
——— *v.* Kusunda Collieries, 16.
——— *v.* Lakshminaranappa, 714.
——— *v.* Narayana, 563.
——— *v.* Shanmuga, 96.
——— *v.* Surendra Nath, 691.
——— Ayyangar *v.* Nella Perumal, 4.
——— Ayyar *v.* Muthukumaraswamiya, 346, 524, 532, 537.
——— Bhaichand *v.* Hari, 369.
——— Chandra *v.* Bhairab Chandra, 532.
——— ——— *v.* Bipin Behari, 498.
——— ——— *v.* Pabna Model Co., 459, 533.
——— ——— *v.* Rasik Lal, 208.
——— Chunder *v.* Krishna Mamud, 335.
——— Doss *v.* Venkatappa, 700.
——— Ghose *v.* Amarendra Nath Dey, 145.
——— Gobind *v.* Hari Churn, 698.
——— Gopal *v.* Miller, 488.
——— Iyer *v.* Susal Reddiar, 422, 423.
——— Kamini *v.* Dinomony, 238.
——— Kumar *v.* Jai Krishna, 261, 273.
——— Nair *v.* Kundu Nair, 745.
——— Paramada *v.* Dhirendra, 208.
——— Patter *v.* Sinnaponnu, 247.
——— ——— *v.* Srinivasa, 508, 509.
——— Pillai *v.* Rangasami, 419.
——— Prasad *v.* Adyanath Ghatole, 230, 716, 724.
——— Rao *v.* Benabai, 118.
——— *v.* Mungara Sanyasi, 709.

K—*contd.*

Krishna Shetti *v.* Gilbert Pinto, 709, 733, 739.
——— Tanhaji *v.* Aba, 49, 297.
——— Swami *v.* Goureama, 379.
Krishnabai *v.* Debi Singh, 261.
——— *v.* Hari Govind, 732.
——— *v.* Sawalram, 258.
Krishnabhat *v.* Kapabhat, 16.
Krishnaramani *v.* Ananda Krishna, 116.
Krishnachandra *v.* President, 6.
——— Das *v.* Poornachandra Das, 219.
Krishnaji *v.* Gajanan, 16.
——— *v.* Mahadev, 416.
——— *v.* Maheshvar, 406.
——— *v.* Motilal, 244.
——— *v.* Ravji, 353.
——— *v.* Sitaram, 732.
——— *v.* Vithalrav, 758.
Krishnamma *v.* Mali, 298, 316, 327, 338.
——— *v.* Suranna, 36.
Krishnamurthy Chettiar *v.* Sambasiva Ayyar, 569.
Krishnan *v.* Amba Karup, 507, 514.
——— *v.* Chadayan, 592.
——— *v.* Kannan, 322.
——— *v.* Perachan, 10.
Krishnappa *v.* Shivappa, 238, 239, 240.
——— Chetty *v.* Abdul Khader, 243.
Krishnaramani *v.* Ananda Krishna, 128.
Krishnarao *v.* Babaji, 17.
——— *v.* Ghaman, 710.
——— *v.* Manaji, 688.
Krishnasami *v.* Natal Emigration Board, 731.
——— *v.* Ramasami, 271.
Krishnaswami *v.* Kamalaaman, 394, 467.
——— *v.* Ramasami, 548.
——— *v.* Thiurmalai, 501.
——— *v.* Vijayaraghava, 330.
——— Iyengar *v.* Subramania, 330, 331.
——— Pillai *v.* Janaklaxmi Ammal, 536, 537.
Krishnaya *v.* Mallya, 239.
Krishnayya *v.* Ponuswami Aiyyar, 379, 380.
Krishnier *v.* Arrapulli, 507.
Krista Das *v.* Abdul Karim, 693, 694.
Kristo Das *v.* Ram Kant, 459.
——— Lall *v.* Bono Malee, 394.

K—*contd.*

Kristo Nath *v.* Brown, 59, 95, 685, 705, 717, 718, 719, 723, 727.
——— Ramani *v.* Kedarnath, 782, 783.
——— Soonder *v.* Koomar Chunder, 665, 669, 690.
——— Sunder *v.* Koomar Chunder Roy, 669.
Kristodhone *v.* Nandarani, 60.
Kristopada Roy *v.* Chaitanya Charan, 592, 593.
Kristoromoni *v.* Narendro, 159.
Kshetranath *v.* Dargapada, 507.
Kshetra Nath *v.* Harasukdas, 378, 380, 518.
Kshirode Chander *v.* Saroda Prasad, 217.
Kuar Dat Prasad *v.* Nahar Singh, 193.
——— Sen *v.* Mamman, 60.
Kubra Bibi *v.* Khudaija, 252.
——— Singh *v.* Khudaija, 251.
Kuchwar Lime Stone Co. *v.* Secretary of State, 288.
Kuda Baksh *v.* Abid Husain, 648.
Kudai Lal *v.* Msst. Aishan Jehan, 401, 408, 509.
Kudrat-ullah *v.* Kubra Begum, 591.
Kukumchand *v.* Hiralal, 329.
Kulachandra Ghosh *v.* Jogendrachandra Ghosh, 302.
Kulandaivilu *v.* Soubagyammal, 240, 244, 253.
Kuldip Singh *v.* Khetrani Koer, 94.
Kulla Mal *v.* Umra, 320.
Kuloda Prasad *v.* Jogeshar, 182, 609.
Kumar Birendra *v.* Tarini Kanta, 600.
——— Chandra *v.* Narendra Nath, 95, 192.
——— Nabin Chandra *v.* Rajani Chandra, 115.
——— Raj Krishna Parsad Lal Singh Deo *v.* Baraboni Coal Concern Ltd., 710.
Kumara Ashima *v.* Kumara Krishna, 111, 128.
——— Tirmulai *v.* Bangaru, 71.
Kumarappa *v.* Suppan, 473.
Kumarappan *v.* Narayan, 361.
Kumini *v.* Parkam, 383.
Kunchithapatham *v.* Palamalai, 540.
Kundan Lal *v.* Deepchand, 629, 649, 709, 735.
Kundanlal *v.* Faqir Baksha, 555, 561.
——— *v.* Kallu, 718, 731.
——— *v.* Mt. Rupbani, 504.

K—*contd.*

Kundan Mal *v.* Kashibai, 509.
Kunhammed *v.* Narayanan, 234.
Kunhanujan *v.* Anjelu, 679, 682.
Kunhayen Haji *v.* Mayan, 672, 740.
Kunhi Amma *v.* Ahmed, 389, 392.
——— *v.* Kunkan, 232.
——— Kutti *v.* Kutti Maraccar, 419.
——— Sou *v.* Mulloli Chathu, 175, 683.
——— Umah *v.* Amed, 253.
Kunhiraman *v.* Aruthalai Kutti, 469.
Kunhu Pothanassiar *v.* Raru Nair, 272.
Kunj Behari *v.* Bisheshwar, 413.
——— ——— Lal *v.* Pandit Prag Narain, 403.
Kunja Lal *v.* Narsamba, 12.
Kunti *v.* Gajraj Tiwari, 743.
Kunwar Bahadur *v.* Gilshor Khan, 210.
——— Chiranjit *v.* Har Swarup, 335, 336, 342.
———Doorganath *v.* Ram Chunder Sen, 180.
——— Nihal Singh *v.* Chanda Kunwar, 258.
——— Ram Lal *v.* Nil Kanth, 70.
Kupa Ram *v.* Bishan Das, 278.
Kuppa *v.* Dorasami, 61.
——— *v.* Mhasti, 356, 357.
Kuppier *v.* Periakaruppa, 464, 468, 470, 471.
Kuppusami Chetti *v.* Papathi Ammal, 420, 532.
Kuppuswami *v.* Chinnaswami, 303.
Kuraymal *v.* Purammal, 422, 427.
Kurri Veerareddi *v.* Karri Bapireddi, 290, 405.
Kurusinga *v.* Narasinha, 246.
Kusehar *v.* Balbhaddar, 211.
Kushaba *v.* Budhaji, 418.
Kushal Singh *v.* Ram Kishun Singh, 546.
Kusturi Bibi *v.* Balliram, 202.
Kustea Loan Office *v.* Annanda Charan, 535.
Kusum Kumari *v.* Jagdish Chandra, 701.
Kusum Kamini *v.* Sales Chandra, 773.
Kutalingam Pillai *v.* Pakiyam Fernandez, 788.
Kutti Chettiar *v.* Subramania Chettiar, 593.
Kuttikatt *v.* Kunhikavamma, 601.
Kuttuva Narayanasami *v.* Soranammal, 508.
Kuverji *v.* Municipality of Lonavla, 752.

L—*contd.*

L. A. Creet *v.* Gungaraj Gulraj, 724.
L. W. Creet *v.* Gangaraj, 229, 230.
La Neuville *v.* Nourse, 744, 745.
Labh Singh *v* Jamnun, 471.
Labhu *v.* Shiv Ram, 287.
—— Ram *v.* Abdulla, 441.
—— —— *v.* Charnu, 264.
Lace *v.* Chantler, 629.
Lacha Ram *v.* Hem Raj, 777.
Lachhmeshwar *v.* Moti Rani, 61.
Lachiram *v.* Bholu, 242.
Lachman *v.* Baldeo, 53.
—— Das *v.* Jawahir Singh, 326.
—— Prasad *v.* Lachmeshwar, 618.
—— —— *v.* Mir Fida Husain, 742.
—— Sing *v.* Salig Ram, 493, 545.
—— Singh *v.* Surendra Bahadur Singh, 390.
Lachmi *v.* Wilayati, 75.
—— Narain *v.* Babu Ram, 457.
—— —— *v.* Hirdey Narain, 592, 593.
—— —— *v.* Jethu Mal, 509.
—— —— *v.* Makund, 71.
—— —— *v.* Muhammad, 421, 423.
—— —— *v.* Muhamadi Begam, 509.
—— —— *v.* Roy Narayan, 597.
—— —— *v.* Turabunnissa, 465.
—— Prasad *v.* Lachmi Narain, 229, 230, 232.
Lachmin Narain *v.* Koteshar Nath, 245, 617.
Lachmipat *v.* Mirza, 394.
Lacon *v.* Allen, 376.
—— *v.* Martins, 445, 495.
Ladhabhai *v.* Sir Jamsetji, 684.
Ladies' Hosiery and Underwear Ltd. *v.* Parker, 633.
Lagdir Nanji *v.* Surendra Mohon, 51, 585, 786.
Ladli Prasad *v.* Nizamuddin, 499.
Ladu Chimaji *v.* Babaji, 452.
—— Narain *v.* Gobardan Das, 208, 210.
Lainson *v.* Lainson, 152.
Lake *v.* Dean, 317.
Lakhangowda *v.* Baswantrao, 63.
Lakhmichand *v.* Ratanbai, 645, 662, 673.
Lakhmidas *v.* Jamnadas, 346, 525, 533.
—— & Co. *v.* D. J. Tata, 314, 343.
Lakhput Kuer *v.* Durga Prasad, 322.
Lakmi Chand *v.* Janardhan, 555, 591.
Lakshamanan Chettiar *v.* Sella Muthu, 590.
Lakshan *v.* Nikunjamoni, 255.
—— Chandra *v.* Berendra Kumar, 713.
Lakshamamma *v.* Kameswara, 18.
Lakshman *v.* Babeni, 59.
—— *v.* Gopal, 499.
—— *v.* Hari Dinkar, 419, 508.
—— *v.* Satyabhamabai, 182, 183, 184.
Lakshman *v.* Secretary of State, 28, 609.
Lakshmana *v.* Ramchandra, 700.
—— Iyer *v.* Sankaramoorthi, 330, 524.
Lakshmanan *v.* Muthaya, 462.
Lakshmandas *v.* Dasrat, 32, 35, 236, 237.
Lakshmayya *v.* Appadu, 500, 507.
Lakshmi *v.* Krishna, 353, 355.
—— Achi *v.* Narayanasami, 568.
—— Amma *v.* Shankara Narayan Menon, 576, 577, 578.
—— Doss *v.* Roop Laul, 759, 760.
—— Narain *v.* Mohamdi, 510.
—— —— *v.* Tara Singh, 261.
—— Narasayyar *v.* Meenkashi, 210.
Lakshminaranappa *v.* Melothraman, 174.
Lakshmishankar *v.* Vaijnath, 131.
Lakshuman Giriraya *v.* Mahadev, 421.
Lal Bahadur *v.* Abaran Singh, 415.
—— *v.* Kamleshar, 181.
—— *v.* Murlidhar, 509, 510, 511.
—— Singh *v.* Rameshwar Prasad, 389, 391, 406.
—— Baijnath *v.* Chandrapal, 52.
—— Batcha Sahib *v.* Arcot Narayanaswami Mudaliar, 548.
—— Khan *v.* Official Receiver, 11.
—— Mahomed *v.* Kallanus, 710.
—— —— Sarkar *v.* Jagir Sheikh, 713.
—— Mohan *v.* Govind Sahi, 555.
—— Ramdhari Lal *v.* Janessar, 364.
—— Sahoo *v.* Deo Narain, 701.
—— Singh *v.* Jai Chand, 276.
—— —— *v.* Mt. Chetey Beti, 89.
—— —— *v.* Kartar Singh, 402.
—— Umrao *v.* Lal Singh, 17.
Lala *v.* Hira Jan, 405.
—— Beni Ram *v.* Kundan Lall, 639.
—— Dilawar *v.* Dewan Bolakiram, 346, 572.
—— Ganga Ram *v.* Mewa Ram, 174, 176.
—— Himmat *v.* Llewhellen, 329.
—— Jagdeo *v.* Brij Behari, 10, 767, 778, 780.

L—*contd.*

Lala Jagmohan Das *v.* Lala Indar Prasad, 202, 204.
—— Kali Prosad *v.* Buli, 237, 253.
—— Kundan Lal *v.* Musammat Musharrafi Begam, 19.
—— Lachmi Narayen *v.* Maharaja Kesho Prasad, 670.
—— Lakhmi Chand *v.* Partab Singh, 616.
—— Manmohan Das *v.* Janki Prasad, 555, 571, 579.
—— Ramjewan *v.* Dal Koer, 145.
Lalchand *v.* Hussainio, 274.
—— *v.* Lalchand, 291.
—— *v.* Lakshman, 291.
—— Lachman Singh *v.* Surendra Bahadur Singh, 19.
—— Nanchand *v.* Narayan Hari, 322.
Lalit Mohan *v.* Chukkun Lal, 81, 91, 96.
—— —— *v.* Gopali, 641.
—— —— *v.* Hardat Rai, 253.
—— —— *v.* Thakurain Lachmi, 196.
Lalita Prasad *v.* Sarnum Singh, 56, 288.
Lalji Mal *v.* Nand Kishore, 256.
Laljimal *v.* Mohan Lal, 471.
Lalju *v.* Janki Lal, 457.
Lalla Himmat *v.* Llewhellen, 298.
—— Kanhoo Lal *v.* Must. Manki, 374.
Lallu *v.* Jagmohan, 135.
—— Gagal *v.* Bai Motan Bibi, 649.
—— Singh *v.* Chandra Sen, 276, 769.
—— —— *v.* Gur Narain, 754, 756.
—— —— *v.* Raghunandan, 439.
—— —— *v.* Rama Nandan, 431, 435 444.
Lallubhai *v.* Bai Amrit, 12, 300.
—— Rupchand *v.* Chimanlal Nandlal, 311.
Lalta Prasad *v.* Hari Lal, 381, 456.
—— —— *v.* Jagdish Narain, 356, 357.
—— Singh *v.* Mathura Upadhia, 465.
Lalu Mulji *v.* Kashibai, 253.
Laluchand *v.* Girjappa, 511.
Lambert *v.* F. W. Woolworth & Company Ltd., 699.
—— *v.* Thwaites, 137.
Lampat *v.* Kennedy, *Re*, Till, 748, 750.
Lancashire Loans Ltd. *v.* Black, 759.
Lancaster, *Ex parte*, *Re*, Marsden, 49.
Land Mortgage Bank *v.* Abdul Kasim, 359.
Lane *v.* Cox, 598.
—— *v.* Dixon, 645.
—— Fox, *Re*, *Ex parte* Gimblett, 264.
Langstaffe *v.* Fenwick, 512.
Langston, *Ex parte*, 378.
Lanoy *v.* Atholl (Duke and Duchess), 524.
Lasa Din *v.* Abdool Shakoor, 461.
—— —— *v.* Gulab Kuar, 454.
Lanka Ram *v.* Sunder Gopala, 255.
Laxman *v.* Bhagwan Singh, 291.
Latchmiput Singh *v.* Land Mortgage Bank of India, 613.
Lawton *v.* Lawton, 23, 85.
Laxaman *v.* Ramchandra, 194, 237, 238, 247.
—— *v.* Raoji, 291.
—— Ganesh *v.* Mathurabai, 619.
Laxmanlal *v.* Mulshankar, 74.
Lazarannassa Bibi *v.* Mahomed Jaffer, 473.
Leach *v.* Thomas, 695.
Leake *v.* Robinson, 117, 134, 140, 142.
Ledward *v.* Hassells, 151.
Lee *v.* Smith, 738.
—— Lim Ma Hock *v.* Saw Ma Hone, 248.
Leech *v.* Schweder, 666.
Leelachand *v.* Vishnu, 238.
Leelanand Singh *v.* Munoorunjun Singh, 634.
Legg *v.* Strudwick, 633.
Legh *v.* Hewit, 662.
Legh's Settlement Trusts, *In re*, 112.
Lehmann and Walker's Contract, *Re*, 325.
Leigh *v.* Burnett, 490.
—— *v.* Taylor, 23, 24.
Leith *v.* Irvin, 512.
Lekhraj Mahton *v.* Jang Bahadur, 580.
Leon Gan Kyu *v.* Maung Gyi, 80.
Leonard *v.* Baker, 269.
Leslie Ltd. *v.* Sheill, 78.
Lester *v.* Foxcroft, 279, 293.
Levine *v.* Brougham, 78.
Levy *v.* Stodgen, 336.
Lewin *v.* American and Colonial Distributors, Ltd., 704.
Lewis *v.* Lyster, 690.
—— *v.* Plunket, 412.
—— *v.* Stephenson, 710, 711.
Lickbarrow *v.* Mason, 198, 789.
Liddy *v.* Kennedy, 655.
Lila Morji *v.* Vasudev, 402.
Liladhar *v.* Nago, 65.
—— Uttamchand *v.* Shivaji Ganesh, 237, 500.
Liles *v.* Terry, 759.
Lim Charlie *v.* The Official Receiver, 753.

L—*contd.*

Limji *v.* Bapuji, 131.
Lin Nakul Chandra *v.* Kalipada Ghosal, 291.
Lincoln *v.* Wright, 355.
Lindsay *v.* Lynch, 281.
Line *v.* Stephenson, 323, 662, 663, 744.
Linga Reddi *v.* Rama Rau, 465.
——— ——— *v.* Sama Rau, 471, 473, 474.
Lingam Krishna *v.* Maharaja Vizianagram, 381, 456.
——— ——— *v.* Vikrama, 608.
Liquidation Estates Purchase Co. *v.* Willoughby, 562, 615, 617.
Lister *v.* Lane & Nesham, 697.
Liverpool Corporation *v.* Wright, 70.
——— Marine Credit Co. *v.* Wilson, 495.
Llewellyn *v.* Williams, 707.
Lloyd *v.* Attwood, 378.
——— *v.* Fleming, 786.
——— *v.* Webb, 134.
Lloyds Bank *v.* P. E. Guzdar & Co., 31, 517, 518.
——— Furniture Palace Ld., *In re*, 264.
Loch *v.* Furze, 339.
Lockhart *v.* Hardy, 467, 596.
Locking *v.* Parkar, 617.
Lodd Govindoss *v.* Muthiah Chetty, 298, 309.
Lodhna Colliery Co. *v.* Bepin Behari, 684.
Loewenthal *v.* Vanhoute, 726, 729.
Lokenath Sahu *v.* Achitananda Das, 247, 252.
Lokhanath Ghose *v.* Jugobundhoo Roy, 632.
Loknath *v.* Thakur Das, 275.
London and Globe Furnace Corporation Ltd. *v.* Montgomery, 398.
——— & S. W. Rly. *v.* Gomm, 100, 113, 114, 188, 190.
——— and North Western Railway Co. *v.* M'Michael, 763.
Lookmanji *v.* Mangal Sing, 318.
Loorthi Odayar *v.* Gopalasami Ayaer, 274.
Lootf Ali *v.* Peary Mohan, 27.
——— Meah *v.* Pearee Mohun Roy, 655.
Lootfulhuck *v.* Gopee Chunder, 177.
Loot Narain *v.* Showkie Lal, 212.
Lopez *v.* Muddun Mohun Thakoor, 671.
Lord Strathcona Steamship Co. *v.* Dominion Coal Co., 101.
——— Strathеden and Campbell, *In re*, 130.
——— Southampton's Estate, *In re*, 384.
Lorden *v.* Brooke Hitchin, 700.
Lovelock *v.* Franklyn, 642.
Low & Co. *v.* Hazarimull, 374, 524, 526.
Lowe, *In re*, Capel *v.* Lowe, 325.
——— *v.* Manners, 162.
Luby *v.* Warwickshire Miners' Association, 3.
Lucas *v.* Comerford, 681.
——— *v.* Rideout, 708.
——— *v.* Seale, 457.
Luchman Chandra *v.* Kalli Charan, 197.
Luchmeshar *v.* Dookh, 369, 455, 466.
Luchmiput Singh *v.* Land Mortgage Bank, 374.
Lucknow Municipal Board *v.* Ramjilal, 32.
——— Municipality *v.* Ramji Lal, 609.
Lucy Moss *v.* Mah Nyien May, 761.
Ludha Mal *v.* Jagannath, 228.
Luker *v.* Dennis, 684.
Lukpat Rai *v.* Fakiruddin, 553.
Lurcott *v.* Wakely & Wheeler, 695, 696, 697.
Luttges *v.* Sherwood, 690.
Luxmore *v.* Robson, 695, 698.
Lyon *v.* Reed, 715.
Lysaght *v.* Lysaght, 176.
——— *v.* Westmacott, 385.

M

M. A. Halphyde *v.* C. A. Saldanha, 108.
M. A. L. M. Chettiar Firm *v.* Maung Po Hoyin, 455.
M. P. L. M. P. Chetty *v.* Ma Ngwe Sin, 761.
M. P. M. S. Firm *v.* Ko Pyu, 448.
M. Huin Yeik *v.* K. A. R. K. Firm, 364.
Ma Asha *v.* B. K. Haldur, 765.
Ma Chit Su *v.* National Bank of India Ltd., 249, 255.
Ma E. *v.* Maung Po Ko, 439.
Ma Gun *v.* Maung Lu Gale, 444.
Ma Gyi *v.* Maung Tet, 644.
Ma Hawa Bi *v.* Sein Ko, 82, 176.
Ma Hla Zan *v.* Pa Pa Yer, 755.
Ma Hnit *v.* Maung Po Pu, 315, 325, 332.
Ma Htay *v.* U Tha Hline, 747.
Ma Huin Yiek *v.* K. A. R. K. Firm, 487.
Ma Joo Tean *v.* Ma Thein Myun, 377.
——— *v.* The Collector of Rangoon, 84, 223, 375.
Ma Kin *v.* Ma Bwin, 248.
Ma Kin Kyaw *v.* R. C. Dey, 590, 591.

M—*contd.*

Ma Kyi *v.* Ma Than, 292.
Ma Lon *v.* Ma Nyo, 580.
Ma Ma E *v.* Maung Tun, 292.
Ma Ma Huya *v.* Maung Nyo Lone, 243.
Ma Mi *v.* Kallender Ammal, 7, 764.
Ma Min Byu *v.* Maung Chit, 398.
Ma Mo E *v.* Ma Kun Hlaing, 393.
Ma Mya *v.* V. P. R. V. S. A. Annanmalia Chettiyar, 284, 300.
Ma Myat Gui *v.* Ma Ma Nyun, 384.
Ma Myat Tha Zan *v.* Ma Dun, 292.
Ma Nyo *v.* Maung Hla Ba, 546.
Ma Pwa Kin *v.* K. P. S. A. R. P. Firm, 493.
Ma Pwa May *v.* S. R. M. M. A. Chettyar Firm, 35, 264.
Ma Pwa Thein *v.* Ma Mesha, 470.
Ma Pyone *v.* Ma U, 292.
Ma Schwe Tu *v.* Maung Ba San, 454.
Ma Sein Bye *v.* S. R. M. M. R. M. Chetty Firm, 380.
Ma Sein Ngo *v.* Mang San Pe, 357.
Ma Sein Nyun *v.* Maung U, 89.
Ma Shew Kin *v.* Ka Hee, 281.
Ma Shin *v.* Ma Thin Kyi, 753, 756.
Ma Shin *v.* Maung Hman, 761.
Ma Sim Ngo *v.* Maung San Pe, 352.
Ma Than *v.* Maung Ba Gyan, 241.
Ma Thet *v.* Ma Se Mai, 286.
Ma Thien Shin *v.* Ma Ngwe Su, 16.
Ma Thin Myaing *v.* Maung Gyi, 755, 764.
Ma Thin On *v.* Ma Ngwe Hnon, 288.
Ma Tok *v.* Maung Cheik, 356.
Ma Yait *v.* Mahomed Ebrahim, 53.
Ma Yait *v.* Mahomed Ebrahim Moolla, 69.
Ma Yait *v.* Official Assignee, 47, 53.
Ma Yin Hu *v.* Ma Chit May, 94, 757.
Macartney, *Re*, Macfarlane *v.* Macartney, 168, 169.
Macaulay *v.* O'Donnel, 108.
Macfarlane *v.* Lister, 783.
Machu, *In re*, 90.
Mackay *v.* Douglas, 264.
Mackintosh *v.* Gopee Mohun, 737.
MacKusick *v.* Carmichael, 679.
Macleay, *In re*, 91, 92, 98.
Macleod *v.* Kikabhoy, 23.
——— *v.* Kissan, 85, 447, 488, 629.
——— *v.* Jones, 479, 481.
MacNaghten *v.* Bheekaree Singh, 679.
——— *v.* Rameshwar Singh, 642.
Macnaghten *v.* Bhikaree, 445.
Macneill *v.* Saroda Sundari, 196, 204.
Maconochi *v.* Brand, 730.
Madam Pillai *v.* Badra Kali, 297.
——— ——— *v.* Badrakali Ammal, 89.
Madan Chandra *v.* Jaki, 3.
——— Gopal *v.* Lehori Mal Ganki, 273.
——— ——— *v.* Sundaram, 227.
——— Lal *v.* Bhagwan Das, 593.
——— Mohan *v.* Bohra Ram Lal, 651.
——— ——— *v.* Holloway, 225.
——— ——— *v.* Nand Ram, 525, 616, 617.
——— ——— *v.* Raj Kishori, 242.
——— ——— *v.* Rebati Mohan, 194.
——— ——— *v.* Sriniwas Prasad, 278.
——— ——— Singh *v.* Raj Kishori, 448.
Madaneswar *v.* Mahamaya Prosad, 241.
Madappa Hedge *v.* Ramkrishna, 454.
Madar *v.* Kader Moidin, 629.
——— Saheb *v.* Sanna Bawa, 95, 685, 717.
Madari *v.* Baldeo Prasad, 504, 510.
Madavan *v.* Athi Nanjigar, 722.
Maddison *v.* Alderson, 278, 279, 280, 281, 282.
Made Gouda *v.* Chenne Gouda, 753.
Maderazu *v.* Bonimadvaru, 210.
Madhab Chandra *v.* Bejoy Chand, 9, 687.
——— Koeri *v.* Baikuntha, 76, 362, 626?
——— Rav *v.* Kashibai, 754.
Madhabilata Devi *v.* Buttlo Kristo Ray, 683, 687, 769.
Madhava *v.* Narayana, 638.
Madhavi Amma *v.* Kunhi Pathummai, 542.
Madhavrao *v.* Balabhai, 91.
——— *v.* Kashibai, 16, 742, 748.
——— *v.* Sahebrao, 357.
Madho Das *v.* Ramji Patak, 68.
——— ——— *v.* Ramkissen, 376.
——— Misser *v.* Sidh Binaik, 606.
——— Pershad *v.* Gajadhur, 365.
——— Prasad *v.* Debi Dial, 474.
——— Ram *v.* Gulam Mohiuddin, 383, 602.
——— ——— *v.* Kulya Nand, 238.
——— ——— *v.* Shamsuddin, 439.
——— Rao *v.* Gulam Mohiuddin, 456.
——— ——— *v.* Lachhmin, 402.
——— Singh *v.* Kalloo Singh, 598.
Madhoram Sand *v.* Kirtyanand, 580.
Madhu *v.* Sabar Ali, 671.
——— Singh *v.* Pancham Singh, 618.
——— ——— *v.* Skinner, 251.

M—*contd.*

Madhu Sudan *v.* Kamini, 9, 77, 678, 687.
Madhuram *v.* Bhotong, 594.
Madhusudan *v.* Midnapore Zemindary Co., 95.
——— Mahton *v.* Midnapore Zemindari Co., 735.
Madhwa *v.* Venkata, 12.
——— Sidhanta *v.* Venkataramanjulu, 370, 371, 380.
Madras Building Co. *v.* Rowlandson, 32, 518.
——— Deposit and Benefit Society *v.* Passanha, 478, 481.
——— Deposit Co. *v.* Oonamalai, 378, 392.
——— Hindu Mutual, etc. *v.* Raghava Chetty, 444.
——— Hindu Union Bank *v.* Venkatarangiah, 517.
Mafiz Sheikh *v.* Rashik Lal Ghose, 21.
Maganlal *v.* Shakra, 590, 591.
Maghir Haran *v.* Mukhtar Haran, 203.
Maghu *v.* Bholi Das, 36, 37.
Magneta Time Co., *Re*, 429.
Magniram *v.* Bakubhai, 79, 211, 213.
——— *v.* Mehdi Hossein, 347, 531, 532.
Maha Mangal Rai *v.* Kishun Kandu, 393.
Mahabal Singh *v.* Rajeshwari, 435.
Mahabir *v.* Bharat Bihari, 357.
——— *v.* Dip Narain, 551.
——— *v.* Sheo Shankar, 508, 514.
——— Pershad Singh *v.* Macnaghten, 414, 415.
——— Prasad *v.* Gangadhur, 10.
——— *v.* Pateshwari Prasad, 631.
——— Singh *v.* Kishori, 602.
Mahadaji *v.* Ganpatshet, 459.
——— *v.* Joti, 370, 380, 472.
——— *v.* Vithal, 355.
Mahadeo *v.* Har Buksh, 192.
——— *v.* Narain, 344.
——— *v.* Ramchandra, 405, 512.
——— *v.* Rameshar, 371.
——— *v.* Sitla Baksh, 472.
——— *v.* Vasudev, 304.
——— Lal Jwala Prasad *v.* Mt. Bibi Maniram, 265.
——— ——— *v.* Sri Gobind, 506.
——— Prasad *v.* Anandi Lal, 609.
——— *v.* Gairaj Singh, 392.
——— ——— *v.* Mathura, 54, 56.
——— Saran *v.* Thakur Prasad, 254.

M—*contd.*

Mahadev Prasad *v.* Anandi Lal, 182.
Mahadevi *v.* Vikrama, 758.
Mahal Singh *v.* Amar Nath, 441.
Mahalakshmammal *v.* Sriman Madhawa, 617, 621.
Mahalakshmi *v.* Lakshmi, 731, 732.
——— *v.* Somaraju, 618.
——— *v.* Somargya, 616.
——— *v.* Venkatreddi, 278.
Mahalatchmi Ammal *v.* Palani Chetti, 234.
Mahalavu *v.* Kusaji, 16.
Mahammad Afzal Khan *v.* Abdul Rahman, 499.
——— Ayejuddin *v.* Prodyat Kumar, 738.
——— Ishaq *v.* Mahammad Yusaf, 267.
——— Ismail *v.* Sharfutullah, 427.
——— Muzaffaral Musavi *v.* Jabeda Khatun, 636.
Mahammad-un-nissa Begum *v.* Bachelor, 265.
Mahamaya Debi *v.* Haridas Haldar, 61, 444.
Mahananda *v.* Mongala, 741.
——— Roy *v.* Sarat Mani Debi, 685, 717.
——— Saratmani *v.* Saratmani, 95.
Mahant Bhagaban *v.* Bisweswar, 200.
——— Shantanand Gir *v.* Basudevanand, 4.
Maharaj *v.* Ramji Lal, 594.
——— Bahadur *v.* Shaikh Abdul Rahim, 237.
——— ——— *v.* Surendra Narain, 253.
——— ——— Singh *v.* Balchand, 113.
——— ——— ——— *v.* Basiruddin, 492.
——— Singh *v.* Balwant Singh, 180.
——— ——— *v.* Lalta Prasad, 508.
——— Kesho Prasad *v.* Chandrika Prasad, 371.
——— of Bobbili *v.* Zamindar of Chundi, 181.
——— of Jeypore *v.* Rukmini, 2, 9, 649, 719, 720, 721, 722.
——— of Pithapuram *v.* Gokuldass, 487.
——— Tej Chand *v.* Sri Kanth, 627.
Maharaja Keshava Prasad *v.* Mathura Kuar, 178.
——— Surjya Kanta Acharjya *v.* Sarat Chandra Roy, 82.
Maharajah Ramnarain *v.* Ram Kumar, 533.

M—*contd.*

Maharana Futtehsangji v. Desai Kallianraiji, 16.
Maharani of Burdwan v. Murtunjoy, 5.
Mahbub v. Kalekhar, 302.
Mahesh Das v. Daulat Ram, 518.
——— Singh v. Chauharja, 473.
Mahesha Mal v. Gopal, 365.
Maheshar v. Ratan Singh, 180.
Maheswari v. Manrajo, 724.
Mahim Chandra v. Esahak, 291.
——— ——— v. Ram Dayal, 749.
Mahipat v. Lakshman, 721.
Mahl Singh v. Amar Nath, 616.
Mahmad Sujat v. Mst. Chandbi, 204.
Mahmood Mamuna v. National Bank of India, 318.
Mahmud Khan v. Khuda Baksh, 245.
Mahomed v. Comandur, 71.
——— v. Ezekiel, 405, 632.
——— v. Hem Chandra, 254.
——— v. Mahomed, 71.
——— v. Yeoh, 5.
——— Abdul v. Baldeo Sahai, 533.
——— ——— Samad v. Girdhari Lal, 613.
——— Ali v. Ali Mirza, 514.
——— ——— v. Venkatapathi, 317, 319.
——— ——— v. Nazar, 167.
——— ——— v. Nissar Ali, 355, 356.
——— ——— Sheriff v. Venkatapathy, 323, 339.
——— Ameer v. Peryag Singh, 731.
——— Ashkar v. Mahomed Abdul, 175.
——— Buksh v. Hosseini Bibi, 759, 760.
——— Fariduddin v. Nand Ram, 600.
——— Fayez v. Jamoo Gazee, 640.
——— Hafiz v. United Provinces, 722.
——— Haji v. Ramappa, 367.
——— Hashan, *In re*, 50.
——— Hushen v. Jamini Nath, 278.
——— Ibrahim Hossain Khan v. Ambika Pershad Singh, 559, 574, 582.
——— Jeaullya Mean v. Sukheannessa Bibi, 690.
——— Juman Mia v. Akali Mudiani, 593.
——— Liaqat Ali v. Ajudhia Prasad, 644.
——— Mozaffer Ali v. Asraf Ali, 367.
——— Musa v. Aghore Kumar Ganguli, 278, 282.
——— Muse v. Bagas, 370.
——— ——— v. Jijibhai, 405.

M—*contd.*

Mahomed Rahimtoola v. Ismail Allarakhia, 456.
——— Raza v. Mt. Abbas Bandi, 92.
——— Shabbar v. Harnath, 61.
——— Shakar v. Shehjahan, 201.
——— Sheriff v. Sayyad Kasim, 420.
——— Shumsool v. Shewukram, 81, 565.
——— Syedol Ariffin v. Yeoh, 78.
——— Taki v. Thomas, 534.
——— Wajid v. Tayyuban, 248.
——— Yunus Khan v. Court of Wards, 27, 31.
——— Zaki v. Ahmed Shah, 427.
——— ——— v. Mannu, 297.
Mahomedally v. Abdulla, 652.
——— v. Campbell, 666.
Mahommad Hanif v. Khacrabali, 241.
——— Yagoolally v. Chottey Lal, 303.
Mahommed Abdul Jalil Khan v. Mahommed Abus Salim Khan, 176.
Mahram Das v. Ajudhia, 96, 99.
Mahtab Rai v. Sant Lal, 424, 458.
——— Singh v. Collector of Saharanpur, 333.
Mahumed Juman Mia v. Akali Mudiani, 244.
Maida v. Kishan Bahadur, 324.
Maidin Saiba v. Nagappa, 638.
Maina v. Bachchi, 182, 607, 609.
——— v. Bhagwati Prasad, 210.
Mainland v. Upjohn, 403.
Mainwarning Mainwarning v. Verden, 591.
Maitland v. Chalie, 157.
Makhan v. Jasoda, 545.
——— Lal v. Bunku Behari, 44, 300, 301.
——— ——— v. Gokal Chand, 618.
——— ——— v. Hanuman, 44, 358, 360.
——— ——— v. Natthi, 568.
——— ——— v. Sohan Lal, 592.
Makin v. Watkinson, 674.
Makkama v. Masambi, 201.
Makkhan Lal Saha v. Nagendranath Adhikari, 47, 49.
Makund v. Rajrup, 94.
——— Prasad v. Rajrup Singh, 757.
Mala Singh v. Budh Singh, 489.
Malik Ahmed Wali Khan v. Musammat Shamsi Jahan Begum, 598.
——— Singh v. Shiam Lal, 245.
Malireddi Ayyareddi v. Gopala Krishnayya, 562, 563, 564, 568, 581, 615.
Malkarjun v. Sarubai, 182, 184.
Mallappa v. Janardan, 733.

M—*contd.*

Mallikarjuna Sastri *v.* Narasimha, 349.
Mallikarjuadu *v.* Linga Murti, 416, 591.
Mallikarjunda *v.* Mallikarjunda, 365, 366.
Mallot *v.* Wilson, 526, 749.
Malone *v.* Lasky, 674.
Malzy *v.* Eichholz, 668.
Mamillapalli Kottappa *v.* Pamidipati Ragharayya, 583.
Mammikutti *v.* Puzhakkal, 21, 644.
Mamola *v.* Kedar Nath, 598.
Mamu *v.* Kattu, 428.
Mamubai *v.* Dossa Morarji, 167.
Man Bhari *v.* Naunidh, 749.
—— Mohan *v.* Janki Prasad, 556.
—— Singh *v.* Guman, 357.
Manavadan *v.* Parry & Co., 715.
Mancharam *v.* Pranshanker, 61.
Mancharji *v.* Narayan, 313, 341.
—— *v.* Noor Mahomedbhoy, 479.
Mancherji *v.* Dinbai, 675.
Mancheraha *v.* Kamrunissa, 440, 441.
Manchershaw *v.* Ardeshir, 750.
Manchester Bonded Warehouse *v.* Carr, 672, 674, 699.
—— Sheffield & Lincolnshire Rly. Co. *v.* Anderson, 669.
Mander *v.* Falcke, 190.
Manekjee Pallanjee *v.* S. A. Mayappa Chetty, 387.
Manekji *v.* Rustomji, 375, 456.
Maneklal *v.* Saraspur Manufacturing Co., 357.
Mangal Prasad *v.* Chandra, 609.
—— Sen *v.* Kewal Ram, 555.
—— Singh *v.* Ghasita, 57.
Mangalaswami *v.* Subbia Pillai, 296.
Mangalathammal *v.* Narayanaswamy, 334.
Mangaldas *v.* Runchoddas, 173.
—— *v.* Tribhuwan Das, 118.
Mangali Prasad *v.* Pati Ram, 552.
Mangat Rai *v.* Dulichand, 256.
Manghi *v.* Dial Chand, 363, 412, 454.
Mangladha *v.* Gandamal, 323.
Mangles *v.* Dixon, 782, 783.
Mangtulal *v.* Upendra Lal, 616.
—— Bagaria *v.* Upendra Mohan, 447, 448.
Manhu Lal *v.* Palu Sahu, 196.
Mani Divi *v.* Anpurna Dai, 11.
Mania *v.* Lalubhai, 632.
Manicka *v.* Chinnappa, 630.

M—*contd.*

Manicka Nadar *v.* Aramugha Sundara, 408.
Manickam Pillai *v.* Audinarayana, 607.
—— *v.* Ratnasami Nadar, 653, 705, 706.
Manicklal *v.* Kadambini, 730.
Manickram *v.* Ramalingam, 54.
Manik Chand *v.* Rangappa, 363.
Manika Gramani *v.* Ellappa, 247.
Maniklal *v.* Bijoy Singh, 268.
Manilal *v.* Nandlal, 711, 738.
—— Ranchod *v.* Motibhai, 369.
Manilall Singh *v.* Trustees for the Improvement of Calcutta, 1.
Manimohan Pal *v.* Gour Chandra Das, 625.
Manindra Chandra *v.* Narendra Chandra, 690.
—— *v.* Troylucko Nath, 32.
Manishankar *v.* Ramkrishna, 317, 318, 338.
Manjamma *v.* Padmanabhayya, 118.
Manjappa *v.* Krishnayya, 213, 214, 479.
—— *v.* Venkatesh, 682.
—— Roi *v.* Krishnayya, 566.
Manjaya *v.* Shanmuga, 216.
—— *v.* Tammaya, 671.
Manjeshwara *v.* Vasudeva, 253.
Manjhoori *v.* Akel Mahumed, 4.
Manji *v.* Hoorbai, 39, 206.
Manjunath *v.* Shankar, 61.
Manks *v.* Whiteley, 346, 562, 615.
Mankuar *v.* Jasoda, 75.
Manloe *v.* Bale and Bruton, 442, 495.
Manmatha Nath *v.* Balaichandra, 680.
—— *v.* Nalinaksha, 682.
—— *v.* Nalinksha Rai, 680.
—— *v.* Peary Mohan, 738.
—— *v.* Sarat Chandra, 546.
Manmohan *v.* Bidhu Bushan, 65, 67.
—— Mukherji *v.* Kesrichand Gulabchand, 387.
—— Das *v.* Official Liquidator, 296.
Mannu Lal *v.* Sri Thakur, 751.
—— Singh *v.* Umadat Pande, 759.
Manohar Das *v.* Huzarimull, 493.
—— Lal *v.* Ram Babu, 596.
Manoharlal *v.* Kanhailal, 609.
Manorama *v.* Kalicharan, 131.
Manpal *v.* Sahib Ram, 251.
Mansar Ali *v.* Abdul Karim, 730.
Mansing *v.* Amantara, 242, 253.
Mantel and Mantel, *In re*, 97.
Mantoora *v.* Jagmohan, 447.
Mantz *v.* Goring, 696.

M—*contd.*

Manual *v.* Sangapalli, 237.
Maqbul Fatima *v.* Lalta Prasad, 495.
Maqsud Ali Khan *v.* Abdullah Khan, 568.
Marana Ammanna *v.* Pendyala, 421.
Marangami *v.* Nagur Meera Labhai, 54.
Marcar *v.* Sigg, 376.
Mariam Bibi *v.* Ibrahim, 760.
——— *v.* Sakina, 759.
Mariano *v.* Rt. Rev. F. Provost, 130.
Mariappa Pillai *v.* Raman Chettiyar, 275.
Mariette, *In re*, Mariette *v.* Governing Body of Aldenham School, 129.
Markham *v.* Paget, 663, 666, 667.
Marlborough (Duke) *v.* Godolphin (Lord), 136.
Marquess of Zetland *v.* Driver, 189, 324.
Marriot *v.* Anchor Reversionary Co., 511.
Marsden *v.* Edward Heyes, Ltd., 697, 701.
Marsh & Granville (Earl), *Re*, 311, 312, 341.
——— *v.* Lee, 588.
Marshall, *In re*, Marshall *v.* Whateley, 78.
——— *v.* Berridge, 627.
——— *v.* Green, 21.
——— *v.* Hollaway, 125.
Martand *v.* Dhondo, 414.
Martinson *v.* Clows, 480.
Martrinez *v.* Cooper, 30.
Martyn *v.* Williams, 705.
Maruthai *v.* Dasappa, 356.
Maruti *v.* Balaji, 355, 356, 357.
——— *v.* Manohar, 418.
Marwadi Samnaji *v.* Sripathi, 272.
Masesh *v.* Dan, 597.
Maseyk *v.* Fergusson, 143.
Mashook *v.* Marem, 368, 407.
Masitullah *v.* Umrao, 218.
Mason, *Re*, Mason *v.* Mason, 127.
——— *v.* Westoby, 486.
Master's Settlement, *In re*, Master *v.* Master, 137.
Mastram *v.* Ma Ohn, 285.
Mastulla Mandal *v.* Jan Mamud, 618.
Mata Din *v.* Iftikhar Husain, 562.
——— *v.* Kazim Husain, 10, 46.
——— Prasad *v.* Nageshar Sahai, 93, 94.
Matadin *v.* Kazim Husain, 595.
——— *v.* Kazim, 616.

M—*contd.*

Matangini Dassi *v.* Chooneymoney, 461.
——— Dassee *v.* Choonaymoney, 610.
Mataprasad Upadhya *v.* Kunnon Devi, 477, 481.
Mather *v.* Fraser, 23, 24.
Mathews *v.* Keble, 127.
——— *v.* Wallwyn, 385.
Mathewson *v.* Jadu Mahto, 720.
——— *v.* Ram Kanai Singh, 684.
——— *v.* Ram Kanai Singh Deb, 190.
Mathieson, *In re*, 46.
Mathra Das *v.* Amichand, 591.
——— *v.* Nizam Din, 409.
Mathu *v.* Achu, 68.
Mathur Lalbhai, *In re*, 746.
Mathura *v.* Ambika, 206, 221.
——— Das *v.* Jadubir, 21.
——— Kuer *v.* Dharam Samaj, 748.
——— Kurmi *v.* Jagdeo Singh, 355, 357.
——— Mohan *v.* Ramkumar, 304.
——— *v.* Ramkumar Saha, 300.
——— Prasad *v.* Anandi, 201.
——— *v.* Cheddi Lal, 392.
——— *v.* Desai Sahu, 254.
——— *v.* Harakh Narain, 402.
——— *v.* Ram Sarup, 328.
——— Rai *v.* Mandal Das, 448.
Mathuvelu *v.* Vythilinga, 357.
Mati Lal *v.* Darjeeling Municipality, 737, 738.
——— *v.* Radhe Lal, 68.
——— Das *v.* The Eastern Mortgage and Agency Co., 485, 504.
——— Lall Pal *v.* Preo Lal, 250.
Matilal *v.* Preo Lal, 239, 253.
Matilda Fernandez *v.* Pinto, 60.
Matlub Hasan *v.* Mt. Kalawati, 359, 364, 553, 605, 606, 607, 610.
——— *v.* Mt. Kalwati, 116.
Matru Mal *v.* Durga Kunwar, 416, 592.
Mattapalli Raju *v.* Challa Venkata, 418.
Matthews *v.* Feaver, 273.
——— *v.* Smallwood, 727.
Matthey *v.* Curling, 667.
Mattongeney *v.* Ramnarain, 394.
Matura Subba *v.* Surendra Nath, 115, 405.
Maula Baksh *v.* Iman Din, 515.
Mauladan *v.* Raghunandan, 300.
Maung Aung *v.* Ma Nyun, 282.
——— Ba *v.* Maung Kywe, 288.

M—*contd.*

Maung Ba Tu *v.* Ma Thet Su, 217.
—— Bya *v.* Maung San, 197.
—— Din *v.* Ma Hnin Me, 269.
—— Hla Maung *v.* Maung-Po Htai, 286, 753.
—— Hlaw *v.* M.M.S. Chettyar Firm, 32.
—— Hmwe *v.* Ma Lun, 202.
—— Hoe Kyin *v.* Pe Hla Gyi, 295.
—— Kyin *v.* Ma Shwe Law, 355, 356.
—— Mon *v.* Ma Kin Oh, 300.
—— Mya Maung *v.* Ma Khine, 302.
—— Myat Tha Zan *v.* Ma Dun, 283, 290.
—— Ohu *v.* Maung Po Kwe, 285.
—— Ok Kyi *v.* Ma Pu, 292.
—— Pe Gyi *v.* Hakim Ally, 357.
—— Po *v.* Maung Mye, 201.
—— —— *v.* Maung Min Din, 392.
—— —— *v.* Ma Ngwe, 386.
—— —— Kwe *v.* Maung Po Sein, 285.
—— —— Kywe *v.* Maung Po Thin, 291.
—— —— Lu *v.* Bank of Chettinad, 203.
—— —— Sin *v.* Ma Nyein, 291.
—— —— Te *v.* Maung Shwe Ko, 312.
—— —— Yin *v.* Maung Tet Tu, 304.
—— San Gyaw *v.* Maung Kyaw, 265.
—— Saing *v.* Shwe Lon, 297.
—— Sein *v.* Maung Htoon Shwe, 644.
—— Shan *v.* U Po, 384.
—— Shwe *v.* Karambu, 591.
—— —— *v.* Ponniah, 438.
—— —— Bye *v.* Chawari Mutu, 389.
—— —— Goh *v.* Maung Inn, 303, 326.
—— —— Hmon *v.* Maung Tha Byaw, 292.
—— Sin Ba *v.* Maung Kyme, 196, 199, 205.
—— Ta Pan *v.* Maung Po Thaw, 247.
—— Than *v.* U. Po, 267.
—— —— *v.* Ma On, 202.
—— Thanag *v.* M. M. Chettyar Firm,
—— Tin *v.* Maung Po Kin, 210.
—— Tun Pe *v.* Maung Sein Myi, 290.
—— —— Ya *v.* Maung Aung Dun, 290, 292, 393, 604.
—— —— Thein *v.* Maung Siu, 275.
—— Yan Kuin *v.* Maung Po Ka, 465.
- Ye *v*, M. A. S. Firm, 76.
Mayandi Chettiyar *v.* Chokkalingam, 634.
Mayappa Chettiar *v.* Kolandaivelu, 543, 552.
Mayashankar *v.* Burjorji, 2, 421, 460, 536.
Mayavi Dalip Rajeshwari *v.* Mohan Bikram, 779.

M—*contd.*

Mayer *v.* Murray, 484, 505.
Mayhew *v.* Suttle, 646.
Mayilaraya *v.* Subbaraya, 401.
Mayor of London and Tubbs' Contract, *Re*, 344.
—— —— Lyons *v.* East India Co., 130.
Mazhar Husein *v.* Abdul, 132.
—— Rai *v.* Ramgat Singh, 641.
Mazhoor Pudukudi *v.* Perandatta, 728.
—— Padu Kudi *v.* Pudiyapurayil, 724.
McEacharn *v.* Cotton, 684.
—— *v.* Colton, 686.
McLeod *v.* Kisson, 684.
McNaghten *v.* Lalla Mewa Lall, 683.
Md. Farooq *v.* Musjidi Begam, 631.
—— Hafiz Ulla *v.* United Provinces, 719.
—— Yahiya *v.* Rashid-ud-din, 528.
—— Zayauddin *v.* Dargahan, 637.
Meadows *v.* Parry, 153.
Medina Bibi *v.* Ismail Durga Association, 275.
Meenakshi *v.* Chidambaram, 670.
—— *v.* Rathnasami, 358, 371.
—— Ammal *v.* Ammani Ammal, 263, 267.
—— Sundara *v.* Chidambaram Chetty, 691.
Meenatchi *v.* Manicka, 230, 232.
Megh Lal Pandey *v.* Rajakumar Thakur Giridhari Singh, 635.
Meghji *v.* Dayalji, 738.
—— Moorji *v.* Tyeballi, 310, 312.
Meghlal *v.* Rajkumar, 9.
Meghraj *v.* Abdullah, 328, 329, 330.
—— *v.* Krishna Chandra, 539.
—— *v.* Krishna Chandra Bhattacharji, 24.
Mehar Ali Khan *v.* Aratunessa, 290, 291.
Mehdi Husain *v.* Jafar Khan, 319.
—— Ali Khan *v.* Chunni Lal, 50.
Meher Ali Khan *v.* Arutunnessa, 743.
Meherunnessa *v.* Sham Sundar, 619.
Mehrban Khan *v.* Makhma, 398, 399.
Mehta *v.* Cassumbhai, 429.
—— *v.* Gadadhar Rai, 682.
Meiyyalu *v.* Anjalay, 750.
Mela Ram & Sons *v.* Ram Das Joshi & Sons, 329, 330.
—— —— *v.* Pritvi Chand, 402.
—— —— *v.* Sandhi Khan, 722.
Melles & Co. *v.* Holme, 674.
Mengha Ram *v.* Makhana, 197.

M—*contd.*

Merbai *v.* Perozbai, 754.
Mercantile Bank of India *v.* Official Assignee of Madras, 44, 789.
Mercer, *Ex parte, Re,* Wise, 267.
Mervin, *In re,* Mervin *v.* Crossman, 142, 143.
Merwanji *v.* Syed Sardar Ali, 666.
Messrs. Sadasook Ramprotap *v.* Hoare Miller & Co., 770, 780, 781.
Messent *v.* Reynolds, 667.
Metcalfe *v.* Metcalfe, 90.
Metropolis Estates Company *v.* Wilde, 723.
Metters *v.* Brown, 479.
Mewa Ram *v.* Ganga Ram, 427.
Mian Pir Bux *v.* Sardar Mahomed Tahar, 193, 278, 284, 290, 291, 303.
Middlesex Justices *v.* R., 3.
Middleton (Lord) *v.* Eliot, 412.
——— *v.* Losh, 127.
——— *v.* Pollock, 264, 265.
Midnapore Zamindari Co. *v.* Joyram Santal, 727.
——— ——— ——— *v.* Naresh Narain, 243.
Mikran Mumar *v.* Mohit Krishna, 174.
Mila *v.* Mangal Ram, 265.
Milford Haven & Co. *v.* Mowatt, 349.
Miles *v.* Ester, 186, 189.
Milki Ram *v.* Gujar Mal, 355.
Mill *v.* Hill, 227.
Miller & Ashworth Ltd. *v.* Sharp, 281.
——— *v.* Brindaban, 23.
——— *v.* Budh Singh, 65.
——— *v.* Cook, 478.
——— *v.* Madho Das, 376, 378.
——— *v.* Runganath, 465, 466.
Mills *v.* Auriol, 680.
——— *v.* Temple-West, 674.
——— *v.* Wilkins, 1.
Milmo *v.* Carreras, 678.
Milnes *v.* Grey, 297.
Milroy *v.* Lord, 750.
Mina Kumari *v.* Bijoy Singh, 261, 265, 268.
Minakshi Ayyar *v.* Janaki, 495.
——— *v.* Janaki, 545.
Minors *v.* Battison, 156.
Minto *v.* Kaleecharn, 666.
Mir Ali Nawaz *v.* Mir Ali Asghar, 221.
——— Eusuff Ali *v.* Punchanan, 415, 421, 460, 535.
Mir Sarwarjan *v.* Fakhruddin Mahomed, 76, 303.
——— Singh *v.* Raghuvir Singh, 380.
Mir Wajidali *v.* Abdal Khan, 428.
Miran Baksh *v.* Bajrang, 405.
——— ——— *v.* Azizbaksh, 717.
Miras in a temple—*Ramaswami v. Ranga,* 70.
Mirtinjai Baksh Singh *v.* Hinga, 20.
Mirza Abid Husain *v.* Munnoo Bibi, 242, 253.
——— Yadalli Beg *v.* Tukaram, 420, 426.
Misri Lal *v.* Abdiul Aziz, 386.
——— ——— *v.* Gajadhar, 514.
——— ——— *v.* Mithu Lal, 416.
——— ——— *v.* Mozhar Hossain, 51, 388.
Mitarjit *v.* Sheikh Leakut, 736.
Mitchel *v.* Reynolds, 149.
Mitchell *v.* Homfray, 759, 760.
——— *v.* Phillips, 581.
——— *v.* Reynolds, 756.
Mithibai *v.* Meherbai, 81.
Mitthu Lal *v.* Kishnan Lal, 588.
M'Kenzie *v.* British Linen Co., 27.
Mocatta *v.* Murgatroyd, 614.
Modhu Sudan *v.* Rhidoymoni, 356.
——— ——— *v.* Rooke, 172, 634.
Modu Mohan *v.* Ashad Ali, 368.
Modun Mohun *v.* Futtarunnissa, 767.
Mofiz Shiekh *v.* Rasik Lal, 677.
Moffett *v.* Bates, 762.
Mohabir *v.* Gungadhar, 366.
Mohamad Sujat *v.* Mst. Chandbi, 200, 201, 205.
Mohamed Shah *v.* Official Trustee of Bengal, 107.
——— *v.* Sheodarshan, 496.
——— Yunus Khan *v.* Court of Wards, Balrampur Estate, 345.
——— Haji *v.* Ramappa, 365.
——— Siddiq *v.* Li Kan Shoo, 311.
——— Shumsool *v.* Shewakaram, 81.
Mohammad Abdulla *v.* Mohamad Yasin, 7, 369, 381.
——— ——— *v.* Madarisah, 52.
——— Afzal Khan *v.* Abdul Rahman, 498, 499.
——— Abdussumad *v.* Kurban, 4.
——— Ali *v.* Bismillah Begam, 262, 498.
——— Azim *v.* Pateshwari Prasad, 226.
——— *v.* Fakhr Jahar, 11.
——— Hashmat Ali *v.* Kaniz Fatima, 56.

M—*contd.*

Mohammad Ishaq *v.* Mohammad Yusaf, 261, 264, 273.
———— Khan *v.* Chandi Shah, 407.
———— Mossa *v.* Joganund Singh, 657, 658, 736.
———— Muzaffar *v.* Madad Ali, 76.
———— Narsing Partab *v.* Yakub, 473, 602.
———— Noor *v.* Mirza Ashiq Beg, 651.
———— Sadiq *v.* Ghasi Ram, 251, 253.
———— Shakur *v.* Shah Jehan, 197.
———— Sher Khan *v.* Raja Seth Swami Dayal, 397.
———— ———— *v.* Seth Swami Dayal, 382, 397.
———— Yusaf *v.* Hafiz Abdul, 715.
Mohammadi Bibi *v.* Kashi, 18.
Mohammed Sher Khan *v.* Raja Seth Swami Dayal, 398, 399, 401, 601.
Mohan Das Talib *v.* Mehdi Khan, 456.
Mohan Lal *v.* Genda Singh, 644, 656, 657.
———— *v.* Governor-General, 726.
———— *v.* Mati Lal, 65.
———— *v.* Prasadi Lal, 458.
———— *v.* Ram Charan, 416, 417.
———— *v.* Wadhawa Singh, 500.
———— Manohar *v.* Togu Uka, 591.
———— Singh *v.* Sewa Ram, 213, 215.
Mohanlal *v.* Indomati, 354.
———— *v.* Mahomed Sujat, 569.
———— *v.* Niranjan Das, 156.
Mohanlall *v.* Chaodhri, 438, 439.
Mohant-Pryad Das *v.* Mohant Kriparam, 70.
Mohanya *v.* Ram Bahadur, 495.
Mohar Singh *v.* Het Singh, 751.
Moharaj Bahadur Singh *v.* Surendra Narain, 255.
Moharam *v.* Telamudin, 636.
Mohebut Ali *v.* Mohamed Faizullah, 640.
Mohendra *v.* Gagan Chandra, 96.
———— *v.* Kali, 50.
———— *v.* Krishna Kumari, 678.
———— Nath *v.* Kali Proshad, 626, 779.
———— ———— *v.* Nagendra, 647.
———— ———— *v.* Parameswar, 241.
Mohesh Lal *v.* Mohunt Bawan Das, 557, 574.
Mohideen *v.* Muhammad Mustappah, 272.
———— Ravuthar *v.* Jayarama Aiyar, 699.
Mohidin *v.* Shivlingappa, 60.
———— Pichai *v.* Meera Rowther, 385.
Mohindra Man *v.* Maharaj Singh, 355, 356.
Mohini Debi *v.* Purna Sashi, 183, 193, 606, 607.
———— Mohan *v.* Sarat, 382.
———— ———— Roy *v.* Ramdas Paramhansa, 191.
Mohipal *v.* Lalji, 645.
Mohmad Surjat *v.* Mst. Chandbi, 200, 204, 205.
Mohori Bibee *v.* Dhurmodas Ghose, 2, 39, 361, 748.
———— Bibi *v.* Dharmodas Ghose, 76, 78, 210.
Mohsenuddin *v.* Bhagaban Chandra, 734.
Mohunto Southo Pursad *v.* Rughoo, 628.
Moidin *v.* Avaran, 302.
———— *v.* Oothumanganni, 598.
———— Kutti *v.* Valia, 471.
Moidunni Haji *v.* Madhavan Nair, 449.
Moir, *Re*, Warner *v.* Moir, 150.
Moitheensa *v.* Apsa Bivi, 230, 231.
Mokoda Devi *v.* Umesh Chandra, 208, 213, 214.
Mokoondo Lall *v.* Ganesh Chandra, 99, 125, 127.
Mokund Lall *v.* Goluck Chunder, 509.
Mollaya *v.* Krishnaswami, 200, 204, 609.
Molyneaux *v.* Hawtrey, 28, 312.
Monematha Day *v.* Onanthnanth, 760.
Monica *v.* Subraya Hebbara, 681.
———— Kitheria Saldanha *v.* Subraya, 739.
———— ———— Saldhana *v.* Subraya Hebbara, 678, 683.
Monindra Chandra *v.* Troylucko Nath, 32, 517, 518.
———— Nath *v.* Radha Prosanna, 647.
Monindro Chunder Sirkar *v.* Muneeroodeen Biswas, 700.
Monk *v.* Cooper, 672.
Monmohan *v.* Dwarka Nath, 783.
———— *v.* Hatem Makbul, 737.
Monmatha Nath *v.* Matilal Mitra, 66.
Monmotha Paul *v.* Mohendra Nath, 712.
Monohar Das *v.* Hazarimull, 588.
Montague, *Re*, Faber *v.* Montague, 172.
Monte *v.* Barnes, 23.
Monypenny *v.* Derring, 120, 121.
Mool Chand *v.* Ganga Jal, 245.
———— ———— *v.* Thakurbai, 183.
Moolla & Sons *v.* Rangoon Official Assignee, 16, 296.

M—*contd.*

Moore *v.* Makhan Singh, 648.
——— *v.* Makhan, 738.
——— *v.* Moore, 750.
——— *v.* Smee and Cornish, 732.
——— *v.* Ullcoats Mining Co., 724, 728.
——— *In re*, Trafford *v.* Maconochie, 756.
Moores *v.* Choat, 679.
Moorgate Estates Ltd. *v.* Trower, 497.
Moosa Abdul Habib *v.* Maung Tun, 387.
——— Kutty *v.* Thekke, 648.
Mopurappa *v.* Ramaswami Gramani, 642, 657.
Mora Joshi *v.* Ramchandra, 428.
Moran *v.* Mitu Bibi, 223.
Morarji *v.* Neubai, 131.
Moreland *v.* Richardson, 39.
Moreney, *In re*, 244.
Moreshwar *v.* Dattu, 37, 38, 222.
Morgan *v.* Fernandez, 643.
——— *v.* Govt. of Haiderabad, 27, 38.
——— *v.* Liverpool Corporation, 674.
——— *v.* Milman, 297, 298.
——— *v.* Russel 21.
——— d. Dowling *v.* Bissell, 642.
Morice *v.* Bishop of Durham, 129.
Morley *v.* Bird, 218, 408.
——— *v.* Loughnan, 759.
Moro *v.* Tukaram, 628, 643.
——— Raghunath *v.* Balaji, 459, 534.
Moroney, *In re*, 265.
Morphett *v.* Jones, 280.
Morris *v.* Burroughs, 155.
——— *v.* Debenham, 220.
Morton *v.* Woodfall, 331.
Moss' Empires Ltd. *v.* Olympia (Liverpool) Ltd., 698.
Motanmal *v.* Mahammad, 362.
Mote Ram *v.* Bisheshwar Nath, 468.
Mothiar Mira *v.* Ahmatti Ahmed, 545.
Mothoora Mohun *v.* Ram Lall, 731.
——— Pandey *v.* Ram Ruchaya, 269.
Mothooranath Chattopadhya *v.* Kristokumar, 540.
Moti Begum *v.* Zorazar, 389.
Motibhai *v.* Desaibhai, 9.
Motichand *v.* British India Corporation, 232, 241, 246.
——— *v.* Ikram Ullah, 76.
——— *v.* Sagun, 221, 358, 360.
Moti Lal *v.* Bhagwan Das, 329.
——— *v.* Bijay Lal, 457.

M—*contd.*

Moti Lal *v.* Kartar Singh, 627.
—— Shah *v.* Gandharp Singh, 57.
—— Singh *v.* Deoki Singh, 17.
—— —— *v.* Ramohari Singh, 362.
—— —— *v.* Yar Muhammad, 665, 693.
Motilal *v.* Advocate-General of Bombay, 81.
——— Daga *v.* Ishwar Lal Radha, 186.
——— *v.* Karrabuldin, 246, 253, 254.
——— *v.* Kartar Singh, 625.
——— *v.* Kasambhai, 18.
——— *v.* Kashibai, 264, 265.
——— Jadav *v.* Samal Becher, 420.
——— Pal *v.* Chandra Kumar, 724.
——— Ravichand *v.* Utam Jagjiwandas, 261.
——— Shival *v.* Poona Cotton & Silk Manfg. Co., 11, 255.
Motiram *v.* Bharat National Bank, 375, 380.
——— *v.* Vitai, 353, 364, 380, 381.
Motisha *v.* Hiresha, 39.
Motivahoo *v.* Vinayak, 339, 342.
Motivahu *v.* Mamoobai, 122.
Mottide *v.* Derring, 338.
Motumal *v.* Manghomal, 269, 273.
Moule *v.* Garratt, 683.
Moulvi Ali Hossain Mia *v.* Rajkumar Haldar, 92.
——— Muhammad *v.* Fatimabi Bibi, 99, 756.
——— Osman Ali *v.* Faijian Bewa, 514.
——— Razeeooddeen *v.* Jhubboo, 420.
——— Sayyud Uzhur Ali *v.* Mst. Bebee Ulfat Fatima, 754.
Mountfort, *Ex parte*, 378.
Mower's Trusts, *Re*, 525.
Mozam Shaikh *v.* Ananda Prasad, 629.
Mrinalini *v.* Mohima Chandra, 302.
Mritunjoy *v.* Gopal, 727.
Mst. Abbas Bandi *v.* Saiyed Muhammad, 204.
—— Amina Bibi *v.* Shaik Muhammad Ibrahim, 264, 265, 273.
—— Azizunnissa *v.* Koinal Singh, 427.
—— Banti *v.* Mandu, 115.
—— Barkatunnissa *v.* Debi Baksh, 760.
—— Bhagannah *v.* Chandi Singh, 213.
—— Bolo *v.* Koklan, 145.
—— Chandrani *v.* Lala Sheo Nath, 390.
—— Dhanwanti *v.* Hargobind, 532.
—— Fatima *v.* Raza Ali, 255.

M—*contd.*

Mst. Fazal Nishan *v.* S. Hukum Singh, 461.
—— Hakiman *v.* Mst. Badru-un-nissa, 204.
—— Hardei *v.* Bhagwan Singh, 57, 58.
—— Hira Bibi *v.* Ramdhan Pal, 392.
—— Hoymobutty *v.* Sreekishen, 690.
—— Gasodhar Dusadhin *v.* Mst. Sukurmani, 203.
—— Jhuna *v.* Munshi Tarachand, 239.
—— Jio *v.* Mst. Rukman, 218.
—— Kaniz Fizza *v.* Data Din, 496.
—— Kesar *v.* Mst. Munna, 335.
—— Lakpat Koer *v.* Durga Prasad, 317, 319.
—— Lali *v.* Murli Dhar, 761.
—— Mumtaz-un-nisa *v.* Bhagirath, 317.
—— Murtazai Begam *v.* Dildar Ali, 515.
—— Nanhi *v.* Mst. Ketki, 323.
—— Phool Kuer *v.* Rewari Singh, 546, 548.
—— Pran Dei *v.* Sat Deo Tewaro, 316.
—— Rais-un-nissa *v.* Zorawar, 406.
—— Raj Kuer *v.* Din Dayal, 270.
—— Ramdulari Kuer *v.* Upendra Nath, 239, 253.
—— Ranjhari *v.* Gokul Singh, 288.
—— Razia Begam *v.* Shaikh Muhammad Daud, 657, 664.
—— Sheoratan Koer *v.* Kamta Prasad, 594.
—— Uday *v.* Mst. Ladu, 207.
—— Waleyatunnissa *v.* Mst. Chalakhi, 460.
Msst. Ketki *v.* Dinabandhu, 438.
—— Lalun *v.* Hemraj Singh, 688.
Mt. Abdul Samad *v.* Girdhari Lal, 197.
—— Akli *v.* Mt. Dahe, 290.
—— Amina *v.* Lakmi Chand, 265.
—— Anande *v.* Lala Ram, 243.
—— Balo *v.* Mt. Parbati, 75.
—— Bhagwati *v.* Jagdam, 54.
—— Bibi Alimunissa *v.* Abdul Aziz, 769.
—— Boota *v.* Gur Prasad, 467, 468.
—— Chanda Bibi *v.* Mohanram Sahu, 617.
—— Gomti *v.* Meghraj Singh, 352, 357.
—— Ishro *v.* Naubat Rai, 324.
—— Jaidevi *v.* Sripal, 567.
—— Jeleshwar Kuer *v.* Sheonarayan Sah, 471.
—— Jugshri Kuer *v.* Aftab Chand, 406.
—— Khatun *v.* Tahira Khatun, 359, 605.
—— Kulsum Bibi *v.* Shiam Sunderlal, 263, 266, 755.
—— Mathura Devi *v.* Mohan Lall, 469.
—— Mushraft Begum *v.* Kundan Lal, 19.

M—*contd.*

Mt. Nasiban *v.* Md. Syed, 285.
—— Pran Dei *v.* Sat Deo, 327.
—— Powri *v.* Shiva Paika, 68.
—— Radhe *v.* Ajudhia Pershad, 598.
—— Ramzan Khatun *v.* Mt. Abidu Khalim, 263, 266.
—— Rangit *v.* Peary Lal, 390, 399.
—— Sadigunnissa *v.* Bhagwandan, 533.
—— Sawitribai *v.* Nanhelal, 556.
—— Shamez-un-Nissa Bibi *v.* Sh. Ali Asghar, 200.
—— Sheoraji *v.* Ram Sawari Devi, 81.
—— Subralan *v.* Shabbirali, 230.
Mubarakunnissa *v.* Muhammad Raza, 201, 204.
Muchiram *v.* Ishan Chunder, 46.
—————— Barik *v.* Ishan Chunder Chuckerbutty, 767.
Muckleston *v.* Brown, 73.
Mudara *v.* Muthu Hengsu, 92.
Muddasami Sidappa *v.* Lakshmi, 230.
Mudhoo Soodun *v.* Juddooputty, 230.
Muhamdi Begam *v.* Tufail Hasain, 417.
Muhammad *v.* Birj Bhiari, 181.
—————— *v.* Fakir Chand, 355, 356, 357.
—————— *v.* Kalyana Das, 569.
—————— Abbas *v.* Muhammad Hamid, 540, 541.
—————— Abdul *v.* Dilsukh Rai, 415.
—————— —— *v.* Jairajmal, 406.
—————— —— *v.* Jhouti Mahton, 749, 754.
—————— —— *v.* Nathu, 640.
—————— Afzal *v.* Ghulam Kasim, 167.
—————— Ali *v.* Baldeo, 408, 412.
—————— —— *v.* Jaffer Khan, 391.
—————— —— Sheriff *v.* Venkatapathi, 320.
—————— Ahsan *v.* Umardaraz, 138.
—————— Din *v.* Mst. Sardar Bibi, 201.
—————— Hamiduddin *v.* Shib Sahai, 516.
—————— Hanif *v.* Ishri Prasad, 473.
—————— Hasan *v.* Baidya Nath, 726.
—————— Husain *v.* Hanuman, 551.
—————— —— *v.* Sheodarshan Das, 407.
—————— Ibrahim *v.* Muhammad Aziz, 402.
—————— —— *v.* Nakshed, 319, 320.
—————— Inamullah *v.* Aisha Bibi, 539.
—————— Ishaq Khan *v.* Rup Narain Singh, 511, 514.

M—*contd.*

Muhammad Jaffer *v.* Mazar-ul-ahsan, 217.
——— Jan *v.* Fayaluddin, 114, 194.
——— Khumarali *v.* Ranga Rao, 789.
——— Kumarali *v.* Ranga Rao, 774.
——— Mahmad Khan *v.* Laja Mal, 720.
——— Mashiullah *v.* Jaro, 552.
——— Mian *v.* Thakur Bharat, 536, 537, 538, 598.
——— Mumtaz Ali Khan *v.* Mohan Singh, 638.
——— Mushtag *v.* Banke Lal, 411.
——— Raza *v.* Abbas Bandi, 2, 11, 96.
——— Shafi *v.* Muhammad Said, 201.
——— Sadiq *v.* Ghaus Muhammad, 568, 574.
——— Shah *v.* Jiwan, 355.
——— Siddiq *v.* Muhammad Nuh, 322.
——— ——— *v.* Muhammad Nasir-rullah, 329, 333, 395.
——— Sulaiman *v.* Sakina Bibi, 197, 201.
——— Tabarak Ali *v.* Dalip Narain, 462, 560, 597.
——— Usan *v.* Abdulla, 590, 593.
——— Yahiya *v.* Rashiduddin, 538.
——— Yusuf-ud-din *v.* Queen Empress, 7.
Muhammad-un-nissa *v.* Bachelor, 271.
Muhammed *v.* Uttamchand, 510, 511.
Muharram Ali *v.* Bansi Lal, 738.
Muirhead, *Re*, Muirhead *v.* Hill, 176.
Mujibar Rahman *v.* Isak Surati, 709.
Mujibunnissa *v.* Abdur Rahim, 20.
Mukaram Marwari *v.* Muhammad Hosain, 578.
Mukat Singh *v.* Misra Paras Ram, 722.
Mukh Narain *v.* Ram Lochan, 599.
Mukhram Maiwadi *v.* Bateshwar Mahton, 498.
Mukta Prasad *v.* Mahadev, 460.
Muktakeshi *v.* Ramani Mohan, 421, 460, 535.
Mukteswar *v.* Barakar Coal Co., 278.
Mukund Lal *v.* Sunita, 76.
Mulchand Hazarimal *v.* Hassonmal, 200.
——— Kuber *v.* Lallu Trikam, 563, 616.
——— Nemichand *v.* Basdeo Ram Sarup, 695.
——— *v.* Radhakisan, 568.

Mulchand *v.* Shamdas, 770.
Mul Kunwar *v.* Chattar Singh, 323.
——— Raj *v.* Fazal Imam, 196, 197.
——— ——— *v.* Indar Singh, 210.
Mula Ram *v.* Jiwanda, 267, 271, 273.
Mulkh Raj *v.* Nanak, 253.
Mulla Vittie *v.* Achuthan, 592.
Mullapudi *v.* Venkatanarasimha, 608.
Mulraj *v.* Nanumal, 477, 479.
——— Khatau *v.* Vishwanath, 786.
——— ——— *v.* Viswanath Praburam, 777.
Multanmal *v.* Budhumal, 322.
Mumtaz Begam *v.* Mst. Lachmi, 355.
Munayya *v.* Krishnayya, 330, 331.
Muncherji Furdoonji *v.* Noor Mahomed Bhoy, 479.
Munee Dutt Sing *v.* William Campbell, 669.
Munga Lal *v.* Sagar Mal, 423.
Muni Reddi *v.* Venkata Row, 788.
Munia *v.* Perumal, 76, 295, 626.
——— Goundan *v.* Ramasami, 598.
Municipal Board of Benares *v.* Behari Lal, 60.
——— ——— Cawnpore *v.* Lallu, 60.
——— Corporation of Bombay *v.* Secretary of State, 631.
Municipality *v.* Moradhuj, 285.
Munindra Chandra *v.* Troylucko Nath, 31.
Muniram Bibi *v.* Amjad Ali, 299.
Munir-un-nissa *v.* Akbar Khan, 329, 333.
Munisami *v.* Subbaraya, 73.
——— Naidu *v.* Ammani Ammal, 93.
Munjoori *v.* Akul Mahmud, 3.
Munna Lal *v.* Chuni Lal, 582, 583.
——— ——— *v.* Prakash, 547, 548.
——— ——— *v.* Sarat Chunder, 455.
Munni Bibi *v.* Triloki Nath, 557.
——— Koer *v.* Madan Gopal, 626.
——— Kunwar *v.* Madan Gopal, 76, 295.
Munro *v.* Didcott, 640.
Munshi *v.* Daulat, 427.
——— Bajranji Sahai *v.* Udit Narain, 358, 360.
——— Lal *v.* Ahmed Mirza Beg, 161.
——— ——— *v.* The Notified Area of Barant, 658.
——— Safar Ali *v.* Abdul Majid, 737.
——— Shahed Baksh *v.* Golam Nabi, 61, 70.

M—*contd.*

Munuswami Nayudu *v.* Sagalguno Nayudu, 115.
Muranjani *v.* Karupati, 58.
Murari Lal *v.* Kundan Lal, 761.
Murat Singh *v.* Pheku Singh, 69, 606.
Murli Motiram *v.* Rewachand, 263.
Murlidhar *v.* Parmanand, 230.
Murphy *v.* Hurly, 674.
Murrarrao *v.* Sitaram, 216.
Murray *v.* Jones, 153.
Murti Prasad *v.* Sheo Dat, 529.
Murugesa *v.* Ramasami, 416.
——— Chetti *v.* Chinnathambi, 740.
Musa Miya *v.* Kadar Bux, 764.
Musadee Mahomed *v.* Meerza Ally, 230, 261.
Musahar Sahu *v.* Hakim Lal, 264, 272.
Musaheb Zaman *v.* Inayat Ullah, 466.
Muschamp *v.* Bluet, 92.
Mushrafi Begam *v.* Lala Kundan Lal, 19, 390, 392.
Muskett *v.* Hill, 644, 651.
Mussa Kutti *v.* Rangachariar, 717.
Mussamat Beti *v.* Tantya Singh, 421, 423.
——— Sheoratan Koer *v.* Kamta Prasad, 243.
Mussammat Ram Kaur *v.* Partab Singh, 228.
Mussorie Bank *v.* Raynor, 157.
Musst. Dhanwanti *v.* Hargobind Prashad, 590.
——— Hira Kuer *v.* Palku, 600.
Mustafa Khan *v.* Shadi Lall, 427.
Mutawalli-Wahid Ali *v.* Ashraff, 70.
Mutha *v.* Sami, 518.
——— Ramaswami *v.* Govind Vedayachi, 539.
Muthammal *v.* Razu Pillai, 506, 510.
Muthar Sahib *v.* Kadir Sahib, 774, 789.
Muthia Chetty *v.* Kothandaramaswami, 279.
——— ——— *v.* Sinna Velliam, 326, 328.
——— Raja *v.* Appala Raja, 499.
Muthiah Chetti *v.* Palaniappa Chetti, 265, 269.
——— Chettiar *v.* Doraiswami, 212.
——— ——— *v.* Official Receiver, Tinnevelley, 394.
Muthu *v.* Natravarthi, 84.
——— Veejia Raghunatha *v.* Venkatachellam, 386.
——— Vijia *v.* Vancata Chellam, 359.
Muthukamara Chetty *v.* Anthony, 756.
Muthukannu *v.* Shunmugaveli, 74.
Muthukaruppa *v.* Muthu, 302.
Muthukrishnaier *v.* Veeraraghava Iyer, 676, 779, 785.
Muthukumara *v.* Anthony, 96.
Muthurakoo *v.* Orr, 671.
Muthuraman *v.* Ponnuswamy, 57.
——— Chetty *v.* Ettappasami, 415.
Muthusami *v.* Prince Alagia, 71.
——— Pillay *v.* Srinivasier, 649.
Muthuswamy *v.* Arasayee, 539.
——— *v.* Loganatha, 278, 291.
——— Chettiar *v.* Krishna Aiyar, 463.
——— Pillai *v.* Sandana Velan, 209.
Muthuvaiyan *v.* Sinna Samavaiyan, 709.
Muthuvasu Chettiar *v.* Velu Muruga Nadar, 273.
Muthuveeru *v.* Vythilinga, 54.
Muthuvelu *v.* Vythilinga, 357.
Mutsaddi Lal *v.* Mohammad Hanif, 295.
Mutty Lal *v.* Nandu Lal Neoji, 459, 528, 533, 539.
Mutu Ramanadan *v.* Vava, 132.
Mutura Kanto *v.* Meanjan Mundul, 671.

N

N.S.P.R.M.S.P. Firm *v.* Allaudin, 272, 273.
N. V. N. Natchiappa Chettyar *v.* Ko Tha Zan, 617.
Naba Krishna *v.* Mohit Kali, 8, 242.
——— Kumari *v.* Behari Lal, 636.
Nabadweepchandra Das *v.* Lokenath Roy, 394, 750.
Nabakumar Datta *v.* Trailokya Nath Bose, 715.
Nabin *v.* Raj Coomar, 353.
——— Chandra *v.* Munshi Mander, 664.
——— ——— *v.* Rajani Chandra, 109, 194.
——— Das *v.* Koylas Chunder, 699.
Nabinchandra *v.* Krishna, 339.
——— Chakrabarti *v.* Rameschandra, 739.
Nabjan Sardar *v.* Neburali Molla, 95.
Nabob Amiruddaula *v.* Nateri, 756.
Nabu Mondul *v.* Cholim Mullik, 77, 635, 687.
Nadershaw *v.* Shirinbai, 412, 420, 492, 493, 494, 544, 549.

N—*contd.*

Nafar Chandra *v.* Kailash, 112.
——— ———*v.* Ram Lal, 84.
——— ———*v.* Ram Lal Pal, 677.
——— ———*v.* Ratan, 128.
——— ———*v.* Pal *v.* Shukur, 196.
Nagamma *v.* Venkataramayya, 18, 391.
Naganna *v.* Appalaraju, 281.
Nagappa *v.* Badridas, 67, 773.
——— *v.* Venkat Rao, 732.
——— Chetty *v.* Maung Po Gwe, 243.
Nagardas *v.* Ahmed Khan, 339, 670.
——— *v.* Ganu, 727.
——— Saubhagydas *v.* Ahmed Khan, 323.
Nagathal *v.* Arumugam, 543, 546.
Nagayyar *v.* Govindayyar, 558, 559.
Nagendra *v.* Rabindra, 61.
——— *v.* Sarat Kamini, 242.
——— Chettiar *v.* Lakhsmi Ammal, 593.
Nagendrabala Dasee *v.* Punchanan Mouric, 230.
Nageshar Bux *v.* Bengal Coal Co., 85.
——— Prasad *v.* Raja Pateshri, 201.
——— Rai *v.* Nand Lal, 439.
——— Tewari *v.* Gudar Singh, 250, 252.
Nageshwar Prasad *v.* Bachu Singh, 391.
Nageswara *v.* Srinivasa, 377, 379.
Nagindas *v.* Nanabhai, 357.
——— Sankalchand *v.* Bapalal Purshottam, 710.
Nagorao Nimbaji *v.* Jogeshwar Murlidhar, 200.
Nahanchand *v.* Modi, 17.
Nahar Lal *v.* Baij Nath, 20, 393.
Naima Khatun *v.* Basant Singh, 330, 331.
Nainapillai *v.* Ramanathan, 227, 637, 638.
Nainappa *v.* Chidambaram, 551, 600.
Najibulla *v.* Nasir, 35.
——— *v.* Nusir Mistri, 354.
Najm-un-nissa *v.* Ajaib Ali, 305.
Nakchedi Ram *v.* Ram Chariter, 464, 471.
Nakhela *v.* Kokaya, 68.
Nakta Ram *v.* Chiranji Lal, 417.
——— ——— *v.* Moti Ram, 621.
Nallakumara Goundan *v.* Pappaya Ammal, 241, 245.
Nallamuttu Pillai *v.* Betha, 301.
Nallana *v.* Pallani, 366.
Namasivaya Gurukkal *v.* Kadir Ammal, 64, 773.
Nammalwar Chetty *v.* Krishnasamy, 363.

N—*contd.*

Namtulla *v.* Safiabu, 291.
Nana *v.* Anant, 389, 392.
Nanabhai *v.* Pestanji, 647.
Nanak Chand *v.* Gendu Ram, 214.
——— ——— *v.* Kishan Chand, 64.
Nanack Chand *v.* Teluckdye Koer, 593.
——— ——— Kishore Lal *v.* Ram Sarup Gujar Mal, 774.
Nanchi *v.* Shititi, 438.
Nand Bahadur *v.* Sitaram, 471.
——— Gopal *v.* Batuk Prasad, 101, 191, 195.
——— Kishore *v.* Anwar, 32.
——— ——— *v.* Lallu, 250.
——— ——— *v.* Raja Hari, 415.
——— ——— *v.* Ram Sarup, 176.
——— Kumar *v.* Ganesh Das, 59.
——— Lal *v.* Suraj Prasad, 750.
——— ——— *v.* Hanuman Das, 644.
——— ——— *v.* Mt. Karam Bibi, 196.
——— Ram *v.* Purshotam Das, 323.
Nanda Lal *v.* Abdul Aziz, 32, 516, 518.
Nandan *v.* Jumman, 444.
Nandi *v.* Sarup Lal, 230.
——— Singh *v.* Sita Ram, 755.
Nandlal Bhimji *v.* Anant Govind, 651.
——— *v.* Dharmdeo, 361.
——— *v.* Sunder Lal, 81, 196.
Nandram *v.* Babaji, 416.
Nandramdas *v.* Zuleka Bibi, 269.
Nandu *v.* Chand Datt, 754.
Nandubai *v.* Gau, 774.
Nanhi *v.* Ketki, 323.
Nanhuji *v.* Chimna, 387.
Nani Bibee *v.* Hanizullah, 36.
Nanjamma *v.* Nancharammal, 229.
Nanjappa *v.* Peruma, 230.
——— *v.* Ranga Swami, 678, 683, 739.
Nanke Lal *v.* Ram Bharose, 17.
Nanku Prasad *v.* Kamta Prasad, 467.
Nannu Mal *v.* Ram Chunder, 439, 488.
Nanu *v.* Manchu, 544.
——— Naik *v.* Kantan Ashta, 468.
——— Nair *v.* Ashta, 507.
——— *v.* Raman, 9, 380.
Naorang Sing *v.* Meik, 665.
Naoroji *v.* Kazi Sidick Mirza, 74.
Narahari *v.* Korithan, 211.
Narain *v.* Badi Roy, 62.
——— *v.* Jagan, 402.
——— Chandar *v.* Dataram Roy, 36, 44.
——— Coomary *v.* Ramkrishna, 643.

N—*contd.*

Narain Das *v.* Abinash Chunder, 411.
——— *v.* Dharam Das, 702, 739.
——— *v.* Mst. Dhania, 76, 295, 301, 626.
——— *v.* Murli Dhar, 605.
——— Prasad *v.* Narain Singh, 572.
——— Singh *v.* Imam Din, 253.
Naraina *v.* Shivu Rao, 505.
——— *v.* Vasudeva, 732.
Naranappa *v.* Samarcharlu, 9.
Narandas *v.* Bai Saraswati, 154.
——— *v.* Tejmal, 773.
Naranjan Singh *v.* Dharm Singh, 58.
Naraprath *v.* Parambali, 196.
Narasamma *v.* Subbarayudu, 20, 35, 393.
Narasappa *v.* Hussain Sab, 10, 299.
Narasayya *v.* Guruvappa, 393.
——— *v.* Raja of Venkatagiri, 227, 234, 638.
Narasiah *v.* Venkataramiah, 387.
Narasimha Chari *v.* Gopala Ayyangar, 649.
——— Rao *v.* Seshayya, 397, 403, 408, 434, 515.
——— *v.* Venkatalingum, 50, 751.
Narasimham *v.* Madhavarayudu, 54.
——— *v.* Narayana Rao, 276.
Narasimhamurti *v.* Maharajah of Pittapur, 268.
Narasimma *v.* Anantha, 61.
——— *v.* Lukshmana, 714.
Narasimudu *v.* Basava Sankaram, 212.
Narsing *v.* Pachu, 322.
Narasingerji *v.* Panaganti, 46, 69, 326, 355, 357.
Narasingh *v.* Achhaibar Singh, 411.
Narasingha *v.* Prolhadman, 16.
Narayan *v.* Ali Saiba, 95, 685.
——— *v.* Bapu, 32.
——— *v.* Chintaman, 72, 444.
——— *v.* Ganesh, 228, 232.
——— *v.* Gobind, 254.
——— *v.* Gopalrao, 74.
——— *v.* Handu, 717, 731, 732.
——— *v.* Kalgaunda, 62.
——— *v.* Kashi, 652.
——— *v.* Lakshmandas, 392, 604.
——— *v.* Laxuman, 300.
——— *v.* Mangesh, 720.
——— *v.* Nallamal, 529.
——— *v.* Nathaji, 216.
——— *v.* Nathmal, 569.

N—*contd.*

Narayan *v.* Pandurang, 430.
——— *v.* Parameshvarappa, 569, 578.
——— *v.* Posha Jama, 560.
——— *v.* Purushottam, 197.
——— *v.* Rowji, 403.
——— *v.* Vasudev, 16.
——— Das Khettry *v.* Jatindranath, 20, 676.
——— *v.* Parasram, 704.
——— Dasappa *v.* Ali Saiba, 717.
——— Lakshman *v.* Bapu, 565.
——— Ramkrishna *v.* Vigneshvar, 357.
——— Singh *v.* Niranjan Chakravarti, 62, 63.
——— Sahu *v.* Krishna Sahu, 543.
——— Sao *v.* Mt. Chatterbai, 458.
——— Swami *v.* Lakshmi, 300.
——— *v.* Rama Swamy, 544.
——— Venkoba *v.* Pandurang, 588.
——— Visaji *v.* Lakshuman, 638.
——— Vithal *v.* Ganoji, 380.
Narayana *v.* Narayana, 731.
——— *v.* Official Receiver, 264.
——— *v.* Raghavamal, 384.
——— *v.* Ram Aiyar, 200.
——— *v.* Ranga, 61.
——— *v.* Venkataramana, 371.
——— *v.* Viraraghavan, 266.
——— Aiyar *v.* Sankaranarayana Aiyar, 230.
——— Ayyangar *v.* Orr, 648.
——— Kutti *v.* Pechiammal, 551, 571, 573.
——— Pillai *v.* Ramaswamy, 23.
——— Reddi *v.* Peda Rama, 322.
——— Sa *v.* Balaguruswamy, 24, 377.
Narayanan *v.* Kannan, 99, 756.
——— *v.* Krishna Patter, 678.
Narayanbhat *v.* Davlata, 635.
Narayanaswami Ayyar *v.* Rama Ayyar, 227, 231.
——— *v.* Vellaya, 346.
v. Yerramilli, 664.
Narayen *v.* Laxuman, 12.
——— *v.* Nallamal, 527.
Narbadabai *v.* Mahadeo, 64.
——— *v.* Mahadeo Narayan, 763.
Narendra *v.* Acchaibar, 671.
——— Chandra *v.* Manindra Chandra, 665, 692.
Narindra Bahadur *v.* Khadim Hussain, 363.
Naro Hari *v.* Vithal Bhat, 424, 428.

N—*contd.*

Narotam Das *v.* Sheo Pergash, 363, 466.
—— —— *v.* Thakur Sukhraj Singh, 498.
Narpad Singh *v.* Mahomed Ali, 219.
Narpat *v.* Ram Saran, 381.
Narratan Lal *v.* Stephen, 262.
Narsing *v.* Narayan, 405.
—— Dayal Sahu *v.* Ramnarain Singh, 634.
Narsingh *v.* Achhaibar, 408.
—— Partab *v.* Mohammed Yakub, 380, 381, 474.
—— Prasad, *v.* Rupan Singh, 401.
—— Rao, *v.* Mahalakshmi, 159.
Narsinhamurthi *v.* Satyanandan, 607.
Narsinhamurti *v.* Maharaja of Pittapur, 274.
Narso *v.* Nagava, 50.
Narul Hasan *v.* Mahbub Bux, 472, 473.
Nasarwanji, *v.* Nasarvanji, 671.
Nash, *Re*, Cook *v.* Frederick 112, 168.
Nasib Ali *v.* Munshi Wajed Ali, 755.
Nasiruddin *v.* Ahmad Husain, 565.
—— *v.* Umerji Adam & Co., 690.
Nasirul Huq *v.* Fayuz-ul-Rahaman, 56.
Nataraja *v.* South Indian Bank, 17.
—— *v.* Lakshamma, 517.
Natcheappa *v.* Irrawaddy Flotilla Co., 789.
Natesa *v.* Tangavelu, 17, 21.
—— Aiyar *v.* Appavu, 336, 339, 342.
—— —— *v.* Sahasrana, 361.
—— Chetti *v.* Vengu Nachiar, 664.
—— Thevan *v.* District Board of Tanjore, 229.
—— Vanniyan *v.* Gopalswami, 115, 191.
Natesan Chetti *v.* Soundararaja, 329.
Natesha Chettiar *v.* Subbunarayan, 245.
Nath *v.* Mirza Abdul, 443.
Natha *v.* Dhunbaiji, 16, 262, 269.
—— *v.* Hamid Ali, 338.
—— *v.* Maganchand, 269, 271, 272.
—— *v.* Thakur, 67.
—— Gulab *v.* Shaller, 750, 753.
—— Sing *v.* Chunilal, 371.
Nathaji *v.* Nana, 237.
Nathan Lal *v.* Durga Das, 609.
Nathmal *v.* Nilkanth, 590, 591.
Nathu *v.* Gulabchand, 295, 301.
—— *v.* Hansraj, 63, 68.
—— *v.* Ramchandra, 240.
—— Khan *v.* Burtonath, 316, 318, 338.
—— Lal *v.* Gomti Kuar, 357.
Nathu Mal *v.* Har Dial, 743.
—— Miah *v.* Nand Rani, 23.
—— Ram *v.* Shadi Ram, 401.
—— Singh *v.* Anandrao, 241, 246.
—— —— *v.* Lachu Singh, 447.
Nathuni Prosad *v.* Anwar Karim, 712.
Nathwa *v.* Kanhiya, 407, 430.
National Bank *v.* Paul Hamilton Joseph, 36.
—— —— of Australia *v.* United Hand in Hand Co., 480.
—— —— of India *v.* Nazir Co., 379.
—— Electric Theatres Ltd. *v.* Hudgell, 699.
—— Insurance Co. *v.* Haridas Basu, 11, 788.
—— Provincial Bank *v.* Games, 9.
—— —— —— of England *v.* Games, 492.
—— —— —— of England Marsh, *Re*, 341.
Natraja *v.* South Indian Bank, 86.
Nattu *v.* Annangara, 462.
—— Miah *v.* Nand Rani, 23, 85.
Naubat Lal *v.* Mahadeo Prasad, 347, 491.
Naulaki *v.* Jai Kishan, 81.
Naundidh *v.* Mahadeo Singh, 406.
Naunihal *v.* Rameshar, 235.
Nava Kishore *v.* Madan Mohan, 684.
Navakotti *v.* Lagalinga, 362.
Navalram *v.* Javerilal, 636.
Navnit Lal *v.* Baburao, 729.
Navroji *v.* Perorbai, 218.
Nawab Azimut Ali *v.* Jowahir Singh, 425.
—— Bahadur of Murshidabad *v.* Karnani Industrial Bank, 71.
—— Jahan *v.* Mirza Shujauddin, 528, 537, 600.
—— Sidhee *v.* Rajah Ojhoodhyaram, 500.
—— Syed Mohammad Raza *v.* Bilquis Jehan Begam, 572.
—— Zain-ul-abdin Khan *v.* Muhammad Asghar Ali Khan, 254.
Nawal Kishore *v.* Sarju, 320.
—— —— *v.* Agra Municipality, 32, 609, 611.
Nawrang Singh *v.* Janardan Kishor, 724.
Nazani Din *v.* Ram Sukh, 619.
Nazir Hassan *v.* Matinuzzaman, 65.
Naziunnisa *v.* Asafa, 462.
Neale *v.* Mackenzie, 690, 691, 693.

N—*contd.*

Neale *v.* Wyllie, 677, 696.
Neathway *v.* Reed, 146.
Neba Ram *v.* Muhammad Hussain, 407.
Neelamegam *v.* Govindan, 524.
Neelakandhan *v.* Ananthakrishna Ayyar, 403, 602.
Neelakantam *v.* Madasami, 392, 604.
Neelima Basu *v.* Joharlal Sarkar, 19, 390.
Neesom *v.* Clarkson, 227.
Nehaloonissa *v.* Dhunnoo Lall, 734.
Neison *v.* Liverpool Brewery Co., 674.
Nellore Municipality *v.* Dwarapally Kotamma, 318, 334.
Nelson *v.* Haunmam, 442.
Nemai Chandra *v.* Mahomad Basir, 536.
Nemdhari *v.* Bissessary, 394.
Nemichand *v.* Ganesh, 353.
Nepal Chandra Ghose *v.* Mohendra Nath, 688.
Nepra *v.* Sayer Pramanik, 1, 18.
Nesbit *v.* Maplethorpe Urban Council, 671.
Netrapal Singh *v.* Kalyan Das, 95, 685, 717.
Netta Karuppa *v.* Kumara Sami, 453.
Newbolt *v.* Bingham, 732.
Newby *v.* Sharpe, 666, 667.
Newcastle-upon-Tyne Corporation *v.* Attorney General, 277.
Newcomb *v.* Bonham, 397.
Newman *v.* Newman, 166.
Newsholme Bros. *v.* Road Transport and General Insurance Co., 40.
Nga Hoong *v.* The Queen, 1.
—— Kye *v.* Nga Po Min, 384.
Niader Singh *v.* Ram Chander, 447, 449.
Niamat Rai *v.* Din Dayal, 181.
Niaz Ahmed *v.* Mangulal, 361.
Nibaran Chandra *v.* Parbati, 549.
Nicholl *v.* Tarinee Churn Bose, 701.
Nicholson *v.* Smith, 711.
Nickells *v.* Atherstone, 715.
Nidha Sah *v.* Murli, 354, 360.
Nidhashah *v.* Murli Dhar, 433, 639.
Nidhee Kristo Bose *v.* Nistarini Dossee, 636, 648.
Nidhi Krishna *v.* Ram Doss, 741.
Nidhiram *v.* Sarbessur, 590.
Nidhoomoni Debya *v.* Saroda, 761.
Niharmala Debee *v.* Sarojbandhu Bhattacharjya, 592.
Nijalingappa *v.* Chanbasawa, 441.
Nikka *v.* Gardner, 493, 495.

N—*contd.*

Nil Madhab *v.* Narattam Sikdar, 95, 96, 685, 717.
Niladri Sahu *v.* Mahant Chaturbhuj Das, 180.
Nilakant *v.* Suresh, 253.
Nilakanta *v.* Krishnasami, 784.
Nilawa *v.* Krishnappa, 493.
Nilcomal Pramanick *v.* Kamini, 453.
Nilkamal *v.* Kamakshaya, 217.
—— *v.* Shri Gunomani, 326.
Nilkant *v.* Suresh Chunder, 420, 457.
—— Sein *v.* Shekh Jaenoddeen, 509.
Nilkanth Balwant *v.* Vidya Narasingh Bharati, 453.
Nilkanthrao Laxmanrao *v.* Satyabhamabai, 345.
Nillumbher Mustophy *v.* Doorgachurn, 688.
Nilmadhab *v.* Hara Proshad, 301, 316, 327.
—— Bose *v.* Ananta Ram, 722.
Nilmamud Sardar *v.* Boul Dass, 644.
Nilmani Addy *v.* Dinendranath Das, 313, 314, 340.
Nilmoni Singh *v.* Bakranath Singh, 62.
Nilo Pandurang *v.* Rama, 565.
Nilratan Mandal *v.* Ismail Khan Mahomed, 636, 637, 715.
Nilu *v.* Asirbad, 462.
Nimchand Baboo *v.* Ashutash Dutt, 498.
Nind *v.* Nineteenth Century Building Society, 733.
Nirmal Chunder *v.* Saratmani, 390.
—— Kunwar *v.* Sant Lal, 499.
Nirman Singh *v.* Lal Rudra, 300.
Nisar Ahmad Khan *v.* Manjur Ahmad, 537, 598.
Nisar Husain *v.* Sundar Lal, 242, 250, 252.
Nisbet and Pott's Contract, *In re*, 188.
Nissar Ahmad Khan *v.* Raja Mohan Manucha, 361, 467.
Nistarini Debya *v.* Behary Lal, 145.
Nitai *v.* Champaklata, 298, 300.
Nitya Gopal *v.* Nani Lal, 16, 59, 61.
Nityahari *v.* Dunne, 84.
Nizamuddin *v.* Mumtazuddin, 722, 739.
Noakes *v.* Rice, 397, 398, 404.
Nobin Chandra *v.* Nawab Ali, 115, 194.
—— —— *v.* Surendra, 226.
Nocoordas *v.* Jewraj, 736.
Nogendra Nandini *v.* Benoy Krishna, 751.
Noorang Singh *v.* Meik, 668.
Noorijan Sardar *v.* Bimola Sundari, 690, 693.

N—*contd.*

Norender Narain *v.* Dwarka Lal, 366, 425, 457, 551.
Norendra Nath *v.* Kamalvasini Dasi, 145.
Norfolk County Council *v.* Child, 651.
Norman *v.* Ricketts, 690.
Norris *v.* Le Neve, 40.
——— *v.* Marshall, 384.
——— *v.* Wilkinson, 378.
North of England Oil Cake Co. *v.* Archangel Insurance Co., 786.
Northern Countries of England Fire Insurance Co. *v.* Whipp, 30.
——— Press & Engineering Co. *v.* Shepperd, 24.
Norton *v.* Florence Land & Public Works Co., 360.
Nottage, *Re*, Jones *v.* Palmer, 129.
Nottidge *v.* Derring, 321.
Nottingham Patent Brick & Tile Co. *v.* Butler, 191, 311, 313, 341.
Novakotti *v.* Logalinga, 76.
Nowroji Pudumji *v.* Putlibai, 145.
Noyes *v.* Pollock, 504, 509.
Noyna Misser *v.* Rupikun, 700, 739.
Nrishinha Kumar Sinha *v.* Deb Prosanna Mukherji, 487.
Nrisingha *v.* Rajniti, 487.
Nubeen Chunder *v.* Bhoobun, 83.
Nuddyarchand Shaha *v.* Meanjan, 671, 672.
Nuffer Merda *v.* Ram Lall, 253.
Nugender Chunder Ghose *v.* Sreemutty Kaminee, 557.
Nunburnholme (Lord), *Re*, Wilson *v.* Nunburnholme, 142.
Nund Kishore *v.* Kance Ram, 53, 54.
——— Ram *v.* Mauno Bibee, 643.
Nundeepat Mahta *v.* Urquhart, 788.
Nundo Lall *v.* Prosunno, 355.
Nundoo Kumar *v.* Banomali Gayan, 227, 234.
Nunn *v.* Fabian, 281.
Nur Mahomed *v.* Dinshaw, 195.
——— Mahommad *v.* Ahmad Alikhan, 688.
Nura Bibi *v.* Jagat, 597.
Nursing *v.* Raghobar, 25.
——— Das *v.* Chutto Lall, 310.
——— Narain *v.* Baboo Lukputty, 504.
Nuwal Kishore *v.* Syyud Inayat Ali, 510.
Nuzbat-ud-daula *v.* Dilband Begam, 240.
Nya Hoong *v.* The Queen, 1.
Nyamutoola *v.* Gobind Churn, 701.
Nyaunglebin Co-operative Bank *v.* Maung Ba U, 533.
O.M.O. Chetiar Firm *v.* Ma Mai Jain, 273.
Oakes *v.* Turquand and Harding, 262.
Oastler *v.* Henderson, 715, 716.
Obla Sundaracharïar *v.* Narayanna Ayyar, 379.
Ochhavlal *v.* Gopal, 721.
Ockenden *v.* Henly, 339.
Odayar *v.* Subramania Aiyer, 225.
Odoy Churn *v.* Bhajoshury, 430.
Official Assignee *v.* Abdul Hussaein, 225.
——— ——— *v.* Badri Narayan, 377.
——— ——— *v.* Cowasji Dinshaw, 447.
——— ——— *v.* Hukumchand, 774.
——— ——— *v.* Punjab National Bank, 487.
——— ——— *v.* Thompson, 777.
——— ——— of Bombay *v.* Chimniram Motilal, 387
——— ——— ——— *v.* Shroff, 102.
——— ——— ——— *v.* Sundarachari, 275.
——— ——— Calcutta *v.* Jagabandhu Mullick, 221, 595.
——— ——— Madras *v.* Sampath Naidu, 55.
——— ——— ——— *v.* Vedvalli Thayarammal, 144, 153, 154.
Official Receiver *v.* Lakshman, 17, 384.
——— ——— *v.* Palaniswami Chetty, 275.
——— ——— *v.* Subbamma, 248.
——— ——— *v.* Subbayya, 274.
——— ——— *v.* Samudravijayam, 99.
Ogilvie, *Re*, Ogilvie *v.* Ogilvie, 168.
Okhomoney Dasee *v.* Nilmoney, 153.
Oliver *v.* Hinton, 31, 517.
Oliver's Settlement, *In re*, Everad *v.* Leigh, 168.
O'Mahoney *v.* Burdett, 145.
Om Prakash *v.* Makhtar Ahmed, 363.
O'Reilly *v.* Thompson, 280.
Onkar Mal *v.* Secretary of State, 231.
——— Prasad *v.* Badri Das, 684.
——— Ram Shet *v.* Goverdhan, 353, 364.
Oodit Narain *v.* Hudson, 688.
Oonoung *v.* Moung, 378, 380, 456.
Ooppath, Naramparembath *v.* Koyakutti, 500, 508.
Orr *v.* Mrithyunjaya, 701.
Osborne *v.* Bradley, 189.

O—*contd.*

Otter *v.* Vaux (Lord), 566.
Owen *v.* Homan, 613.
Oxley *v.* James, 633.

P

P. L. T. A. R. Chettyar Firm *v.* Maung Kyaing, 201.
P. M. P. M. Chettyar Firm *v.* Siemens Ltd., 488.
P. R. P. R. Somasundaram Chettiar *v.* Y. P. N. Nachappa Chettiar, 393.
P. R. Somasundram Chettiar *v.* Y. P. N. Nachiappa Chettiar, 604.
P. S. A. Alagan *v.* Maung Po Peik, 465.
P. S. S. M. K. T. Chethiresan Chettiar *v.* N. S. Nadhiappa Chettiar, 516.
P. V. Chetty Firm *v.* Motor Union Insurance Co., 224, 509.
Paban *v.* Badal, 391.
Pachamuthu *v.* Chinnappan, 276.
Packard, *Re*, Packard *v.* Waters, 151.
Padabaya *v.* Baji, 386.
Padarath Halwai *v.* Ram Nain, 519.
——— *v.* Ram Nain, 18.
Padbury *v.* Clark, 172.
Padmakumari *v.* Nanda Padhan.
Padmanabh Bombshenvi *v.* Khemu Kumar, 501.
Padmanabha *v.* Sitaram, 113, 367.
Padmanabho Ayyar *v.* Sitarama Ayyar, 116.
Padmanabhaya *v.* Ranga, 724, 728.
Page *v.* Linwood, 504.
——— *v.* Midland Rly., 323.
Pahlwam Singh *v.* Ram Bharose, 754.
Pain *v.* Coombs, 280.
Paine *v.* Weller, 333.
Pakija Bibi *v.* Adhar Chandra, 218.
Palin Behari *v.* Ram Ranjan, 682.
Pal Singh *v.* Bhola Singh, 419, 441.
——— *v.* Sunder Singh, 560.
Palamalai Mudaliyar *v.* South Indian Export Co., 265, 266, 271, 273, 565.
——— *v.* South Indian Export Co., 245.
Palani *v.* Masakonan, 216.
——— Chetti *v.* Subramanayan Chetti, 246.
Palaniandi *v.* Apparu, 276.
Palaniappa *v.* Lakshmanan, 51, 388.
——— *v.* Official Receiver, 273.
Palaniyappa *v.* Subbaraya, 357.

P—*contd.*

Palawan *v.* Kanu, 789.
Pale Zabaing Rural Co-operative Society *v.* Maung Thu Daw, 225.
Palikandy *v.* Krishnan, 48, 53, 64, 769.
Paliyadi Rajagopala *v.* Karrupiah, 512.
Palingundlu *v.* Geddam, 278.
Pallayya *v.* Ramavadhanulu, 748, 749, 751, 674.
Palmer *v.* Johnson, 320, 338, 343.
Pan Kuer *v.* Ram Narain, 109.
Panachand *v.* Manohar Lal, 231.
Panadai Pathan *v.* Ramasami, 740.
Panaganti Ramarayaningar *v.* Maharaja of Venkatgiri, 382, 431, 433, 435.
Pancham *v.* Kandhai, 250.
——— Lal *v.* Kishen Prasad, 415.
——— Singh *v.* Ali Ahmad, 537, 561, 599.
——— ——— *v.* Balak Ram, 197.
Panchan *v.* Ansar Husain, 454.
Panchanan *v.* Surendra Nath, 61.
Panchi Das *v.* Ahmedullah, 389, 392.
Pandara Sammadhi *v.* Anatha Krishnaswami, 227.
Pande Satdeo *v.* Ramayan Tewari, 535.
Pandiri Bangaram *v.* Karumoory Subaraju, 208, 210.
Pandit Durga Missir *v.* Baijnath Saran, 516.
——— Ram Lochan Prasad *v.* Musammat Ram Raji, 381.
——— Sheo Narain *v.* Ram Jatan, 415.
Pandiyan *v.* Vellayappa, 382, 398, 399.
——— Pillai *v.* Vellayappa, 228.
Pandji *v.* Sadasheva, 561, 599.
Pandurang *v.* Dadabhoy, 410, 411.
——— *v.* Mahadaji, 547, 548.
——— *v.* Mahadev, 326.
——— *v.* Markandya, 19, 200.
——— *v.* Sakharchand, 591.
——— *v.* Yedneshwar, 652.
Panigatan *v.* Raman, 507.
Pannalal *v.* Rajaram, 551.
Pannambatta *v.* Kalathinpadkil, 508.
Panthar Lead Co., *Re*, 716.
Papala Charkrapani *v.* Latchmi, 384.
Papamma Rao *v.* Pratapakoerkonda, 363, 364, 455, 506.
Papaya *v.* Ramana, 62.
Papiah Naidu *v.* Naganatha, 376.
Papireddi *v.* Narasareddi, 309.
Paradine *v.* Jane, 672.
Paragji *v.* Gauri Shanker, 59.

P—*contd.*

Param Hans *v.* Randhir Singh, 391, 392, 604.
Paramananda Singh *v.* Syjou Singh, 737.
Paramanick's case, 232.
Paramasiva *v.* Krishna, 18, 19, 391.
Paramasivan *v.* Ramasami, 487.
Parameshri *v.* Vitappa, 95, 685, 717, 739.
Parameswaran *v.* Krishnan, 638.
Paras Ram *v.* Mohan Manucha, 30, 375.
——— *v.* Mewa, 561.
——— Choubey *v.* Sheo Dhan Panday, 435.
——— Jaishi Ram *v.* Brij Mohan Lal, 466.
——— Singh *v.* Pandobi, 543, 594.
Parashar *v.* Ganu, 228.
Parasharam *v.* Govind, 16, 366.
Parashrampant *v.* Ram, 35.
Parsottam Das *v.* Syed Ali Haidar, 300.
Parasram *v.* Govind, 17, 366.
Parasurama *v.* Kanhunni, 443.
——— *v.* Muthuswamy, 320.
Parattahath *v.* Parattahath, 710.
Parbati *v.* Baij Nath, 752.
——— *v.* Gobinda, 466.
Parbhu Lal *v.* Chatter, 32, 33.
——— Narain *v.* Babu Beni, 537.
——— Singh *v.* Ramzan, 95, 192.
——— Ram *v.* Tekchand, 653, 705.
Parbutty *v.* Mudho Parol, 16.
Pardas Singh *v.* Dwarka Singh, 416.
Paresh Nath *v.* Nabogopal, 16.
Pargan Pandey *v.* Mahaton Mahato, 370, 381, 471.
Pariakaruppa *v.* Satyanarayanmoorthi, 426.
Paricharaka of a temple—Narasimma *v.* Anantha, 70.
Parkash Narain *v.* Raja Binendra, 262, 276.
Parker *v.* Jones, 685.
——— *v.* Smith, 280.
——— *v.* Sowerby, 169.
Parker, *In re*, Barker *v.* Barker, 142, 143.
Parkinson *v.* Hanbury, 480, 481, 505, 506.
Parmanand *v.* Ghulam Hussain, 339.
——— *v.* Nanulal, 478.
——— Miser *v.* Sahib Ali, 419.
——— Pandit *v.* Mata Din, 405, 439.
Parmananda Singh *v.* Syjou Singh, 660.
Parmanandy *v.* Birkhu, 21.
Parmeshwar *v.* Raj Kishore, 430, 462.
Parmeshwar Singh *v.* Mst. Sureba, 712.
Parnell, *In re*, *Ex parte* Barrel, 335.
Parry and Daggs, *In re*, 90.
Pars Ram Jaishi Ram *v.* Brij Mohan, 466.
Parshram *v.* Laxamibai, 405.
Parshair Lal *v.* Brij Mohan Lal, 610.
Parshotam Parshad *v.* Taiwar Ali, 318.
——— Vishnu *v.* Nana Prayag, 632.
——— Ram *v.* Kesho Das, 19.
Parsons, *Re*, 54.
Parsotam *v.* Cheda Lal, 241.
——— *v.* Jaijit, 493, 495.
——— *v.* Sanchi Lal, 238.
——— Saran *v.* Mulu, 457.
Partab Chand *v.* Saiyida Bibi, 196, 201.
Partap Das *v.* Nand Singh, 92.
Parthasarathy *v.* Subbaraya, 39.
——— *v.* Thiruvengoda, 131.
Paru Amma *v.* Kelu Kurup, 515.
——— Amma *v.* Venkatarama Iyer, 585.
Parvathi Ammal *v.* Govinda Raja, 239, 250.
Parvati *v.* Kisansingh, 237, 253.
——— Ammal *v.* Anga Muthu, 198.
——— *v.* Venkatarama, 560, 564 583.
Paschaud *v.* Paschaud Nixon, 184.
Pashupati Nath *v.* Sachi Nath Roy, 561.
——— Venkatapathi *v.* Venkata Subhadryamma, 59.
Pasupati *v.* Durjudhan, 704.
——— *v.* Narayana, 710.
Patel Ranchod *v.* Bhikhabhai, 356.
Pateshri Pertab *v.* Nageshra, 204.
Patman *v.* Harland, 28, 29, 34.
Patrick, *In re*, Bills *v.* Tatham, 778.
Pattabhiramayya *v.* Ramayya, 538.
Pattabhiramier *v.* Venkatrao, 365, 366, 367.
Pattal Ambadi Marhar *v.* Krishna, 774.
Pattimadaumal *v.* Nanjappu, 240.
Paul *v.* Nathaniel, 184, 754.
——— *v.* Nurse, 682.
Pawan Kumar *v.* Dulari Kuar, 362, 422.
Paya Matathil *v.* Kovamel, 449, 551.
Payne *v.* Burridge, 675.
——— *v.* Cardiff Rural Council, 479.
——— *v.* Grey, 115.
——— *v.* Haine, 626, 697.
Peachy *v.* Duke of Somerset, 730.
Pearce *v.* Morris, 411, 418, 550.
Peare Lal *v.* Lala, 295.
Peari Dai *v.* Naimish Chandra, 290.

P—*contd.*

Peari Mohan v. Audhiraj Aftab Chand, 694.
Pearks v. Mosely, 117.
Peary Lal v. Dina Nath, 566.
——— v. Hub Lal, 327.
——— v. Madhoji Jiban, 178, 226.
——— v. Prithu Singh, 285.
——— Mohan v. Sreenath, 391.
——— Mohun Mukerjee v. Narendra Nath, 611.
——— Pasi v. Gauri Lal, 789.
Pell v. Gregory, 466.
Pellat v. Bossey, 727.
Pembroke v. Thorpe, 280.
Penfold v. Abbott, 667.
Pennant's case, 726.
Penton v. Barnett, 627.
——— v. Robart, 676.
Penumetsa Subbaraya v. Veegusena Seetharamaraza, 81.
Pepin v. Chunder Seekur, 683.
Perayya v. Venkata, 413.
Percival v. Dunn, 776.
Performing Right Society v. London Theatre of Varieties, 51.
Pergash Koer v. Mahabir, 361.
——— Lal v. Akhowri, 177, 688.
Peria v. Subramanian, 722.
——— Karuppan v. Subramanian, 649.
Periamurugapa v. Manicka, 239, 240, 252.
Periandi v. Angappa, 551.
Perianna v. Marudairayagam, 491.
——— Servaigaran v. Marudai Nagayam, 570.
Periyan Chetty v. Govind Rao, 638, 701, 739.
Perlathail v. Makude, 370.
Permanand Bhojraj v. Matumal Phatumal, 337.
Permanandas Jiwandas v. Jamnabai, 480.
Perrin v. Morgan, 749.
Perry v. Chotzner, 696.
——— v. Davis, 728.
——— Herrick v. Attwood, 517.
Pertab v. Nihal Singh, 218.
——— Chunder v. Mohendranath, 304.
Peru Bepari v. Ronuo, 24, 85.
Perumal v. Alagirisami, 453.
——— v. Kaveri, 590, 592.
——— v. Perumal, 17, 86, 355.
——— v. Raman Chettiar, 423, 460, 535.
——— Ammal v. Perummal Naicker, 754, 755.

P—*contd.*

Perumal Ammal v. Perumal, 86, 296, 384.
——— Gramani v. Mohmad Kasim, 227.
——— Reddiar v. Suffiah Thevar, 552, 581.
——— ——— v. Suppiah Thevar, 564.
——— ——— v. Suppiah Thevar, 583.
Pestonji v. Hormusjee, 411.
Peter v. Kendall, 626, 715.
——— v. Prince of Wales Theatre, 674.
Petherpermal v. Muniandy, 260, 262.
Pethu Ayyar v. Sankarnarayana, 243, 253.
Phagoo v. Tulshi, 272.
Phattechand v. Uma, 604.
Pheku Mian v. Syed Ali, 295.
Phelps v. City of London Corporation, 668.
Phene v. Pofflewell, 716.
Phillips v. Caldelengh, 341.
——— v. Mullings, 759.
——— v. Silvester, 316.
Phips v. Ackers, 141.
Phiroshaw Bomanji v. Bai Goolbai, 175.
Phool Kuar v. Murli Dhar, 359, 380.
——— Kuer v. Rambhanjan Singh, 318.
Phul Chand v. Shugan Chand, 595.
Phula Singh v. Harnaman, 425.
Phulchand v. Akbar Yar Khan, 132.
——— v. Chandmal, 358, 361.
——— v. Lakkhu, 754, 759, 760.
——— v. Sandilands, 472.
——— v. Surji, 618.
Phulwanti Kunwar v. Janeshar Das, 53.
Phundan Lal v. Arya Prithi, 751.
Piari Lal v. Hanif-un-Nissa, 255.
Pichai Konar v. Narasimha, 562, 564.
——— Moideen Rowther v. Chaturbhuj Das Kushal Das & Sons, 480.
Pichaiyappa v. Govindaraju, 555, 565.
Pichi Naidu v. Jefferson, 115.
Pichu Vadhiar v. Secretary of State, 223, 482.
Pickard v. Sears, 208.
Pickersgill v. Rodger, 169.
Pierce v. Stinde, 224.
Pigott v. Stewart, 771.
Pile v. Pile, 589.
Pindee v. U Hpa, 37, 288.
Pindiprolu v. Pindiprolu, 54.
Pinero v. Judson, 642.
Pinto v. Narayan, 471.
Pir Baksh v. Kadir Baksh, 237.
Pirbhu Narayan v. Amir Singh, 536.

P—*contd.*

Pirjada Ahmedmiya *v.* Shah Kalidas, 422.
Pirthiraj *v.* Rukmin, 347.
Pitamber *v.* Cassibai, 339.
——— *v.* Vanmali, 477.
——— Gain *v.* Ram Charan, 291.
——— Parkait *v.* Madhu Sudan, 370, 381.
Pitambur *v.* Ram Surun, 470.
Pitcha Kutti *v.* Kamala, 628.
Pitcher *v.* Tovey, 640.
Platt *v.* Mendal, 566.
Pleasant d. Hayton *v.* Benson, 653.
Plews *v.* Samuel, 326.
Plott Chandu *v.* Kolathum, 421.
Plumb *v.* Fluitt, 26.
Plumer *v.* Johnson, 695.
Po Due *v.* K. M. T. T. S. Chetty, 445.
Po Tok Maung *v.* Ma Le War, 290.
Pokardas *v.* Amir, 677.
Pokhar Singh *v.* Dulare Kunwar, 49.
——— ——— *v.* Mst. Dulari Kunwar, 58.
Pokker *v.* Kunhamad, 275.
Pokree Saheb *v.* Pokree Beary, 494, 512.
Pollard's Estate, *Re*, 361.
Ponnambala Pillai *v.* Annamali Chettiar, 415, 422, 534, 539.
Ponnammal *v.* Pichai, 571.
Ponnaya Goundan *v.* Muthu, 298, 300, 301.
Ponniah *v.* Deivanai, 637.
Ponnu Chettiyar *v.* Sambasiva Ayyar, 487.
Ponnuranga *v.* Thandvarya, 364.
Ponnusami Mudaliar *v.* Srinivasa, 421, 460, 535.
Ponuranga *v.* Thandavarya, 354.
Pool *v.* Secretary of State, 632.
Poole *v.* Bentley, 642.
Poomabai *v.* Annamal, 327.
Pooran Chand *v.* Radha Raman, 199.
Poothekka Nachiar *v.* Annamalai Chetty, 769, 785.
Poovamalingam Servai *v.* Veerayi, 223.
Pope *v.* Briggs, 226.
Poreshnath *v.* Ram Jodu, 416.
Port Canning & Land Improvement Co. *v.* Katyani, 642.
Porter *v.* Fry, 158.
Posti Mal *v.* Radha Kisan Lalchand, 461.
Potts and Nisbet's Contract, *In re*, 190.
Powell *v.* Brodhurst, 409.
——— *v.* Kempton Park Race Course Co., 1.
——— *v.* Martyr, cf., 326.
Powell *v.* Powell, 760.
Prabati *v.* Baijnath, 753.
Prabh Dial *v.* Bhai Sawaya, 441.
Prabhakar *v.* Pandurang, 512.
Prabhat Chandra *v.* Bengal Central Bank, 722, 733, 740.
Prabhi *v.* Hamira, 251.
Prabhu Ram *v.* Kameshwar Prasad, 533.
——— ——— *v.* Tek Chand, 706.
Prafulla *v.* Jogendra Nath, 131.
Prag Dat *v.* Chote Singh, 58.
——— Din *v.* Nankan Singh, 499.
Prag Narain *v.* Kadir Baksh, 719, 720, 724.
Prakashchandra *v.* Rajendranath, 724.
Prakash Narain *v.* Raja Binendra, 41.
Pralhadrai *v.* Commissioner of Port of Calcutta, 647.
Pramada Dasi *v.* Lakhinarain Mitter, 171.
——— Nath Roy *v.* Ramani Kanta Roy, 688.
Pramatha Nath *v.* Champa Dasi, 636.
——— ——— *v.* Pradyumna, 50.
——— ——— *v.* Sashi Bhushan, 506.
Pramila Bali Das *v.* Jogeshar, 76, 626.
Pran Krishna *v.* Surath Chandra, 217.
——— Mohan Das *v.* Hari Mohan Das, 286.
——— Nath *v.* Jadu Nath, 390, 392, 604.
Pranballav Shaha *v.* Bhagaban Chandra 396, 422.
Pranjivan *v.* Baju, 237, 250.
Pranjiwandas Mehta *v.* Chan Mah Phee, 377, 378.
Pranlal *v.* Chapsey, 183.
Prannath Roy *v.* Janki Nath Roy, 563.
——— ——— *v.* Rookea Begum, 545.
——— Shaha *v.* Madhu Khulu, 722.
Pranpati *v.* Hasiban, 472.
Prasanna Kumar *v.* Asutosh, 69.
——— ——— *v.* Sri Kantha Rout, 210, 214, 638.
——— ——— Holder *v.* Girish Chandra Ghosh, 472, 507.
Pratap Bahadur Singh *v.* Gajadhar Bakshi Singh, 473.
——— Narain *v.* Harihar Singh, 722.
——— ——— Deo *v.* Maig Lal Singh, 739.
Pratchett *v.* Drew, 487.
Prayad Das *v.* Mohunth Kriparam, 61.
Prayag Narain *v.* Chedi Rai, 616.
Prem Singh *v.* District Board of Rawalpindi, 300.
Premchand *v.* Mokshoda Debi, 177.

P—*contd.*

Premchand *v.* Ram Sahai, 314.
——— Pal *v.* Purnima Dasi, 498.
Premier Confectionery Co. *v.* London Commercial Sale Rooms, Ltd., 686.
Premsingh *v.* Mahomed Khurshid, 419.
——— *v.* Mula Lal, 394.
Prem Sukh Das *v.* Bhupia, 641.
——— ——— *v.* Peerkhan, 241, 580.
——— ——— Gulgulia *v.* Habibulla, 51.
Premsukh *v.* Habibullah, 59.
Preonath *v.* Ashutosh, 32.
——— *v.* Madhu, 355.
Price, *Ex parte*, 275.
Price, *In re*, 108.
Price *v.* Worwood, 726, 727, 728, 730.
Prichard *v.* Wilson, 479.
Priya Lal *v.* Bohra Champa, 590.
——— Nath *v.* Surendra Nath, 635.
Prabadh Kumar *v.* Dautmara Tea Co., 285.
Probodh Kumar Das *v.* Dantmara Tea Co. Ltd., 285.
——— ——— ——— *v.* Gillanders Arbuthnot & Co., 315.
Prodyot Kumar *v.* Gopichandra, 677.
Profulla Chandra *v.* Nanda Lal, 647.
Prokash Chandra *v.* Hasan Banu, 469.
Prolad Teor *v.* Kedar Nath Bose, 672.
Promoda Nath Roy *v.* Srigobind, 636.
Promode Ranjan *v.* Aswini, 95, 96, 685.
Promotha *v.* Kishore, 713.
Promotho Nath *v.* Kali Prasanna, 3, 8, 10.
——— ——— *v.* Ramkishan, 427.
——— ——— Mitter *v.* Kali Prasanna, 714, 740.
Prosonno *v.* Barbosa, 182.
Prosonnomoyi *v.* Kali Das, 698.
Prosser *v.* Edmonds, 65.
Prosunno *v.* Jugut Chunder, 713.
——— Coomar *v.* Jagannath, 636, 701.
——— Coomaree *v.* Sheikh Rutton, 635, 652.
——— Kumari *v.* Golab Chand, 50, 180.
Protap Chandra *v.* Peary Mohon, 420, 427, 551.
——— Narain *v.* Biraj Dasi, 720.
Prothab Chandra *v.* Judisthir Das, 209.
Protina *v.* Dookhie, 75.
Proudfoot *v.* Hart, 697.
Province of Bengal *v.* Hingal Kumari, 16.
——— ——— Bombay *v.* Municipal Corporation of the City of Bombay, 3.

P—*contd.*

Provincial Bill Posting Co. *v.* Lowmoor Iron Co., 23.
Pryce-Jones *v.* Williams, 314, 340.
Prytherch, *In re*, Prytherch *v.* Williams, 429.
Pt. Harikishan *v.* Ratan Singh, 62, 75.
Pt. Ram Lochan Prasad *v.* Mt. Ram Raji, 601.
Pt. Sita Ram *v.* Raj Narayan, 35, 200, 519.
Public Trustee *v.* Lawrence, 448.
Puchha Lal *v.* Kunj Behari, 287, 290, 292, 301, 303.
Puckett and Smiths Contract, *In re*, 311.
Pulaka Veetil Muthalakulain *v.* Thiruthipalla, 392.
Pullamma *v.* Pradosham, 499.
Pulliah Chetty *v.* Varadarajulu, 57.
Pulliyadi Ellarayan *v.* Nagendra, 326.
Pumfrey, *In re*, 611.
Punayya *v.* Venkatappa, 23.
Puncha Thakur *v.* Bindheshri, 59, 61.
Punithavelu *v.* Bhashyam, 254, 387.
Punjab Banking Co. *v.* Muhammad Hassan Khan, 31.
——— National Bank *v.* Chaudhari, 736.
——— ——— ——— *v.* Punjab Corporation Bank, 388.
——— and Sind Bank *v.* Amin Chand, 516.
——— ——— ——— ——— *v.* Kishen Singh, 488, 620.
——— ——— Sindh Bank, Ltd. *v.* Ishar Singh, 375.
Punjaram *v.* Harisao, 65.
Punnaya *v.* Venkatappa, 22, 450.
Punnu Ram *v.* Ghulam Hussain, 407, 430.
Puran Chand Nahatta *v.* Monmotha Nath Mukherji, 249.
——— Mahatan *v.* Bhago Mahtan, 295, 302.
——— Mal *v.* Shiva Lal, 196.
Purasawalkam *v.* Kuddus, 478, 479.
Purbhu Ram *v.* Jhalu Kuer, 409.
——— Nath *v.* Sarju Prasad, 262.
Purbi Din *v.* Hardeo Baksh Singh, 528.
Purchase *v.* Lichfield Brewery, 681.
Purshotam *v.* Dattatraya, 649.
——— Vishnu *v.* Nana Prayag, 571.
Purshottam *v.* Isub Mahomad, 424.
——— *v.* Sagaji, 419.
Purmanandas Jeewandas, *In re*, 700, 711.
——— Jiwandas *v.* Jamnabai, 481.
Purmananddas *v.* Dharsey, 642.

P—*contd.*

Purna Chandra *v.* Ali Mahommad, 726.
——— ——— *v.* Barna Kumari, 51.
——— ——— *v.* Barada, 598.
——— ——— *v.* Kalipada Ray, 750.
——— ——— *v.* Peary Mohan, 408.
——— ——— *v.* Soudamini, 62, 214.
——— ——— Sarbajna *v.* Rasik Chakrabarti, 691.
Purnamal *v.* Venkata, 572, 573, 613, 621.
Purnandu Nath Narayan *v.* Narendra Nath, 701.
Puroma Sooonduree *v.* Prollad Chunder, 631.
Purushottama *v.* Municipal Council, 24, 85.
Purusottam *v.* Panchanan, 740.
Purvendu Nath *v.* Hanut Mull, 201, 205.
Pusamal *v.* Makdum, 629.
Puthenpurayil *v.* Kondiyal, 195.
Putimal *v.* Bhagan, 74.
Putlibai *v.* Sorabji Naoroji, 104.
Pyarilal *v.* Mt. Misri, 209.
Pyrke *v.* Waddingham, 311.

Q

Qamar Jahan Begum *v.* Bansidhar, 285.
Qamaruddin *v.* Mst. Hassan Jan, 754.
Qasim Bux *v.* Bhagwandeen, 441.
Quader Parest Khan *v.* Nur Mahomed, 468.
Quadir Bukhsh *v.* Hakam, 73.
Quaim *v.* Ghulam Din, 231.
Queen *v.* Champney, 3.
——— Empress *v.* Abdul, 7.
——— ——— *v.* Abdulla, 2.
——— ——— *v.* Appavu, 297, 742.
——— ——— *v.* Bal Gangadhar Tilak, 4.
——— ——— *v.* Sheikh Ibrahim, 24, 85.
——— ——— *v.* Sri Churn, 4.
Queen's Club Garden Estates Ltd. *v.* Bignel, 633.
Quesnel Forks Gold Mining Co. *v.* Ward, 317.
Quinion *v.* Horne, 314, 343.
Quinton Dick, *Re,* Lord Cloncurry *v.* Fenton, 158.
Qurban Ali *v.* Ashraf Ali, 194.
——— ——— *v.* Seth Raghubar Dayal, 447.

R

R. *v.* Everist, 639.
R. *v.* Nicholson, 626.
R. *v.* Paulson, 726.

R—*contd.*

R. *v.* Spurrell, 646.
R. *v.* St. George's Union, 645.
R. *v.* Westbrook, 639.
R. *v.* Yarborough (Lord), 671.
R.M.A.R.M. Chettyar Firm *v.* U Htaw, 391.
——— ——— *v.* V.S.P.R.M. Chettyar Firm, 495.
R.M.A.R.S. Chattyar Firm *v.* Daw Ngwe, 330, 331.
R.M.S. Firm *v.* Muthu Swami, 130.
R.M.V.V.M. Chettyar Firm *v.* M. Subramanian, 254.
R.N.M.K. Mutu Kumara Pillay *v.* Veerappa, 51.
R.R.O.O. Chettyar Firm *v.* Ma Sein Yin, 267, 275.
Rachappa *v.* Ningappa, 50.
Rachawa *v.* Shivayogapa, 182.
Rachhea *v.* Upendra, 631.
Rachotappa *v.* Konher Deshpande, 733.
——— Iswarappa *v.* Konher Amarao, 721.
Radha Bai *v.* Kamod Singh, 79, 211.
——— Benode Misser *v.* Kripa Moyee, 511.
——— Charan *v.* Golakchandra, 640.
——— Churn *v.* Parbuttee Churn, 445, 469.
——— Gobind *v.* Rakhal Das, 652.
——— Kishan *v.* Fakharuddin, 595, 616.
——— ——— *v.* Fateh Ali, 390.
——— ——— *v.* Hazarilal, 583.
——— ——— *v.* Khursud Hossein, 221.
——— Kishun *v.* Hem Chandra, 551.
——— Krishna *v.* Madhava, 408.
——— ——— *v.* Muthuswamy, 431.
——— ——— *v.* Official Receiver, 275.
——— ——— *v.* O'Flaherty, 663.
——— ——— *v.* Sheo Dayal, 406.
——— Krishnayyar *v.* Muthuswamy, 398, 427.
——— Mohan *v.* Nripendra Nath, 19, 390.
——— Nath *v.* Taruknath, 99.
——— Pershad *v.* Manohar, 449.
——— ——— *v.* Monohar Das, 591.
——— ——— *v.* Rani Moni, 153.
——— ——— Misser *v.* Monohur Das, 593.
- Pershed *v.* Budhu Dashad, 758.
- Proshad *v.* Esuf, 654.
Radhabai *v.* Anantrao, 62.
——— *v.* Gopal, 183.
Radhakanta Pal *v.* Manmohinee Pal, 219.

R—*contd.*

Radhakishen *v.* Babu Hazarilal, 621.
Radhakrishna *v.* Muthu Swamy, 462.
Radhamadhub *v.* Monohur, 238, 253.
Radhasyam *v.* Sibu, 238.
Radhey Lal *v.* Mahesh Prasad, 207.
——— ——— *v.* Ram Lal, 250.
——— Tewari *v.* Bujha, 553.
Radhika *v.* Radhamani, 241, 252.
——— Mohan Gope *v.* Hari Bashi Saha, 275.
——— Nath *v.* Samir Fakir, 677.
——— Prasad *v.* Ramsunder, 628.
Rafiuddin *v.* Brijmohan, 253.
Raghav Rao *v.* Gopalrao, 285.
Raghava *v.* Samachariar, 319, 323, 338.
——— *v.* Srinivasa, 76.
——— Chariar *v.* Srinivasa, 76, 362, 626.
Raghavachari *v.* Venkatanarayana, 530.
Raghavachariar *v.* Duvvuru Krishna, 346.
Ragho *v.* Dwarka Das, 204.
——— *v.* Hari, 410.
——— *v.* Kasshy, 16.
——— *v.* Narayan, 778, 780.
——— Govind *v.* Balvant, 408, 764.
——— Salvi *v.* Balkrishna, 421.
Raghu *v.* Ashraf, 508.
Raghub Prusti *v.* Bhobin, 546.
Raghubar *v.* Ghasite, 239.
——— Dayal *v.* Budhu Lall, 397, 403, 408.
——— Narain *v.* Mohit Narayan, 514.
——— Singh *v.* Jai Indra, 460, 610.
——— ——— *v.* Jai Indra Bahadur Singh, 50, 358, 604.
Raghubir Datt *v.* Narain Datt, 57.
——— Rai *v.* Jai Rai, 329.
——— Sahai *v.* Banyad Ali, 597.
——— Singh *v.* Jethu Mahton, 630, 712.
——— ——— *v.* Jai Indra Bahadur Singh, 362.
——— ——— *v.* Kumar Rajendra Bahadur Singh, 454.
Raghukul Tilak *v.* Pitam Singh, 332, 610.
Raghunandan Rai *v.* Raghunandan, 412, 439.
——— ——— Prasad *v.* Ajodhya Singh, 560.
——— ——— *v.* Ambika Singh, 449, 551.
Raghunath *v.* Amir Baksh, 389.
——— *v.* Balaji, 462.
——— *v.* Dadaji, 469.
Raghunath *v.* Nathu, 74.
——— *v.* Purnanand, 61.
——— *v.* Sheo Pratap, 422.
——— *v.* Varjivandas, 759.
——— Bhagat *v.* Maghu Mander, 469.
——— Prasad *v.* Jamna, 462, 531.
——— ——— *v.* Jurawan Rai, 596.
——— ——— *v.* Sadhu Saran, 422, 427.
——— Roy *v.* Raja of Jheria, 627.
——— Sahay *v.* Lalji Singh, 566.
Raghupati *v.* Nrishingha, 73.
Raghuvala *v.* Rajalingum, 86.
Ragoonathdas *v.* Morarji, 627, 631.
Ragunath Roy *v.* Baraik, 511.
Rahiman Beebi *v.* Khathoon Bee, 202.
Rahimtulla *v.* Official Assignee, Bombay, 315.
——— *v.* Rasulkhan, 275.
Rahmat Ali *v.* Muhammad Mazhar Hussain, 295.
——— ——— *v.* Shadi Ram, 397, 403.
——— ——— Bibi *v.* Maung Po Kin, 765.
——— ——— Ullah *v.* Md. Hussain, 652, 653, 707.
Rahmatulla Beg *v.* Yusuf Ali, 440.
Rai Bahadur Bansidhar Dhandhania *v.* Kairoo Mandar, 577.
——— ——— Dalip Narayan Singh *v.* Suraj Narayan Misser, 691.
——— Bishenchand *v.* Mst. Asmaida Koer, 118, 269.
——— Charan Shar *v.* Administrator-General of Bengal, 693.
——— Indra Narain *v.* Mohammad Ismail, 603.
——— Rewa *v.* Vali Mahomed, 618.
Raikishori *v.* Debendarnath, 96, 99, 156,
Raimala *v.* Shiba Sundari, 635.
Raimoni *v.* Mathura, 644.
Rainford *v.* James Keith and Blackman Co., Ltd., 40.
Raj Bahadur Singh *v.* Nar Singh, 556.
——— Behari *v.* Kailas, 647.
——— ——— *v.* Kailas Chandra, 652.
——— Cumar *v.* Ali Mia, 699.
——— Kamini Debi *v.* Mukanda Lal, 598.
——— Kishen Mookerjee *v.* Radha Madhab, 237, 253.
——— Kishore *v.* Jadhu Nath, 253.
——— ——— *v.* Jaint Singh, 290.
——— Kumar Bharathi *v.* Surajdev Sahi, 466.
——— ——— Lal *v.* Jai Karan Das, 610.

R—*contd.*

Raj Kumari *v.* Samsuddin, 740.
—— Lukhee Debee *v.* Gokool Chandra, 19, 200.
—— Mohan *v.* Mati Lal, 726, 727, 728.
—— Mohon *v.* Sarada Charan, 507.
—— —— *v.* Abdur Rahim, 391.
—— —— *v.* Khobdari, 742.
—— —— *v.* Panna Chand, 689.
—— —— Ghose *v.* Abdur Rahim, 390.
Raja Avergal *v.* Noor Mahomed, 676.
—— Bahadur Mudaliar *v.* Thiruvengada Mudaliar, 273.
—— Baikunth *v.* Benode Behari, 544.
—— Balvant Singh *v.* Rao Maharaj Singh, 78.
—— Barada Kant *v.* Bhagwandas, 433.
—— Bejoy Singh Dudharia *v.* Tarini Charan Saha, 713.
—— Braja Sunder *v.* Sarat, 461.
—— Gour Chandra *v.* Raja Makunda, 80.
—— Jagadish Chandra *v.* Bhubaneshwar, 415.
—— Janki Nath *v.* Syed Asad Reza, 371, 375.
—— Kamakshya Narain Singh *v.* Ramzanali, 551.
—— Keshee *v.* Satish Chandra, 692.
—— Kishen Datt *v.* Raja Mumtaz Ali, 438, 442.
—— ——Dutt *v.* Narendar, 418.
—— Lal Bahadur *v.* Rajendra Narain, 136.
—— Lalanand *v.* Thakur Munoorujnun, 758.
—— Mohan Manucha *v.* Nisar Ahmed, 361.
—— —— —— *v.* Manzoor Ahmad Khan 361, 467.
—— Mokum Singh *v.* Raja Rup Singh, 70.
—— of Kalahasti *v.* Sree Mohant Prayag, 566, 616, 618.
—— — Karnetnagar *v.* Velayuda, 115.
—— — Karetnagar *v.* Saraavana, 205.
—— — Ramnad *v.* Ramanathaswami, 716.
—— — —— *v.* Subramaniam Chettiar, 65.
—— — —— *v.* Sundara Pandiyasami Tewar, 116.
—— — Venkatagiri *v.* Ayyapareddi, 740.
—— — Vizianagram *v.* Appalaswami, 758.
—— — —— *v.* Maharaja of Jaipur, 707.
Raja of Vizianagram *v.* Rajah Setrucherla, 536, 538, 557, 608.

R—*contd.*

Raja Pappamma *v.* Sitaramayya, 759.
—— Pertab Bahadur *v.* Gajadhar, 368, 472.
—— Pratab *v.* Debi Pershad, 227.
—— Rai Bhagwat Dayal *v.* Ram Ratan Sahu, 233.
—— Ram *v.* Chuni Lal, 416.
—— —— *v.* Jagannath, 606.
—— —— *v.* Khandu, 760.
—— Shri Shiva Prasad *v.* Beni Madhub, 359, 604.
Sir Mahomed Ezaz *v.* Hakim Saiyed, 512.
—— Varma Valia *v.* Kettayath, 72.
—— Sir Mahmud *v.* Hakim Saiydali, 495.
—— Venkataramayya *v.* Kamisetti, 392.
Rajah Lakshmi *v.* Krishna, 366.
—— of Vizianagram *v.* Satrucherla, 528.
—— Kishendatt Ram *v.* Rajaj Mumtaz Ali, 481, 482, 488, 714.
—— Nilmoney *v.* The Government, 758.
—— —— Singh *v.* Kally Churn Battacharjee, 638.
—— Nursing *v.* Roy Koylasnath, 91.
—— Sahib Perhlad *v.* Baboo Budhu, 50, 53, 755.
—— Vurmah *v.* Ravi Vurmah, 61.
Rajagopala *v.* Ranganatha, 82, 88, 331.
—— *v.* Sheik Dawood, 358, 360.
—— Chetty *v.* Sivagani, 263.
Rajagopalan *v.* Somasundara, 745.
Rajai Singh *v.* Randir Singh, 403.
—— Tirumal *v.* Pandla Muthial, 358, 360.
Rajagopalachariar *v.* Thiagaraya, 466.
Rajamannar *v.* Venkata, 187.
Rajammal *v.* Sabapathi, 19.
Rajamanickam Chetty *v.* Abdul Hakim, 65.
Rajamier *v.* Subramaniam, 772.
Rajani Kanta *v.* Bashiram Mestari, 202, 203, 205.
—— —— *v.* Panchananda, 391.
—— —— *v.* Sourendra Nath, 462, 536.
—— Kumar *v.* Gour Kishore, 274, 358, 360.
—— Manna *v.* Satish Chandra, 691.
Rajanikanth *v.* Hari Mohan, 768.
Rajanimohan *v.* Sambhunath, 217.
Rajapakse *v.* Fernando, 207.
Rajaram *v.* Ganesh, 61, 761.
—— *v.* Krishnasami, 28, 34.
—— *v.* Narasinga, 634.

R—*contd.*

Rajaram *v.* Vithal, 439.
Rajaramji *v.* Ramnath, 109, 115.
Rajat Kamini *v.* Satyaniranjan, 65.
Rajender *v.* Sham Chand, 99.
Rajendra *v.* Malhoo Khan, 21.
——— Lal *v.* Mrinalini Dasi, 149.
——— Lall *v.* Raj Coomari, 128, 131, 132.
——— Narain *v.* Watson & Co., 784.
——— Prasad *v.* Bahuria, 494.
——— ——— *v.* Ram Jatan Rai, 72.
Rajendranath *v.* Bassider, 648, 649, 652.
Rajeshwar *v.* Mt. Rukhna, 488.
——— Swami *v.* Behari, 606.
Rajeswar Prosad *v.* Anil Kumar Roy, 85, 89.
——— Saha *v.* Sheikh Yadali, 68.
Rajindra *v.* Raghobans, 99.
——— *v.* Sundara Bibi, 64.
——— Chandra Sarkar *v.* Bipin Chandra Shaha Bhoumik, 460.
Rajjo *v.* Lajja, 297.
——— *v.* Lalman, 63.
Rajheshwar Prasad *v.* Mohammed Khalil, 524, 525, 532.
——— ——— *v.* Mahommad Rahiman, 346.
Rajkumar Lal *v.* Jaikaran Das, 493.
——— Ramgopal *v.* Ram Dutt, 354.
Raj Mal *v.* Harmam Singh, 1, 4.
Rajmal *v.* Shivaji, 397, 406.
Rajnarain *v.* Ekadasi Bag, 177.
Rajoni Bibi *v.* Hafisonnissa, 654, 655.
Rajrup Kunwar *v.* Gopi, 227.
Raju Malu *v.* Krishna Rav, 322.
Rakestraw *v.* Brower, 442, 490.
Rakhohari Chattaraja *v.* Bipra Das, 492, 493.
Rakkan *v.* Alagappudayan, 355.
Ralli Brothers *v.* Punjab National Bank, 7, 222, 519.
Ram *v.* Pramatha, 665.
——— *v.* Sameswari, 647.
——— Adhar *v.* Shankar Baksh Singh, 552.
——— Anant Singh *v.* Shankar Singh, 705.
——— Autar *v.* Dhanauri, 36.
——— Badan Lal *v.* Kunwar Singh, 743.
——— Bahadur Singh *v.* Ajodhya, 18, 361.
——— Baksh *v.* Mohant Ram Lall, 411.
——— Bali *v.* Ram Asre, 399.
——— Barki Singh *v.* Sheodevi, 318, 467.
——— Baran *v.* Bhagwati Pandey, 594.

R—*contd.*

Ram Bhaj Datta *v.* Ram Dhas, 782.
——— Bharose *v.* Rampal Singh, 239.
——— ——— *v.* Rameshwar Prasad Singh, 750.
——— Bharosey *v.* Bhagwan Din, 208, 211.
——— Birch Narain *v.* Ambika Prasad, 437.
——— Bissen Dutt *v.* Haripada Mukherji, 9, 713.
——— Brahman *v.* Venkatanarasu, 364.
——— Brichh Singh *v.* Chhakauri Singh, 439.
——— Chalitra *v.* Shivnandan, 201.
——— Chand *v.* Mathura Chand, 263, 276.
——— Chandar *v.* Kalu, 551.
——— ——— *v.* Prabhu Dayal, 535.
——— Chander *v.* Bhagwati, 323.
——— Chandra Marwari *v.* Rani Keshobati, 545.
——— Charan *v.* Bhairon, 19, 390.
——— ——— *v.* Bhikari Lal, 389.
——— ——— *v.* Hari Charan, 651, 687.
——— ——— *v.* Joy Ram, 31, 199.
——— ——— *v.* Parmeshwar Din, 250.
——— ——— Das *v.* Mt. Nazeeran, 68.
——— ——— Lal *v.* Dharma Singh, 357.
——— ——— Lonia *v.* Bhagwan Das, 565.
——— Chunder *v.* Maharaj Kunwar, 252.
——— ——— Dutt *v.* Dwarkanath, 317, 319, 320.
——— Coomar *v.* McQueen, 29.
——— ——— Coondoo *v.* Chunder Canto Mookerji, 69, 784.
——— Das Choube *v.* Mst. Simirkha Kuar, 435.
——— ——— *v.* Brindaban, 356, 357.
——— ——— *v.* Debu, 263.
——— ——— *v.* Swami Dayal, 402.
——— Dayal *v.* Asghur, 252.
——— Dei *v.* Abu Jafar, 181.
——— Dhani *v.* Ram Rikh Singh, 357.
——— Dhun Dhur *v.* Mohesh Chunder, 248, 346.
——— Dihal *v.* Maharaja of Vizianagram, 550.
——— Ditta *v.* Official Receiver, 272, 274.
——— Doolary *v.* Thakoor Roy, 370, 389, 392.
——— Duar Rai *v.* Lachhmi Prasad, 636.
——— Ganesh *v.* Rup Narain, 399, 401, 403.
——— Gopal *v.* Lachhman Das, 543.
——— ——— *v.* Nurumuddin, 16, 626.
——— ——— *v.* Tulshi Ram, 283, 742.
——— Het *v.* Pohkar 357, 571, 572, 609.

R—*contd.*

Ram Jaggi Rai *v.* Kauleshar Rai, 323.
—— Japan *v.* Jogesara Koer, 209.
—— Jatan Rai *v.* Ramhit Singh, 386.
—— Jiwan *v.* Jagarnath, 465.
—— —— *v.* Ratturaj Singh, 193.
—— Kanie *v.* Gunesh, 649.
—— Karan *v.* Jogeshwar, 597.
—— Kaur *v.* Atma Singh, 137.
—— Khelawan *v.* Soondra, 736.
Ghulam Hussain, 352, 368, 381, 473.
—— Kinkar *v.* Hariram Hazra, 593.
—— —— *v.* Satya Charan, 353, 372, 378, 379, 682.
—— Kirpae *v.* Baleshwar, 410.
—— Kishen *v.* Doolee Chand, 237.
—— —— *v.* Girdhari Lal, 773.
—— —— Das *v.* Badri Bishal, 505.
—— Kishun *v.* Bibi Sohila, 630, 631, 662, 725.
—— Kishore *v.* Ram Nandan, 407.
—— —— *v.* Surajdeo, 466.
—— Kissen Singh *v.* Shah Kundun Lal, 509, 510.
—— —— *v.* Suraj Deo, 363.
—— Krishna *v.* Chotmal, 613.
—— —— *v.* Heramba, 401.
—— —— *v.* Venkat Swami, 564.
—— Kristo *v.* Mst. Ameeroonissa, 420.
—— Kumar *v.* Chartered Bank, 487.
—— —— *v.* Krishna Gopal, 17.
—— —— *v.* Ram Newaj, 62.
—— Kunwar *v.* Amar Nath, 182.
—— —— *v.* Ram Dai (1901), 182, 183.
—— —— *v.* Ram Dai, 182.
—— Lal *v.* Dhurendra Nath, 665.
—— —— *v.* Harrison, 360.
—— —— *v.* Mahadev, 225.
—— —— *v.* Mt. Genda, 381.
—— —— *v.* Secretary of State, 711.
—— —— *v.* Shiama Lal, 212.
—— —— Misser *v.* Chundrabullee, 704.
—— —— Mukerji *v.* Secretary of State, 156.
—— —— Patak *v.* Dina Nath, 649.
—— —— Sahu *v.* Bibi Zohra, 635.
—— —— Sett *v.* Kanai Lal Sett, 118.
—— Linga *v.* Virupakshi, 99.
—— Lochan Baid *v.* Kumar Kamakhya, 738.
—— Logan *v.* Mary Coffin, 438.

Ram Mohan *v.* Mul Chand, 217.
—— Narain *v.* Bandi Pershad, 33.
—— —— *v.* Nawab Sajjadali Khan, 240.
—— —— *v.* Pearay, 81.
—— —— *v.* Somi, 593.
—— —— Pathak *v.* Surathnath, 405.
—— —— Sah *v.* Sahdeo Singh, 572, 573.
—— —— Sahoo *v.* Bandi Pershad, 593.
—— —— Singh *v.* Adhindra Nath, 392, 465, 466, 467, 471.
—— —— Singh *v.* Chota Nagpur Banking Association, 634.
—— Narayan *v.* Adhindra, 369, 469.
—— —— Shah *v.* Sahdeo Singh, 526.
—— —— Singh *v.* Adhindrat Nath, 363, 367, 369.
—— Nath *v.* Badri Nath, 648.
—— —— *v.* Gajadhar, 302.
—— Newaz *v.* Nankoo, 109.
—— Padarath *v.* Nimar Singh, 471.
—— Pershad *v.* Ram Prasad, 10.
—— —— *v.* Ranee Phoolpottee, 759.
—— Phor *v.* Ajudhia Singh, 219.
—— Piari *v.* Krishna, 219.
—— Prasad *v.* Bedo, 300.
—— —— *v.* Bhikari Das, 553, 591.
—— —— *v.* Bishambhai, 433.
—— —— *v.* Salik Ram, 494.
—— Prosad *v.* Debi Prosad, 738.
—— Rachhya Singh *v.* Kumar Kamakhya Narayan Singh, 634, 638, 737.
—— Raghubir *v.* United Refineries (Burma) Ltd., 610.
—— —— Lal *v.* The United Refineries, 329, 465.
—— Rai *v.* Maheshwar Prasad, 439.
—— Ran Bijaya *v.* Aprup Tewari, 393.
—— Ranbija *v.* Ramjiwan Ram, 637, 657.
—— Ranjan *v.* Indra Narain, 536.
—— —— *v.* Ram Narain Singh, 636, 637.
—— Rao *v.* Gopala, 544, 546.
—— Ratan *v.* Bishun Chand, 222.
—— —— *v.* Chaudhri, 208.
—— —— *v.* Gobind Ram, 789.
—— —— *v.* Mt. Sew Kumari, 379.
—— —— Lal *v.* Abdul Wahid, 333.
—— —— Lala *v.* Babu Aditya, 431, 435.
—— Sabad *v.* Subiah, 524.
—— Sahai *v.* Debi Din, 457.

R—*contd.*

Ram Sahai *v.* Gaya, 63.
—— —— *v.* Kunvar Sah, 559.
—— —— *v.* Mahabir Singh, 618.
—— —— *v.* Manohar Prasad, 618.
—— Samujh *v.* Mst. Mainath, 391.
—— Sanchi Lal *v.* Janki Prasad, 594.
—— Saran *v.* Amrita Kuer, 356, 401.
—— —— *v.* Janki, 538.
—— —— *v.* Yudhistar, 11.
—— —— Das *v.* Bhagwat Prasad, 5, 251.
—— —— —— *v.* Ram Pergash Das, 490.
—— Sarup *v.* Bharat Singh, 616.
—— —— *v.* Charitter Rai, 300.
—— —— *v.* Gaya Prasad, 452, 602.
—— —— *v.* Kishen Lal, 74.
—— —— *v.* Mohan Lal, 388.
—— —— *v.* Ram Lal, 618, 619.
—— —— *v.* Ram Richhpal, 581.
—— —— *v.* Shiv Dayal, 379, 764.
—— Sewak *v.* Sheo Naik, 469.
—— Shankar *v.* Ganesh, 359.
—— —— *v.* Ganesh Prasad, 1.
—— —— *v.* Nanik Prasad, 251.
—— —— Lal *v.* Ganesh Prasad, 386, 595.
—— Singh *v.* Ali Baksh, 60.
—— —— *v.* Baij Nath, 399.
—— —— *v.* Baldeo Prasad, 551.
—— Sonji *v.* Krishnaji, 544.
—— Subhag *v.* Narsingh, 386, 552.
—— Sumran *v.* Sahibzada, 542, 543.
—— Sundar *v.* Bataso Kuer, 737.
—— —— *v.* Ram Narain, 197.
—— —— Saha *v.* Raj Kumar Sen, 310.
—— —— —— *v.* Raj Kumar Sen, Chowdhury, 298.
—— Surat *v.* Gur Prasad, 464, 471.
—— Tuhal Singh *v.* Biseswar Lal, 556, 571.
Rama *v.* Bhagchend, 418.
—— *v.* Gowra, 45, 292.
—— *v.* Manek, 423, 535, 539.
—— *v.* Martand, 406.
—— Aiyangar *v.* Gurusami, 634, 720.
—— Aiyar *v.* Bagavathi Murthu, 619.
—— —— *v.* Narayanasami Aiyar, 230, 232.
—— Brahaman *v.* Venkatanarasu, 358.
—— Charan *v.* Nimai Nandal, 614.

R—*contd.*

Rama Iyen *v.* Vencatachallam Patter, 774.
—— Krishna *v.* Nekker, 407.
—— —— Rao *v.* Mahadeo Bhatte, 641.
—— Krishnayya *v.* Venkata Somayajulu, 401, 562.
—— Naidu *v.* Sri Mahunt Rama, 689.
—— Nand Bharti *v.* Sheo Das, 328.
—— Raju *v.* Subbarayadu, 347.
—— Rao *v.* Thimappa, 95, 115.
—— —— *v.* Vedayya, 394.
—— Ranchhod *v.* Sayad Abdul, 721.
—— Rayanimgar *v.* Venkatalingam, 605.
—— Reddi *v.* Appaji Reddi, 362.
—— Sami Iyengar *v.* Kuppusami, 607.
—— Shankar *v.* Ghulam Husain, 345, 347, 531.
—— Varma *v.* Raman Nayar, 61.
Ramabai *v.* Babaji, 635.
Ramabhadra *v.* Arunachalam, 548.
Ramabhadrachar *v.* Srinivasa, 528, 530, 537.
Ramabrahman *v.* Rami Reddi, 732.
Ramachandra *v.* Mudeshwar, 64.
—— *v.* Sheikh Hussain, 704, 714.
—— Dikshitar *v.* Narayanswami, 600.
Ramadhin *v.* Jokhan, 427.
Ramadin *v.* Sheoratan, 191.
Ramakrishna *v.* Baburaya, 731.
—— *v.* Kesavalu, 380.
—— *v.* Kurikal, 700.
—— *v.* Official Assignee, 478, 479, 481.
—— *v.* Subbaraya, 4.
—— *v.* The Official Assignee of Madras, 245.
—— Ayyar *v.* Subramania, 329.
Ramakrishnama Chetty *v.* Vuvvati Chengu, 469.
Ramalinga *v.* Ayyadora, 300.
—— *v.* Samiappa, 232.
—— *v.* Sivachidambara, 50.
—— Chetty *v.* Sivachidambara Chetty, 751.
—— Mudaliar *v.* Arunachela, 399.
Ramamurthi *v.* Bangaru, 569.
Raman Chetty *v.* Nagarathana Naicker, 774, 777, 789.
—— —— *v.* Steel Brothers, 517.
—— Menon *v.* Malabar Forest and Rubber Co. Ltd., 718.
—— Nair *v.* Mariyomma, 720.

R—*contd.*

Ramanadhan Chetti *v.* Alkonda, 593.
——— *v.* Zemindar of Ramnad, 701.
Ramanamma *v.* Viranna, 70.
Ramanandan *v.* Rangammal, 182, 184.
Ramanathan *v.* Delhi Batcha, 19, 390.
——— *v.* Ranganathan, 284.
Ramanathum *v.* Unniammal, 262.
Ramani Kanta *v.* Hara Chandra, 691.
Ramappa *v.* Yellappa, 228, 231, 441.
Ramaraja *v.* Arunachala, 222.
Ramasami *v.* Chinnan, 115, 195.
——— *v.* Govinda, 237, 241, 242, 250.
——— *v.* Muniyandi, 409.
——— *v.* Rajagopala, 640.
——— *v.* Ramasami, 56.
——— *v.* Samiyappa, 366, 367.
——— *v.* Samiyappanayakan, 365, 370, 382, 466.
——— *v.* Srinivasa, 369.
——— *v.* Sundara, 361.
——— Naik *v.* Ramasami Chatti, 211.
——— Pattar *v.* Chinnan Asari, 295, 405.
——— Pillai *v.* Muthu Chetty, 785.
Ramasamia *v.* Adinarayana, 269, 271.
Ramasray Prasad Chaudhari *v.* C. G. Akins, 450.
Ramasoondari *v.* Radhika, 635.
Ramasubbu *v.* Muthiah, 310, 311, 337.
Ramaswami *v.* Abdul Kuddus, 68.
——— *v.* Lakshmana, 276.
——— Aiyar *v.* Deivashgamani, 67.
——— Chettiar *v.* Malappa Reddiar, 262, 276.
——— Chetty *v.* Madura Mills Co., 524.
——— Pillai *v.* Narayanaswami, 59.
Ramaswamireddi *v.* Veera Kudamban, 422.
Ramaswamy *v.* Thirupathi, 643.
——— *v.* Venkata, 61.
Ramavatar *v.* Tulsi Persad, 510.
Ramaya *v.* Venkata, 454.
Ramayya *v.* Dhara Satchi, 211.
——— *v.* Garuva, 381.
——— *v.* Jagannadham, 211.
——— *v.* Kotayya, 324, 339.
——— *v.* Krishnamma, 357, 367.
——— *v.* Venkatarama, 381.
Ramayyar *v.* Mahalaxmi, 168.
Rambahadur *v.* Ajodhya, 19.
——— Singh *v.* Ajodhya, 390.
Rambaran Singh *v.* Ramker Singh, 401.

R—*contd.*

Rambhat *v.* Bababhat, 641.
——— *v.* Lakshman, 253.
Rambrahma *v.* Kedar, 751.
Ramchand *v.* Lush, 629.
——— *v.* Raj Hans, 413, 506.
Ramchandar *v.* Kallu, 54.
Ramchander *v.* Maharaj Kunwar, 285.
Ramchandra *v.* Balbhim, 417.
——— *v.* Bhagwan, 241.
——— *v.* Ganesh, 597, 598.
——— *v.* Hanmanta, 398, 418.
——— *v.* Jagdeshwari Prasad, 146.
——— *v.* Jaideo, 251.
——— *v.* Jairam, 27, 516.
——— *v.* Janardhan, 310, 367.
——— *v.* Kamlabai, 248.
——— *v.* Kondeo Jagna, 196.
——— *v.* Laxman, 748.
——— *v.* Mukund, 413, 419.
——— *v.* Narasinha, 632.
——— *v.* Panalayammal, 565.
——— *v.* Shripati, 439, 508.
——— *v.* Syameswari, 631.
——— *v.* Tama, 631.
——— *v.* Vishnu, 234.
——— Yeshwant *v.* Sadashiv, 598.
Ramcharan *v.* Jagan Behari Lal, 406.
Ramchunder *v.* Tohfah, 323.
——— Dutt *v.* Jugheschunder, 715.
Ramchandra *v.* Shanker, 782.
Ramcoomar *v.* MacQueen, 195, 203, 205.
Ramdas *v.* Damodhar, 60.
——— *v.* S. Amerchand & Co., 789.
——— Vithaldas *v.* S. Amerchand, 44, 788.
Ramdayal *v.* Chatrapani, 555.
Ramdhan *v.* Kedarnath, 236.
Ramdhari *v.* Gorakh, 301.
Ramdin *v.* Kalka Prasad, 465.
——— *v.* Ranglal, 357.
Rameshar *v.* Subbkaram, 461.
Rameshwar *v.* Jibendar, 64.
——— Koer *v.* Mahomed Mehdi Hussein Khan, 10.
——— Lal *v.* Butto Kristo Rai, 225, 692.
——— Narain *v.* Pani Ram, 370.
——— ——— Singh *v.* Riknath Koer, 753, 769, 777.
——— Nath *v.* Mt. Aftab Begum, 263, 266.

R—*contd.*

Rameshwar Singh *v.* Chunni Lal Shaha, 487.
—— *v.* Hussain, 431.
Ramgati *v.* Pran Hari, 722.
Ramgopal *v.* Nanakram, 555.
Ramgouda *v.* Bhausaheb, 57.
—— *v.* Richard Blaquiere, 613.
Ramiah *v.* Rukmani, 68.
Ramjanam *v.* Kunj Behari, 471.
Ramjhuri Kuar *v.* Lala Kashinath, 590.
Ramji *v.* Bai Parvati, 18.
—— *v.* Chinto, 367, 506.
—— *v.* Pandharinath, 398, 417.
—— *v.* Secretary of State, 278.
—— Lal *v.* Shib Charan Das, 722.
Ramjiban *v.* Dhiku, 443.
Ramjilal *v.* Municipal Board, Lucknow, 32.
Ramjiwan *v.* Hanuman Prasad, 285.
—— *v.* Mt. Maharani, 657.
Ramjoo Mahomed *v.* Haridas Mullick, 291, 292, 642.
Ramkaran *v.* Jogeshwar, 597.
Ramkati Suryanarayana *v.* Ramchandrudu, 609.
Ramkishore *v.* Jagarnath, 414.
Ramkissendas *v.* Binjraj, 735.
Ramkrishna *v.* Anasuyabai, 214.
—— *v.* Chothmal, 621.
—— *v.* Fernandez, 731.
—— *v.* Ganesh Narain, 444.
—— *v.* Panchanmal, 330.
—— *v.* Unni Check, 646.
—— *v.* Venkat Swami, 552.
—— Chetty *v.* Vuvvati Chengu, 470.
—— Jha *v.* Jainandan Jha, 278, 644.
Ramlal *v.* Muhammad, 447.
—— Mookerjee *v.* Secretary of State, 91.
—— Sen *v.* Bidhumukhi, 128.
—— Dutt Sarkar *v.* Dhirendra Nath Roy, 692.
Ramlinga *v.* Virupakshi, 94.
Ramlochan *v.* Ram Narain, 347.
Ramnarain *v.* Kula Chandra, 295.
Ramnarayan *v.* Ram Ratan, 357.
Ramnath *v.* Siba Sundari, 724.
Ramnidhee Manjee *v.* Parbutty, 671.
Ramnirunjun *v.* Prayag Singh, 56.
Rampal Singh *v.* Balbhaddar Singh, 40, 41, 42.
Ramprosad *v.* Imratbai, 199.
Ramranandan Parbat *v.* Deni Sahi, 471.
Ramrao *v.* Purmanand, 285.
—— *v.* Rustom Khan, 60.
Ram Ratan *v.* Babu Aditya, 363.
—— *v.* Mt. Sew Kumari, 379.
Ramsarup *v.* Bela, 71, 75, 148, 757.
Ramsay *v.* Gilchrist, 277.
Ramsden *v.* Dyson, 227, 233.
—— *v.* Langley, 495.
Ramshankar *v.* Gulab Shankar, 561, 613.
Ramshet Bachashet *v.* Pandharinath, 399, 506.
Ramsidh *v.* Balgobind, 359, 360.
Ramsingh *v.* Bai Dhanba, 644.
Ramu *v.* Subbaraya, 617.
Ramu Naikan *v.* Subbaraya Mudali, 563, 615.
Ramunni *v.* Kerala Varma Valia Raja, 715.
Remal Das *v.* Mst. Jannat, 605.
Ranchod *v.* Bhikabai, 355.
—— *v.* Manmohandas, 339.
Randall *v.* Darby, *In re* Darby's Estate, 541.
—— *v.* Payne, 162.
Randhir Singh *v.* Bhagawan Das, 212.
—— *v.* Randhir Singh, 743.
Ranee Annapurni *v.* Swaminatha, 64.
—— Bhobosoonduree *v.* Issur Chunder, 50.
—— Lallun Monee *v.* Nobin Mohan, 75.
—— *v.* Sona Monee, 631.
—— Sonet Kowar *v.* Mirza Himmut Bahadoor, 624, 647, 648.
Raneshwar *v.* Mst. Sheorani, 598.
Rangampudi *v.* Vekateshwar, 607.
—— *v.* Venkateswarlu, 88.
Ranganadha *v.* Bhagirathi, 109, 118.
Ranganatha *v.* Mohankrishna, 138.
—— *v.* Rajagopala, 82, 88, 331.
Ranganayakaki *v.* Parthasarathy, 330.
Rangappa *v.* Imamuddin, 517.
—— *v.* Shiva, 175.
—— *v.* Thamayappa, 466.
Rangasami *v.* Annamalai, 32, 518.
—— *v.* Gnana, 637.
—— *v.* Muttukumarappa, 353, 364.
—— *v.* Ranga, 61.
—— Nandan *v.* Subbaraya, 462.
Rangasamy Naiken *v.* Komarammal, 592.
Ranga Swami *v.* Jainabu, 738.
Rangaswami *v.* Nachiappa, 180.
—— *v.* Sundarapandia, 197, 251.
—— *v.* Veeraghava, 392.

R—*contd.*

Rang Raj Sing *v.* Sheonarayan, 363.
Rangayya *v.* Bobba Sriramulu, 689.
——— Chettiar *v.* Parthasarathi, 504.
——— Chetty *v.* Raghavacharlu, 405.
——— Naidu *v.* Basana, 434.
Rangeley *v.* Midland Rly. Co., 60.
Rangiah Chetty *v.* Vajravelu, 175.
Rangilbai *v.* Vinayak, 261.
Rani *v.* Ajudhia Prasad, 768.
—— *v.* Amir Baksh, 597, 599.
—— Bhuneshwari *v.* Secretary of State, 639.
—— Chatra Kumari's case, 375.
—— Chhatra Kumari *v.* Mohan Bikram, 48.
—— Dassi *v.* Ashutosh Roy, 693.
—— Janki Kunwar *v.* Ajit Singh, 760.
—— Lalita Sundari *v.* Rani Surnomoyee Dasi, 690.
—— Mewa Kunwar *v.* Rani Hulas Kunwar, 58, 93.
—— Senabati Kumar *v.* Raja Katyanand, 63.
Ranimoni Dassi *v.* Radha Prosad, 118.
Ranjit Khan *v.* Ramdhan, 406, 431, 461.
——— Roy *v.* D. A. David, 786.
Rannu Rai *v.* Rafi-ud-din, 734.
Ranu *v.* Luxmanrao, 390, 391.
Raoji *v.* Narayan, 572.
Rarichan *v.* Manaikkal, 453.
Ras Behari *v.* Jagdish Chandra, 701.
Rasa Goundan *v.* Arunachala, 49, 270.
Raseswari *v.* Saurendra Mohun, 690, 691.
Rash Behari *v.* Kasumkumari, 498.
——— ——— *v.* Sha Bharanjan, 115.
——— Mohan *v.* Kristodas, 265.
Rashidunissa *v.* Muhammad, 459.
Rashik Lal *v.* Ram Narain, 44, 358, 360.
Rasik Chandra *v.* Jagabandu, 498.
——— Lal *v.* Bidumukhi, 77.
Rasoolbibi *v.* Yusuf Ajam, 138.
Rasulam Bibi *v.* Nand Lal, 204.
Ratan Chand *v.* Kishen Chand, 269.
——— ——— *v.* Smail, 7.
——— Devi *v.* Sher Singh, 505.
——— Lal *v.* Farshi Bibi, 737.
——— —— *v.* Makundi Lal, 518.
——— Sen *v.* Suraj Bhan, 197.
Ratanbai *v.* Ghasiram, 323.
Ratanlal *v.* Ramanujadas, 92, 114.
——— Choonilal *v.* Municipal Commissioner, 326.
Rathna Bai *v.* Mrs. A. R. Barrass, 312.
——— Mudaliar *v.* Perumual, 427.
Rathnasami *v.* Subramanya, 10, 767, 787.
Ratna Koer *v.* Nanhaki, 546.
Ratnasabhapathi *v.* Venkatachalam, 631.
Rattamma *v.* Seshachallam, 248.
Rattan Sen *v.* Sm. Krishna Kaur, 647.
Raushan Ali *v.* Kali Mohan, 537, 561, 598, 599, 600.
Ravaneshwar *v.* Chandi Prasad, 180, 181.
Ravji *v.* Kirishnaji, 253.
—— *v.* Sayajirav, 70.
Rawlinson *v.* Ames, 281.
Ray Chand *v.* Basapa, 610.
—— Satindra *v.* Ray Jatindra, 409, 457.
Rayner *v.* Preston, 224.
Raza Mohammed *v.* Ram Lal, 402.
Reajuddin *v.* Basuda Sundari, 685.
Reasut Hossein *v.* Chorwar Singh, 728.
Rebati Mohan *v.* Ahmed, 58.
Rees d. Mears *v.* Perrot, 653.
Reese River Silver Mining Co. *v.* Atwell, 263, 275.
Reeve *v.* Berridge, 28, 312, 337.
——— *v.* Lisle, 398.
Reeves *v.* Pope, 783.
Reference [(1884) 7 Mad. 155], 640.
——— [(1902) 25 Mad. 3], 628.
Refuge Assurance Co. *v.* Pearlberg, 485.
Reg *v.* Morrish, 644.
Registered Jessore Loan Co. *v.* Shailajantah, 363.
Regnart *v.* Porter, 642.
Reid *v.* Bickerstaff, 191.
—— *v.* Parsons, 717.
Reis, *In re, Ex parte* Clough, 271.
Remola *v.* Mahun, 362.
Renals *v.* Cowlishaw, 189, 190.
Renand *v.* Tourangean, 92.
Renuka Bala *v.* Nagendra Nath, 253.
Renukabai *v.* Bhavan, 610.
——— *v.* Bhoosan, 28, 34, 39.
Reoti Singh *v.* Ram Lal, 591, 592.
Rewun Persad *v.* Radha Beeby, 135.
Rex *v.* Dunstan, 24.
—— *v.* Halliday, 3.
—— *v.* Hedges, 24.
—— *v.* West Riding of Yorkshire County Council, 4.
Reynolds *v.* Asby, 23, 448, 488.
Rhodes *v.* Bate, 759.
——— *v.* Buckland, 479.

R—*contd.*

Richards *v.* Delbridge, 750.
——— *v.* Easto, 695.
——— *v.* Kidderminster Corporation, 486.
——— *v.* Kidderminster Overseers, 486, 504.
——— *v.* Morgan, 508.
——— Sheirstone *v.* Brock, *Re*, 750.
Richardson *v.* Langridge, 630.
——— Shilltto *v.* Hobson, *Re*, 754.
Rickards *v.* Lothian, 695.
Rickettes *v.* Enfield Church Wardens, 684.
Ridgway *v.* Woodhouse, 756.
Ridley, *In re*, 111.
Riggs, *Re*, *Ex parte* Levell, 686.
Right d. Flower *v.* Darby, 652, 736.
——— Fisher *v.* Cutbell, 654.
Rikhi Kesh *v.* Jwala Sahai, 441.
Rikki Ram *v.* Sheo Pershan, 363.
Ring *v.* Harwick, 159.
Rinsa Ansa *v.* Mohanlal Madangopal, 318, 319.
Robbins *v.* Jones, 662.
——— *v.* Whiyte, 447.
——— *v.* Whyte, 714.
Robert Watson & Co. *v.* Mohesh Narain Roy, 634.
Roberts *v.* Croft, 376, 519.
——— *v.* Hayward, 651.
——— *v.* Holland, 705.
——— *v.* Smith, 758.
Robinson *v.* Hofman, 688.
——— *v.* Kilvert, 669.
Robson *v.* Palace Chambers, 666.
Rochford *v.* Hackman, 90, 102.
Rodha Mal *v.* Ramji Das, 392.
Rodhmal *v.* Ram Harakh, 346.
Rodick *v.* Gandell, 770, 776.
Roe d. Berkeley (Earl) *v.* York (Archbishop), 715.
——— d. Blair *v.* Street, 655.
——— d. Hunter *v.* Galliers, 102, 723.
Rogers *v.* Challis, 358, 521.
——— *v.* Hosegood, 186, 188, 683.
——— *v.* Towsey, 147.
Roghu Nath *v.* Harilal Sadhu, 532.
Rolfe *v.* Chester, 408, 588.
Rolland *v.* Hart, 41.
Rolph *v.* Crouch, 670.
Root *v.* French, 198.
Rose *v.* Watson, 336.
——— Ammal *v.* Rajarathnan, 407, 408.

R—*contd.*

Roshan Lal *v.* Arjan Dev, 8.
——— Singh *v.* Balwant Singh, 551.
Rosher *v.* Williams, 258.
——— *Re*, Rosher *v.* Rosher, 90, 91, 92.
Rourke *v.* Robinson, 410.
Rous *v.* Jackson, 112.
Row *v.* Dawson, 775.
Rowbotham *v.* Wilson, 85.
Rowe *v.* Chichester, 442.
Rowell *v.* Satchell, 41.
Royal Bristol Permanent Building Society *v.* Bomash, 316, 317, 339.
Royce, *In re*, 129.
Royzuddi *v.* Kalinath, 182, 359, 392, 608, 609.
——— Sheik *v.* Kali Nath, 604.
Rudra Perkash *v.* Krishna, 46, 768.
——— ———*v.* Krishna Mohun, 67.
——— Prasad *v.* Nasiruddin, 465, 469.
Rudrappa *v.* Narsingrao, 630.
Rugad Singh *v.* Sat Narain, 406, 420, 454, 538, 546, 551.
Ruhulla *v.* Hassanalli, 759.
Rukhiminibai *v.* Venkatesh, 546.
Rukhmini *v.* Rayaji, 720, 727.
——— Kanta *v.* Baldeo Das, 374.
Rukhminibai *v.* Laxmibai, 96, 99, 757.
——— *v.* Venkatesh, 411, 434, 455.
Rummens *v.* Hare, 754.
Runchoddas *v.* Parvatibai, 131, 674, 751.
Rungama *v.* Atchama, 172.
Runganaiki *v.* Ramanuja, 184.
Runglall Sing *v.* Lalla Roodur Pershad, 668.
Rungo Lall *v.* Abdul Guffoor, 641.
——— ——— Lohea *v.* Wilson, 636.
Rup Narain *v.* Junko, 61.
——— ——— Singh *v.* Har Gopal Tewari, 211.
Rupabai *v.* Audimulam, 572, 581.
Rupan *v.* Champa Lal, 439, 440.
——— Singh *v.* Champa Lal, 493.
Rupchand *v.* Jankibai, 303.
Rupsingh *v.* Bhabuti, 99.
Rure Khan *v.* Ghulam, 648.
Russell *v.* Coggins, 708.
——— *v.* Shenton, 674.
——— *v.* Watts, 233.
Russickloll *v.* Lokenath, 676.
Rustamali *v.* Aftab Khan, 605.
Rustamalli *v.* Aftabhussain Khan, 605.
Rustom Ali *v.* Abdul Jubbur, 213.

R—*contd.*

Rustomji *v.* Bai Moti, 278.
——— *v.* Keshavji, 225, 447.
Rutnam Pillai *v.* Kamalambal, 553.
Ruttnessur *v.* Hurish Chunder, 640.
Rutton Singh *v.* Greedharee, 370.
Ruttenjee Eduljee Shet *v.* Collector of Thana, 21, 677.
Ryland *v.* Fletcher, 695.
Ryrappan *v.* Raman, 353, 358.

S

S. K. A. R. S. T. Chettyar Firm *v.* A. L. A. R. Chettyar Firm, 515, 591.
S. N. Banerji *v.* Kuchwar Lime Stone Co., 286, 288.
S. P. K. R. R. M. Chettyar Firm *v.* Administrator-General of Bengal, 380.
Sabava *v.* Yamanappa Sabu, 72, 73, 74, 75.
Sabh Ram *v.* Ram Kishen, 59.
Sabir Husain *v.* Firasat Ghaus, 538.
Sabjan Mandal *v.* Haripada Saha, 617.
Sabju Sahib *v.* Noordin, 769.
Saburannessa *v.* Sabdu Shaikh, 305.
Sachindra Mohan *v.* Commissioners for the Port of Calcutta, 507.
Sachitanand *v.* Baloram, 452.
——— *v.* Radhapat, 263, 275.
Sadagopal *v.* Dorasami, 393.
Sada Kavur *v.* Tadepally, 342, 392, 394.
Sadanand *v.* Ratanji, 507.
Sadananda Pal *v.* Emperor, 390.
Sadasheohao *v.* Ruchand, 458.
Sadashiv *v.* Dhakubai, 338.
——— *v.* Govind, 458.
——— *v.* Ramkrishna, 640.
——— *v.* Trimbak, 262, 264.
——— *v.* Trimbuck, 362.
——— *v.* Vyankatrao, 368, 369.
——— Anant *v.* Vithal, 438.
——— Bhasker *v.* Dhakubai, 230.
Sadasook Ramprotap *v.* Hoar Miller & Co., 770, 780, 781.
Saddu *v.* Bihari, 178.
Sadha Singh *v.* Mangal Singh, 202.
Sadhu Ram *v.* Pirthi Singh & Co., 49.
——— Saran *v.* Bahramdeo, 471.
Sadik Hashim *v.* Hashim Ali, 757.
——— Husain *v.* Hashim Ali, 11, 171, 173.
Sadiq Ali Khan *v.* Jai Kishori, 78, 199, 361.
Safar Ali *v.* Abdul Rashid, 77, 678, 687.
Safdar Ali *v.* Ghulam, 7.
——— *v.* Maharaja Ambika Prasad, 644.
Saffron, etc., Society *v.* Ragner, 41.

S—*contd.*

Sagaji *v.* Namdeo, 298, 301, 316, 327.
Sah Lal Chand *v.* Indarjit, 298, 356.
——— Mukhun Lal *v.* Sah Koondan Lall, 35.
Sahadev *v.* Shekh Papa, 33, 384.
Sahdeo Karan Singh *v.* Usman Ali Khan, 184.
Sahandrabai *v.* Shri Deo Radha Ballabji, 240.
Saheb Din *v.* Gauri Shankar, 724.
Sahebzada *v.* Hills, 501.
Sahib Baksh *v.* Mohammad Ali, 401.
——— Dayal *v.* Dhanpat, 647.
——— Singh *v.* Girdhari Lal, 181.
——— Zada *v.* Parmeshwar, 433.
Sahodra *v.* Bardi Prasad, 205.
Sahtawan *v.* Mohan Singh, 652.
Sahu Jali *v.* Bahal Singh, 764.
Sahu Ram *v.* Bhup Singh, 180.
Said Ahmad *v.* Raja Bahadur Mahesh, 559.
——— Ahmed *v.* Raja Barkhandi Mahesh, 505, 509.
Saiduddin *v.* Ratan Lal, 597.
Saidunnassa *v.* Faiyaz Hasan, 447.
Saiful Bibi *v.* Abdul Aziz Khan, 297.
Saifulla Khan *v.* Chaman Lal, 8.
Saik Kasam *v.* Haji Jusuf, 648.
Saila Bala *v.* Swerna Moyee, 488.
Saiyad Abdullah *v.* Saiyad Ahmad, 219.
Saiyed *v.* Muhammad, 32.
Saiyid Ahmad *v.* Dharmun, 408, 412, 545.
——— Zahid Ali *v.* Mst. Sadar Begam, 250.
Sajjad Ahamad *v.* Trailkhya Nath, 692.
——— Hussain *v.* Wazir Ali Khan, 759.
Sajjadi Begum *v.* Janki Bibi, 469.
Sajjan Singh *v.* Attar Singh, 427.
Sakalaguna Nayudu *v.* Chinna Munuswami, 69, 773.
Sakaram Shet *v.* Amtha Devji, 441, 496.
Sakharam *v.* Dhaktojirao, 504.
——— *v.* Vishram, 17.
——— *v.* Vitu, 397, 403, 408.
——— Narayan *v.* Gopal Lakshman, 426.
Sakhada Kanta Bhattacharjee *v.* Joginee Kanta Bhattacharjee, 465.
Sakhiuddin *v.* Sonaullah, 17, 86, 296.
Salabat *v.* Abdul Rahman, 744.
Salamat Ali *v.* Budh Singh, 516.
Salamat-ul-Zamin *v.* Masha Allah Khan, 283, 743.
Saleh Abraham *v.* Manekji, 74.
Salig Ram *v.* Muradan, 416.

S—*contd.*

Salik Ram *v.* Ashik Husain, 545.
Salmon, *In re, Ex parte* Trustee, 430.
Salt *v.* Northampton (Marquis), 397, 399.
Sama Rao *v.* Vanajee, 18, 392.
——— Row *v.* Doraisami, 273.
Samal *v.* Babaji, 238, 242.
Samar Ali *v.* Karimullah, 9, 370.
——— Bahadur *v.* Jit Lal, 745.
Samaratmal Uttamchand *v.* Govind, 297, 442.
Samaya *v.* Nagalingam, 465.
Sambasiva *v.* Venkatarama, 81, 88.
——— Chettiar *v.* Secretary of State, 487.
Sambhu *v.* Kamalrao, 688.
Sambu *v.* Babaji, 500.
Sami Ayyan *v.* Ammai Ammal, 237.
——— Nath *v.* Thakur Prasad, 242.
——— Rowappa *v.* Kuppusami Iyengar, 415, 534, 539.
Saminatha *v.* Krishna, 581.
Sammo *v.* Abdul Wahid, 439, 440.
Samoo Patter *v.* Abdul Sammad, 392, 604.
Sampuran Singh *v.* Ahmed Singh, 364.
Samsherkhan *v.* Vithaldas, 357.
Samsuddin *v.* Abdul Hussein, 54, 56, 58, 137, 141.
Samu Pattan *v.* Chidambara, 320.
Samuel *v.* Jones, 494.
——— *v.* Jarrah Timber etc. Corporation, 397, 398, 399, 405.
Sanagapally Lakshmayya *v.* Intoori Bolla Reddi, 445.
Sanaullah *v.* Jai Narain, 467.
Sandbach and Edmonsons Contract, *Re*, 342.
Sanders *v.* Karnell, 738.
Sanderson *v.* Berwick-on-Tweed Corporation, 669.
——— *v.* Mayor of Berwick-on-Tweed, 666.
Sandon *v.* Hooper, 441, 444, 494.
Sandu *v.* Bhickchand, 283, 743.
Sane *v.* Bilton, 606.
Saner *v.* Bilton, 672, 674, 699.
Sangapally Lakshmayya *v.* Intoory, 500.
Sangappa *v.* Basappa, 394.
Sangu Ayyar *v.* Cumarsami, 300.
Sanjib Chandra *v.* Santosh, 642.
——— ——— *v.* Santosh Kumar, 211, 291, 292, 293.
Sankara *v.* Kalathil, 322.

S—*contd.*

Sankaran *v.* Periasami, 638.
——— Nair *v.* Ramaswami, 320.
Sankata *v.* Jagat Narain, 471.
Sankunni Varriar *v.* Neela Kundhan, 507.
Saunamma *v.* Radhabhayi, 211.
Sanniyasi *v.* Salur, 758.
Sant Lal *v.* Nankul Lal, 423.
Santaya *v.* Narayan, 12, 300.
Santley *v.* Wilde, 397.
Santokhi Misser *v.* Siro Jha, 302.
Santuram *v.* Trust of India Assurance Co., 785, 786.
Sanval Das *v.* Saiyed Ali, 385.
Sanwal *v.* Ganesh Lal, 423, 460.
Sanwaley Prasad *v.* Sheo Sarup, 408.
Sapenswar *v.* Brindiban, 399.
Sarada Kanta *v.* Nabin Chandra, 677, 678, 687.
——— Kripa *v.* Akhil, 634.
——— Prasad *v.* Triguna Charan, 19, 390.
Saradakripa *v.* Bepin Chandra, 95, 192.
Saradamoyi *v.* Atul Chandra, 208.
Saradindu *v.* Kunja Kamini Ray, 680, 682.
Sarafali *v.* Subraya, 695, 698, 726, 727.
Sarajbala *v.* Kamini Kumar, 474.
Sarajbashini Ghose *v.* Baijnath Pandey, 369.
Saraju Bala *v.* Jyotermoyee, 81, 91, 99, 159, 160.
Sarajul Haque *v.* Durjendra Mohan, 638.
Saral Chand *v.* Mohan, 361.
Saramma *v.* Suriyanarayana, 609.
Saraswati *v.* Mahabir, 262.
Sarat Chander *v.* Gopal Chunder, 196, 200, 207, 208.
——— Chandra *v.* Bhupendra Nath, 180.
——— ——— *v.* Hari Pada, 300.
——— ——— *v.* Jadab Chandra, 657.
——— ——— *v.* Nahapiet, 590.
——— ——— *v.* Pramath Nath, 560.
——— ——— Saha *v.* Bepin Behary Chakerbutty, 77.
Saravana *v.* Chinnamal, 471.
Sarba Mohan Banerjee *v.* Manmohan Banerjee, 749.
Sarban Singh *v.* Bhagwan, 402.
Sarbdawan *v.* Bijai Singh, 401, 403.
Sard *v.* Rhodes, 690.
Sardar Karan Singh *v.* Raja Muhammad Siddik, 542.
——— Singh *v.* Ratan Lal, 415.
Sarfaraz *v.* Muhammad Salim, 422.

S—*contd.*

Sarferaz Singh *v.* Udwat Singh, 401, 402.
Sari *v.* Motiram, 397, 403.
Sariffudin *v.* Mohiuddin, 305.
Sarip Jan Bibi *v.* Aftabuddin Miah, 691.
Sarju Kumar *v.* Dwarka Prasad, 596.
——— ——— *v.* Thakur Prasad, 459, 533.
——— Lal *v.* Baijnath Prasad, 538.
——— Parshad *v.* Bir Bhaddar, 604.
——— Prasad *v.* Bindeshari, 209.
——— Singh *v.* Shiam Sunder, 275.
Sarkar Bernard *v.* Alak Manjary, 19, 390.
Sarkum *v.* Rahaman, 61, 70.
Saroda Prosad *v.* Umasankar, 635.
Sarojini Dassi *v.* Gnanendra Nath, 132.
Sartoris's Estate, *Re*, 102.
Sarupa *v.* Mst. Dhundan, 199.
Sarvothama *v.* Raja Rao, 590, 594.
Sashi Bhusan *v.* Chandra, 389.
——— ——— *v.* Jyoti Prasad, 85.
Sasi Bhusan *v.* Chandra Peshker, 691, 752.
——— ——— *v.* Tara Lal, 680.
Sat Narain *v.* Badri, 239.
Satis Chandra *v.* Jagendra Nath, 391, 392.
Satischandra Pal *v.* Hrisheekesh Law, 694.
Satish Chandra *v.* Sarat Subdari, 162.
Satnarain Tewari *v.* Chowdhuri, 567.
Satraji Dongerchand *v.* Madho Singh, 71.
Satrucherla *v.* Maharaja of Jaipur, 554.
Satya Bhupal *v.* Rajnandini, 176.
——— Charan Law *v.* Rai Mohan Sil Das, 635.
——— Kripal *v.* Gopikishore, 540.
——— Kumar *v.* Satya Kirpal, 89.
——— ——— Banerjee *v.* Satya Kirpal, 49, 742.
——— Niranjan *v.* Ram Lal, 701.
——— ——— *v.* Sarajubala Debi, 680, 740.
——— ——— Chakravarti *v.* Ram Lal Kaviraj, 85.
Satyabadi *v.* Harabati, 2.
——— Behara *v.* Harabati, 411, 546, 548.
Satyanarayan Murthi *v.* Pydaya, 196, 199, 201, 488.
Satyanarayana *v.* Lakshmayya, 60, 297.
——— *v.* Venkataramamurthy, 723.
Satyaniranjan Chakravarty *v.* Habibur Sobhan, 281, 284.
Satyendra Nath *v.* Anil Chandra, 642.
——— ——— *v.* Nilkantha, 11, 173, 174.

Satyesh *v.* Jillar Rahman, 178.
Satynarayan Murthi *v.* Sathiraju, 333.
Saunders *v.* Dunman, 445.
——— *v.* Vautier, 134, 136.
Saurur Jigar Begum *v.* Barada Kanta Mitter, 391.
Savery *v.* King, 759, 760.
Savitri *v.* Holebasappa, 62.
Sawaba Khandapa *v.* Abaji, 464, 471.
Sayad Abdul Hak *v.* Gulam Jilani, 397, 402, 403, 408.
Sayaji *v.* Umaji, 736.
Sayamali *v.* Anisuddin, 590.
Sazawar Khan *v.* Satyendra Lal, 649.
Scales *v.* Lawrence, 696.
Scarf *v.* Jardine, 256.
Schloss *v.* Stiebel, 761.
Scobie *v.* Collins, 374.
Scorell *v.* Boxall, 21.
Scott *v.* Tyler, 134, 149.
——— *v.* Uxbridge, 410.
Scurheld *v.* Howes, 147.
Seal *v.* Claridye, 18.
Seale *v.* Brown, 362.
Sear *v.* House Property and Investment Society, 686.
Searle *v.* Law, 754.
Seat, *In re*, 532.
Seaton *v.* Mapp, 323, 339.
——— *v.* Twyford, 453.
Secretary of State *v.* A. H. Forbes, 684.
——— ——— ——— *v.* Beni Prasad, 635, 637.
——— ——— ——— *v.* Bhupalchandra Ray, 645.
——— ——— ——— *v.* Bishen Narasup 223.
——— ——— ——— *v.* Dattatrya, 27.
——— ——— ——— *v.* Digambar, 635.
——— ——— ——— *v.* Duggappa, 230.
——— ——— ——— *v.* Forbes, 290, 711.
——— ——— ——— *v.* Kadirikutti, 671.
——— ——— ——— *v.* Karuna Kanta, 644, 645.
——— ——— ——— *v.* Khemchand Jeychand, 71.
——— ——— ——— *v.* Kuchwar Lime & Stone Co., 719.
——— ——— ——— *v.* Luchmeshwar Singh, 635.
——— ——— ——— *v.* Madhu Sudan Mukherji, 650, 651, 652, 736.

S—*contd.*

Secretary of State *v.* Maharaja of Bobbili, 1.
——— *v.* Maharajah Luchmeswar Singh, 637.
——— *v.* Mathurabhai, 3.
——— *v.* Nistarini Annie Mitter, 658.
——— *v.* Rajah of Vizianagram, 671.
——— *v.* Rajendra Prasad, 635.
——— *v.* Rishi Ram, 789.
——— *v.* Venkayya, 662, 664.
——— for Foreign Affairs *v.* Charlesworth Pilling & Co., 21.
——— for India *v.* Arathoon, 758.
——— for India *v.* Kuchwar Lime & Stone Co., Ltd., 686.
——— for India *v.* Volkart Bros., 684, 687.
Seddon *v.* North Eastern Salt Co., 338.
Seeni Chettiar *v.* Santhanathan, 17, 21, 626, 644, 645.
Seetamma *v.* Venkataramanayya, 66, 690.
Seetharama *v.* Bayanna, 760.
——— *v.* Venkatakrishna, 572, 620.
——— Iyer *v.* Narayanaswamy Pillai, 776.
Seetharamanujacharyulu *v.* Venkatasubhamma, 247, 248, 253.
Seetharamaya *v.* Venkatanarayya, 553.
Seettamma *v.* Venkataramanayya, 767.
Selby *v.* Jackson, 78.
Sellick *v.* Trevor, 341.
Selwyn *v.* Graft, 481.
Sendattikalai Pandia *v.* Sanjiti Veerappa, 175.
Sengamutha *v.* Thayaraunnal, 619.
Seoti Bibi *v.* Jagannath, 652.
Serajul Haque *v.* Dwendra Mohan, 278.
Seramot Ali *v.* Samad Ali, 300.
Serjeant *v.* Nash, 724.
——— *v.* Nash, Field & Co., 727.
Sesha Ayyar *v.* Krishna Ayyangar, 415, 530, 534, 538.
——— *v.* Sreenivasa, 522, 605.
Seshagiri *v.* Pichu, 557, 608.
Seshamma Shettali *v.* Chickaya Hegade, 638, 639.

S—*contd.*

Seshiaya *v.* Gaouramma, 62.
Setappa Goundan *v.* Muthia Goundan, 237, 241.
Seth Bansiram *v.* Gunnia Naga Ayyar, 457.
——— Chitor Mal *v.* Shib Lal, 557, 608.
——— Jaidayal *v.* Ram Sahae, 358.
——— Jiwandas *v.* Janki, 466.
Sethna *v.* Hemingway, 776.
Sethumadhava *v.* Bacha, 205.
Seton *v.* Slade, 365.
Setrucherla Ramabadra *v.* Sarianarayanaraju, 433.
Seturatnam Aiyar *v.* Venkatachala Gounden, 637.
Sevvaji Raghundha *v.* Chinna Nayana, 418.
Sewakram *v.* Meerut Municipal Board, 628, 711.
Sewdayal *v.* Official Trustee, 119, 134, 142.
Shadi Lal *v.* Lal Bahadur, 510.
——— *v.* Thakurdas, 359.
——— Ram *v.* Het Ram, 613.
Shafiq Ullah Khan *v.* Sami Ullah, 240, 560.
Shafiqul Huq *v.* Krishna Gobinda, 2, 291.
Shafiqullah *v.* Samiullah, 201, 205.
Shafiunnissa *v.* Fazalrab, 514.
Shah Gholam Nuzuf *v.* Mst. Emanun, 510.
——— Lal Chand *v.* Indarjit, 329.
——— Mahammad Habibul *v.* Abdul, 71.
——— *v.* Kashi, 60.
——— Mehdi Hasan *v.* Baboo Sree Kishen-Mukhun Lall Singh, 370, 505.
——— *v.* Syed Ismail, 417.
——— *v.* Sree Kishen, 509, 510.
——— *v.* Srikishen Singh, 172.
——— Nawaj *v.* Ghulam Murtaza, 54, 57.
——— Ram Chand *v.* Pandit Parbhu, 423.
——— Wali *v.* Hussaini Begam, 730.
Shaha Saheb *v.* Sadashiv Supdu, 460.
Shahabuddin *v.* Vahibdux, 230.
Shahar Bano *v.* Raj Bahadur, 196.
Shahebzada *v.* Hills, 223, 499.
Shahrukh *v.* Sheo Prasad, 68.
Shahzad Singh *v.* Jaichha Kunwar, 194.
——— *v.* Madan Gopal, 764.
——— *v.* Narain Kurmi, 469.
Shahzada Begam *v.* Gokul Chand, 275.
Shaik Abdulla *v.* Haji Abdulla, 590.
——— Galim *v.* Sadamjam Bibi, 358.
——— Idrus *v.* Abdul Rahiman, 369, 383.

S—*contd.*

Shaik Sona Ullah *v.* Troylukho Nath, 652.
Shaikh Danoollah *v.* Shaikh Amanutoolah, 627.
——— Hakim *v.* Awaita Chandra, 409.
——— Husain *v.* Govardhandas, 676.
——— Khan Ali *v.* Pestonji, 251.
Shailendranath Palit *v.* Hede Kaza Mane, 335, 379.
Shalig Ram *v.* Charanjit, 81.
Shaligram *v.* Narain, 320.
Sham Dei *v.* Baljit Singh, 591.
——— Kumari *v.* Rameswar Singh, 779.
——— Lal *v.* Chajju Ram, 556.
——— Lall Mitra *v.* Amarendra Nath, 73.
——— Shivendar *v.* Janki Koer, 759.
——— Sunder *v.* Cheita, 387.
Shama *v.* Abdul, 72.
——— Churn *v.* Wooma Churn, 650.
——— Prosad *v.* Taki Mullik, 664, 688.
Shambati Koeri *v.* Jago Bibi, 759.
Shambhu Singh *v.* Jagdish Baksh, 357.
Shambu Dat *v.* Shiam Narain, 465.
Shamdas *v.* Batul Bibi, 500.
Shams Shah *v.* Hussain Shah, 743.
Shamsuddin *v.* Dayabhai, 313.
——— *v.* Haidarali, 555, 560.
Shamu Patter *v.* Abdul, 18.
——— *v.* Abdul Kader, 18.
Shan Maun Mull *v.* Madras Building Co., 32, 518, 616.
Shananda *v.* Srinath, 553.
Shankar *v.* Bhikaji, 420, 551, 571.
——— *v.* Daooji, 199.
——— *v.* Ganpat, 461.
——— *v.* Hukumchand, 551.
——— *v.* Jagannath, 710.
——— *v.* Mejo Mal, 621.
——— *v.* Sadashiv, 617.
——— *v.* Yeshwant, 399.
——— Bala *v.* Gotiram Pandurang, 330.
——— Din *v.* Gokal Prasad, 399.
——— Lal *v.* Babu Ram, 651.
——— Mahadeo *v.* Bhikaji, 597.
——— Rao *v.* Ramji, 392.
——— Sarup *v.* Mejo Mal, 462.
——— Vishvanath *v.* Umabai, 777.
Shankarappa *v.* Khatumbi, 66.
Shankarbhai *v.* Kassibai, 353, 367.
Shankarlal *v.* Latafat, 538, 539.
Shankri *v.* Malkha Singh, 89, 335.
Shanmugha Samudram *v.* Parvati Ammal, 247, 249.
Shantanand Gir *v.* Basudevanand, 4.

S—*contd.*

Shantappa *v.* Balapa, 616, 617.
Shantilal *v.* Manilal, 259.
——— *v.* Munshilal, 270.
Shanto Chandar *v.* Nainsukh, 537.
Sharat Sundari *v.* Bhobo Pershad, 698.
Sharfudin *v.* Govind, 35, 36.
Sharfumiya *v.* Pacha Sahib, 268.
Shariff Ahnad *v.* H. Hunter, 65, 610.
Shariff Hussain *v.* Nur Shah, 245.
Sharman's Contract, *In re*, 315.
Sharp *v.* Key, 296, 705, 706.
Sharpe *v.* Foy, 42.
Shashi Kumar *v.* Seeta Nath, 688.
Shau Ram *v.* Bhup Singh, 165.
Shaukat Begam *v.* Sri Thakurji, 50, 751.
Shaw *v.* Bunny, 416, 480.
——— *v.* Coffin, 717.
——— *v.* Foster, 47, 375, 378.
——— *v.* Kay, 628.
——— *v.* Stenton, 669.
Shazadi *v.* Sheikh Jamal, 355.
Shebait — Nagendra *v.* Rabindra, 70.
Shebati — Gobinda *v.* Debendra, 70.
Sheik Ibrahim *v.* Rama Aiyar, 409.
——— Kachu *v.* Mahammad Ali, 391.
Sheikh Abdur Rahman *v.* Ram Pandarnath, 403.
——— Akloo *v.* Sheikh Emaman, 632, 647, 648, 657.
——— Dargahan *v.* Hafiz Mahamed, 636.
——— Dawood *v.* Moideen, 302.
——— Elahi Baksh *v.* Sheikh Hukum, 643.
——— Enayutoolah *v.* Elahee Buksh, 672, 736.
——— Galim *v.* Sadarjan Bibi, 358, 360.
——— Hub Ali *v.* Wazir-un-nissa, 365.
——— Hushmat *v.* Sheikh Jamir, 295.
——— Juman *v.* Mohammad, 301, 303.
——— Kalu Sharup *v.* Akhoy Charan, 593.
——— Miadhar *v.* Rajani, 722.
——— Pokhan *v.* Rajani Kamal, 646.
——— Salamati Ali *v.* Nur Muhammad, 251.
——— Yusuf *v.* Jyotish Chandra, 735.
Sheir Lal *v.* Damodar Das, 199.
Shekari *v.* Mangulom, 353.
——— Varma *v.* Mangalom, 383.
Shelley's Case, 91.
Sheo Baldeo Prasad *v.* Sheo Dial, 531.
——— Barat Singh *v.* Padarath, 506.
——— Darshan *v.* Beni Chaudhri, 495.
——— Dial *v.* Parg Dat, 394.

S—*contd.*

Sheo Dulare *v.* Jagannath, 335.
—— Dulari *v.* Mst. Batasha, 494.
—— Gobind Koeri *v.* Ram Asray Singh, 262.
—— Golam *v.* Roy Dinkar Dayal, 469.
—— —— Singh *v.* Roy Dinker, 370.
—— Karan *v.* Parbhu Narain, 644.
—— Kumar Upadhya *v.* Jittu Singh, 406.
—— Narain *v.* Chunni Lal, 256, 552.
—— —— *v.* Lakhan, 605.
—— —— *v.* Mata Prasad, 75.
—— —— Saha *v.* Ram Nire Khan, 594.
—— —— Singh *v.* Darbari Mahton, 300.
—— Pershad *v.* Kally Dass Singh, 634.
—— Prasad *v.* Behari Lal, 423, 460, 535, 536.
—— Ram *v.* Thakur Mahton, 311, 338.
—— Saran Chaudhri *v.* Ram Lagan, 547, 548.
—— —— Singh *v.* Mahabir Prasad, 504.
—— —— *v.* Amta Co-operative Credit Society, 587.
—— Shankar *v.* Parma Mahton, 406.
— *v.* Raj Jas, 472.
—— Singh *v.* Birbahadar Singh, 405.
—— Tahal *v.* Sheodan Rai, 423, 460, 535.
Sheogobind *v.* Anwar Ali, 201.
—— Singh *v.* Gouri Prasad, 84, 769, 788.
Sheokaram Singh *v.* Maharaja Parbhi Singh, 631.
Sheonandan Lal *v.* Zainul, 88.
Sheonarain *v.* Lakhan, 611.
Sheopati Singh *v.* Jagdeo Singh, 358.
Sheoraj *v.* Gangu Prasad Rai, 80.
—— *v.* Harchandi Lal, 620.
Sheoram Singh *v.* Babu Singh, 365.
Sheoratan *v.* Mahipal, 354, 364.
Sheosaran *v.* Amla Co-operative Credit Society, 583, 599.
Sheotahal *v.* Lal Narain, 203.
Shepard *v.* Jones, 441.
Shepheard *v.* Beetham, 687.
Sher Singh *v.* Daya Ram, 359, 605.
—— —— *v.* Nihalu, 441.
Sherwin *v.* Shakespear, 316.
Sheshgiri Shanbhog *v.* Salvador, 590.
Shevbagavadiranumal *v.* Mupidalhi Ammul, 54.
Shiam Lal *v.* Chhaki, 75.
v. Hukum Kuer, 597.

S—*contd.*

Shiam Lal *v.* Jagdamba Prasad, 397, 401, 403, 408.
—— —— *v.* Mata Din, 203.
—— —— *v.* Ram Piari, 557.
—— —— *v.* Sohan Lal, 240, 244.
—— Saran *v.* Banarsi Das, 427.
—— Sunder *v.* Chottey Lal, 740.
Shib Chandra *v.* Gour Chandra, 392.
—— —— *v.* Lachmi Narain, 244, 250, 412, 544.
—— Charan *v.* Kharka, 724.
—— Das *v.* Kali Kumar, 506.
—— Deo Misra *v.* Ram Prasad, 197.
—— Lal *v.* Azmat Ullah, 768.
—— —— *v.* Bhagwan, 316.
—— —— *v.* Bhagwan Das, 298, 301, 327.
—— —— *v.* Bhawani Shankar, 459, 532, 539.
—— —— *v.* Munni Lal, 651, 583.
—— Narain *v.* Gujadhar, 406.
Shiba Prasad *v.* Lekha Raj, 93, 103, 115.
—— —— *v.* Lekhraj, 627.
Shibbu Haldar *v.* Gupi Sundari, 16.
Shiddappa *v.* Pandurang Vasudev, 228.
Shikri Prasad *v.* Aziz Ali, 274, 275.
Shira Khatoon *v.* Maung Pau, 285.
Shirekuli *v.* Mahablya, 732.
Shiv Dayal *v.* Pattu Lal, 21.
—— Nath *v.* Lachhmi Narain, 99.
—— Prasad *v.* Mandira Kumari, 726, 729
—— —— *v.* Tom Smith, 679.
—— Shankarappa *v.* Shivappa, 241.
Shiva *v.* Jaru, 10.
—— Devi *v.* Jaru, 505, 508.
—— Nath *v.* Manhor Lal, 547.
Shivachidambara *v.* Kamatchi, 515.
Shivaprasad *v.* Prayag Kumari, 11, 175.
Shivasubramania Ayyar *v.* Subramania Ayyar, 331.
Shivjiram *v.* Waman, 238.
Shivlal *v.* Shambu Prasad, 254.
Shivmurteppa *v.* Virappa, 216.
Shivram *v.* Bhao, 387.
Shivrao *v.* Official Liquidator, 697.
—— *v.* Pundlik, 557, 608.
Shivu Shidhu *v.* Lakhmichand, 262.
Shoilojanund *v.* Peary Charan, 59.
Shookmoy Chandra *v.* Manohari Dasi, 111, 131.
Shore *v.* Shore, 467.
Shoroshi Charan *v.* Bhagloo, 636.
Shravan Jayram *v.* Garbad Ukha, 284.

S—contd.

Shree Shree Radha Krishna Thakur v. The Official Receiver, 274.
Shrewsbury v. Hope Scott, 756.
Shri Bhawani v. Devrao, 324, 325, 338.
—— Ganesh v. Keshavrav, 444.
—— Krishanlal v. Ramnath, 731.
—— Prasad v. Sris Chandra, 640.
Shridhar v. Ganu, 418.
Shrinath v. Kanhaiyalal, 69.
—— Roy v. Godadhur, 376, 456.
Shrinivas v. Shiddika, 243.
Shrinivasdas v. Meherbai, 311, 313, 314, 318, 410.
Shrish Chandra v. Mungri Bewa, 387.
Shubratan v. Dhanpat Godaraiyu, 401, 402.
Shujaul v. Muhammad, 53.
Shukyi v. Hajee Bee Bee, 375.
Shuttleworth v. Claws, 339.
Shyam Behrai Mal v. Maha Prasad, 764.
—— —— Singh v. Rameshwar Prasad, 465.
—— Chand Koondoo v. The Land Mortgage Bank of India, 66, 769.
—— Kishore v. Umesh Chandra, 290, 291.
—— Kresto v. Ganesh, 234.
—— Lal v. Beshiruddin, 573.
—— Narain v. Mangal Prasad, 55, 211.
—— Sundar v. Bajpai, 358.
—— Sunder Lal v. Din Shah, 278.
Shyama v. Ananda, 213, 214.
—— Charan v. Naba Charan, 156, 163.
—— —— Mandal v. Heras Mollah, 689.
—— Churn v. Ananda Chandra, 253, 488.
—— —— v. Mahomed Ali, 699.
Shyanusuddin v. Asadulla, 583.
Sib Chunder Ghose v. Russick Chunder Neogy, 352.
Sibanand v. Jagmohan, 560, 561, 565, 581, 582, 583.
Sibendrapada Nath v. Secretary of State, 296, 302.
Siboo Jelya v. Gopal Chunder, 741.
Sichel v. Mosenthal, 358, 521.
Siddappa v. Vishwanath, 201.
Siddeshwar Martand v. Ganpatrao Bhaurao, 414, 415, 427.
Sidebotham v. Holland, 650, 653.
Sidha Nath v. Har Narain, 227.
Sidhanath v. Chiko, 637.

S—contd.

Sidick Haji v. Bruel & Co., 672, 673.
Sidilingappa v. Hirasa, 73.
Sidramappa v. Shidappa, 232.
Sigamani v. Manibadra, 319.
Siggers v. Evans, 749.
Sikandar Ara Amina Begum v. Hasan Ara Begum, 607.
Sikander v. Bahadur, 16, 626.
Simons v. Associated Furnishers Ltd., 670.
Simpson v. Clayton, 684, 687.
Sinaya v. Munisami, 362.
Singai Murlidhar v. Lala, 609.
Singaracharlu v. Sivabai, 787.
Singaram v. Kalyanam Subdara, 357.
Singeshwar Jha v. Ajab Lal, 714.
Singheeram v. Bhagbat, 290.
Singheshwar Singh v. Medni Prasad, 461.
Singjee v. Tiruvengadam, 363, 446, 466, 469.
Sinnaswami Gounden v. Rama Gounden, 581.
Sinnott v. Bowden, 224, 496.
Sinnu v. Santhoji, 782.
Sir Mahomed Yusuf v. Secretary of State, 642, 643.
Siraj Husain v. Mushaf Husain, 138.
Sirajuddin v. Sirajuddin, 528.
Sirbadhi Rai v. Raghunath, 588.
—— v. Raghunath Prasad, 596.
Sirish Chandra v. Kadambini, 160.
Sita Nath v. Basudev, 727.
—— —— v. Thakurdas, 382.
—— —— Ghose v. Thakurdas, 473.
—— Ram v. Kartar Singh, 571.
—— —— v. Nanak Chand, 324.
—— —— v. Sheo Darshan, 406.
Sitabai v. Sambhu, 21.
—— v. Sambhu Sonu, 677.
Sital Chandra v. Delanney, 1, 49, 50, 297.
—— —— v. Parbati Charan, 617.
—— Prasad v. M. Md. Maranwatyar Khan, 250.
—— —— v. Nawab Dildar, 95, 685, 717.
Sitamaya v. Venkataramanna, 454.
Sitaram v. Jiaul Hasan, 305.
—— v. Khandu, 552.
—— v. Krishnarao, 367.
—— v. Madho Lal, 417.
—— v. Sayad Sirajal, 305.
—— v. Shridhar, 409, 410.
Sitarambhat v. Sitaram, 61.
—— Maharaj v. Narayan, 682.

S—*contd.*

Sitaramayya *v.* Venkataramanna, 547.
Sitha *v.* Samiuddin, 231.
Sitharama *v.* Krishnaswami, 211.
Sitla *v.* Dhun Singh, 413, 514.
—— Baksh *v.* Lalta Prasad, 366.
Situl *v.* Luchmi, 356.
—— Pershad *v.* Luchmi, 365.
Siva *v.* Nundo, 417.
Sivakami Ammal *v.* Gopala, 370, 380, 381, 466.
Sivananjiah *v.* Sethay Goundar, 438, 489.
Sivarama Aiyar *v.* Muthu Alagappa, 723.
Sivaramayya *v.* Kapa Venkata Subbama, 217.
Sivasankara *v.* Subramania, 110.
Sivasubramania *v.* Theerpathi, 740.
———— Ayyar *v.* Subramania Ayyar, 330.
Sivraj Lal *v.* H. P. F. Ltd., 504.
Skinner *v.* Nauni Lal Singh, 621.
——— *v.* Skinner, 304.
Skipper and Tucker *v.* Holloway and Howard, 772.
Slater *v.* Burnley Corporation, 761.
Slipper *v.* Tottenham etc. Rly., 686.
Sm. Kamal Mayee Dasi *v.* Nibaran Chandra Pramanik, 77, 687.
—— Renula Bose, *In re*, 485.
Smart *v.* Jones, 664.
Smith *v.* Blackmore, 716.
——— *v.* Colbourne, 100.
——— *v.* Cox, 688.
——— *v.* Dinonath, 675.
——— *v.* Durrant, 480.
——— *v.* Gronow, 723.
——— *v.* Marrable, 662.
——— *v.* Mills, 696.
——— *v.* Roberts, 716.
——— *v.* Robinson, 341.
——— *v.* Seghill, 646.
——— *v.* Smith, 420, 549.
——— *Re*, Smith *v.* Smith, 102.
——— *v.* St. Michael Cambridge Overseers, 644, 645.
Smithies *v.* National Association of Operative Plasterers, 4.
Smuth *v.* Gronow, 102.
Smyth, *Ex parte*, 174, 175.
Sobhagchand *v.* Bhaichand, 36, 221, 222.
Sobhalal Shyamlal *v.* Didhlal Halkelal, 327.
Sochet Singh *v.* Hidayat Ullah, 469.
Sofaoll Khan *v.* Woopean Khan, 630.
Sohama Singh *v.* Kesar Singh, 638.
Sohan Lal *v.* Atal Nath, 304.
——— *v.* Kunwar, 402.
——— *v.* Mohan Lal, 16, 45, 292, 295, 302.
Sohni *v.* Raj Kumar Singh, 50.
Solaiman *v.* Jatindra Nath, 736.
Solema Bibi *v.* Hafiz Mahammad, 383.
——— *v.* Hafez Mahummad Hossein, 264.
Soloman *v.* Official Assignee, 51, 59.
Solomon *v.* Solomon, 2.
Somanatha *v.* Ananta, 459.
Somashekarrao *v.* K. S. Mishra, 757, 770.
Somasundara Tambiran *v.* Sakkarai, 518.
Somasundaram *v.* Shwe Bwa, 298.
———— *v.* Unnamalai, 182, 183, 184.
Somerset (Duke) *v.* Fogwell, 626.
Somesh *v.* Ram Krishna, 416.
Someshwar *v.* Naranbhai, 385.
Someshwari Prasad *v.* Maheshwari, 713.
Somu *v.* Rangammal, 18.
——— Achari *v.* Singara Achari, 326, 330.
Sonai Chutia *v.* Sonaram Chutia, 302.
Sonaji *v.* Krishna Rao, 539.
Sonaram *v.* Sitaram, 388.
Sonathun *v.* Dinanath, 392.
Sonatun *v.* Juggutsundree, 128.
Sonaulla Karikar *v.* Abu Sayad, 616, 618.
Soobul Chunder *v.* Russick Lall, 550, 553.
Sookhmoy Chunder *v.* Manoharry Dassi, 128.
Sookyaboye *v.* Latchmi, 759.
Soondur Koomaree *v.* Kishoree Lal, 759.
Soopi *v.* Mariyoma, 551.
Soorja Koer *v.* Nath Buksh, 183, 184.
Soorjeemoney Dossey *v.* Denobundoo Mullick, 141, 144, 156.
Soorjomonee Dayee *v.* Suddanund, 155.
Soper *v.* Arnold, 335, 336.
Sopher *v.* Administrator-General of Bengal, 5, 104, 142.
Sopwith *v.* Maughan, 172.
Sorabjee *v.* Dwarkadas, 437, 442.
Sorolah *v.* Bhoobun, 182.
Sothamaya *v.* Vallipallia, 16.
Soti Suraj *v.* Than Singh, 459.
Soudaminey *v.* Jogesh, 109.
Soundara Rajan *v.* Natarajan, 111, 119.
Sounders *v.* Vantier, 125.

S—*contd.*

South African Territories Ltd. *v.* Wallington, 358, 360.
——— Eastern Railway *v.* Associated Portland Cement Manufacturers, 112.
——— Essex Estuary Co., *Ex parte*, Chorley, 783.
——— of England Dairies Ltd. *v.* Baker, 192, 679, 681, 684.
——— Nigeria *v.* Holt & Co., 671.
Southampton (Lord) *v.* Hertford (Marquis), 125, 126, 127.
Southend-on-Sea Estates Co. *v.* Inland Revenue Commissioners, 708.
Southport and West Lancashire Banking Co. *v.* Thompson, 478, 488.
Soward *v.* Laggatt, 696.
Sowbagia *v.* Manicka, 182.
Sowcar Lodd Govinda Doss *v.* Lepati Muneppa Naidu, 788.
Sowter *v.* Potter, 625.
Spence, *In re*, 129.
Spencer's Case, 186, 188, 683, 684.
Spike *v.* Harding, 702.
Spirett *v.* Willows, 267.
Spollan and Long's Contract, *In re*, 314.
Spoor *v.* Green, 695.
Spyer *v.* Phillipson, 23.
Sree Chand Sarcar *v.* Kasi Chetty, 135.
—— Misser *v.* Crowdy, 688.
—— Sankarachari *v.* Varada, 640.
Sreedharan Valia *v.* Kunhunni, 720.
Sreegopal *v.* Ram Cuaran, 304.
Sreemanchunder Dey *v.* Gopalchander, 268.
Sreemati Raj Kumari Debi *v.* Mukunda Lal, 598.
Sreenutty Pubitra *v.* Damoodur, 760.
———— Rani *v.* Rajah Sri Nath, 392, 604.
———— Tripoora *v.* Jugger Nath, 113, 304.
Sreenath *v.* Cally Doss, 358.
———— *v.* Mohesh, 177.
Sreenivasa Ayyangar *v.* Johnsa, 744.
Sreeram *v.* Bammireddi, 378.
Sri Bavani *v.* Devrao, 83.
—— Gopal *v.* Pirthi Singh, 519.
—— Jagannada *v.* Sri Raja Prasada Rao, 211.
—— Kanta Prasad *v.* Jag Sah, 420, 550, 551.
—— Ku Kulam Subramanyam *v.* Kurra Subba Rao, 287.
—— Raja Simhadri *v.* Prattapati, 654.
—— —— ———— *v.* Prattipatti Ramayya, 177, 178, 706.
Sri Raja Vencata Narasimha *v.* Sri Raja Sobhandri, 758.
—— —— Venkata *v.* Sri Rahah Suraneni, 106.
—— Rajah Bollapragada Venkata *v.* Menda Seetayya, 609.
—— —— Rao Venkata *v.* Court of Wards, 761.
—— —— Setrucherla *v.* Sri Raja Vairicherlal, 407.
—— Ram *v.* Kidari Parshad, 316, 319.
—— —— *v.* Kesrimal, 510.
—— —— *v.* Ramji Das, 618.
—— —— Chandra *v.* Thakur Ajodhya, 724.
—— Thakurji *v.* Narsingh Narain, 275.
Sricharan *v.* Makhan Lal, 392.
Sridevi *v.* Virarayan, 353.
Srimanavedan *v.* Anjela, 683.
Srimati Bramamayi *v.* Joges Chandra, 109, 125, 127.
——— Farman Bibi *v.* Sheikh Tasha Haddal, 720.
——— Krishna Kumari *v.* Bhaya Rajendra, 85.
——— Mallika Dassi *v.* Makham Lal, 720, 722.
——— ——— *v.* Ratanmani, 61, 444.
——— Sasibala *v.* Srimati Amala, 740.
Srimatty Akhoj Kumari *v.* Kanai Lal, 34.
Srinath Das *v.* Kehttar Mohan, 10, 366.
——— Roy *v.* Dinabandhu Sen, 671.
Srinivas Aiyangar *v.* Rangaswami, 690, 739.
Srinivasa *v.* Dandayudapani, 137.
———— *v.* Radhakrishnam, 381, 398, 399.
———— *v.* Rama, 557, 608.
———— *v.* Ranganatha, 609.
———— *v.* Thiruvengadathaiyanger, 184.
———— *v.* Yamunabai, 596.
———— Ayyangar *v.* Radha Krishnam Pillai, 365, 382, 601.
———— Ayyar *v.* Muthusami Pallai, 724.
———— Chari *v.* Gnanaprakasa, 445, 446.
———— Rahghava *v.* Rengasami, 745.
Sripad *v.* Kashibai, 489.
Sripat Singh *v.* Naresh Chandra, 524.
Sriramulu *v.* Chimma, 394.
———— *v.* Jogiraju, 641.
Sris Chundra Nandey *v.* Rakhalananda, 607.
Srish Chandra *v.* Kadambini, 757.
—— ——— *v.* Doa Mahammad, 711.
Sristidhar *v.* Rakshakali, 391.
Stait *v.* Fenner, 654.

S—*contd.*

Stamford and Warrington (Earl), *In re*, Payne *v.* Grey, 126.
Standen *v.* Christmas, 187, 696.
Standing *v.* Bowring, 749, 761.
Stanhope *v.* Haworth, 732.
Stanley *v.* Grundy, 504.
——— *v.* Leigh, 107.
——— *v.* Towgood, 696.
Stapleton *v.* Cheales, 140.
State of Gondal *v.* Govindram, 318.
Steeds *v.* Steeds, 409.
Steel Wing Co., Ltd., *In re*, 772.
Stephenson & Co., *Re*, Pool *v.* The Company, 686.
Stepney *v.* Biddulph, 227.
Stevens *v.* Guppy, 315.
Stevenson *v.* Lambard, 684, 704.
——— *v.* Lombard, 191.
Stewart *v.* Bank of Upper India, 34, 222, 375, 377.
Stickney *v.* Keeble, 344.
Stileman *v.* Ashdown, 263.
Stocker *v.* Planet Building Society, 673, 696.
Stone *v.* Evans, 679.
Stonewegg *v.* Rameshwar, 738.
Stranks *v.* St. John, 663.
Strapp *v.* Bull, 223.
Strathede, *Re*, *v.* Campbell, 129.
Streatfield *v.* Streatfield, 166, 169.
Stringer *v.* Harper, 539.
Stri Seshattri *v.* San Kara, 394.
Strong *v.* Stringer, 726.
Stuart *v.* Joy, 705.
——— & Olivant & Seadon's Contract, *In re*, 313.
Suba Bibi *v.* Balgobind, 261, 263, 266.
Subadini *v.* Durga Charan, 652, 655.
Subama *v.* Yamanappa, 748.
Subana *v.* Yamanappa, 299.
Subba Rama *v.* Venkat Sabba, 753.
——— *v.* Nagappa, 649, 722.
——— *v.* Saravarayudu, 424, 425, 428, 458, 503, 504, 543, 544, 546.
——— Rao *v.* Pakkiamma Nadathi, 395, 543.
——— *v.* Veeranjaneyaswami, 227, 233.
——— Rau *v.* Devu Shetti, 358, 360.
——— Row *v.* Veradiah, 333.
——— Reddy *v.* Guruva Reddy, 295, 626.
Subbai Goundan *v.* Palani, 411, 544, 546.

S—*contd.*

Subbalakshmi *v.* Narasimiah, 35.
Subbama *v.* Narayya, 368, 455.
Subbamal *v.* Muthu, 600.
——— *v.* Venkata, 780.
Subbammal *v.* Venkatarama, 767, 778.
Subban Chettiar *v.* Rangan Chetty, 435.
Subbaraju *v.* Seetharamaraju, 174, 252, 447.
Subbaraya *v.* Krishna, 96, 723, 731.
——— *v.* Rajagopala, 317, 319, 320, 322.
——— Aiyar *v.* Srinivasa, 782.
Subbarayar *v.* Subbammal, 761.
Subbarayudu *v.* Kotayya, 61, 788.
——— *v.* Lakshminarasamma, 576.
Subbaroyar *v.* Kottaya Goundan, 316, 325. 326.
Subbayar *v.* Moniem, 298.
Subbiah Chetty *v.* Kuppama, 453.
——— *v.* Rama Reddi, 445.
Subbraveti *v.* Gundala, 629.
Subha Reddy *v.* Gurava Reddy, 76.
Subhabhat *v.* Vasudeobhai, 354.
Subhadrayamma *v.* Venkatapati Raju, 296.
Subodh Chandra *v.* Bhagwandas, 234.
Subradrabhai *v.* Mahomedbhai, 344.
Subramania *v.* Bala Subramania, 431, 462.
——— *v.* Muthia Chettiar, 276.
——— *v.* Palaniappa Mudali, 565.
——— *v.* Panchanada, 473.
——— *v.* Ramakrishna, 254.
——— *v.* Rama Subba, 778.
——— *v.* Saminatha, 323.
——— Aiyar *v.* Narayanaswami, 544, 549.
——— Ayyar *v.* Poovan, 327, 329.
——— ——— *v.* Saminatha, 744.
——— ——— *v.* Sitha Lakshmi, 763.
——— ——— *v.* Subramania Patter, 385, 783.
——— Chettiar *v.* Sinnammal, 553.
——— Mudaliar *v.* Gnana Sambanda, 330.
——— Pattar *v.* Kattamballi, 672.
Sbramaniam *v.* Chidambaram, 25.
Subramaniam Chettyar *v.* V. K. Shivalkar, 452.
——— Pattar *v.* Kiradadasan, 782.
——— *v.* Perumal, 86, 295, 296.
——— *v.* Subramaniam, 137, 138.
Subramanian *v.* Arunachalam, 769.
——— *v.* Raja of Ramnad, 460, 610.

S—*contd.*

Subramanya Chettiar *v.* Subramanya Mudaliar, 637.
Subramaniam *v.* Chidambaran, 25.
Subramanya *v.* Sadasiva, 181.
Subramanyan *v.* Mandyan, 421.
Subramonian *v.* Lutchman, 378, 379.
Subramonion Chetty *v.* Mohan Ali, 239.
Subrao *v.* Munjapa, 405, 412.
Subratan *v.* Dhanpat Godaria, 434.
Subraya *v.* Ganpat, 346, 519.
——— *v.* Krishna, 64.
——— *v.* Perumal, 269.
——— *v.* Timmanna, 562.
——— *v.* Tummanna, 555, 561.
——— *v.* Velayudu, 71.
——— Pai *v.* Subramania Pattai, 369.
——— Goundan *v.* Perumal Chettiar, 273.
Sudala Muthu *v.* Sankara, 232.
Sudhamoyee *v.* Bhujendra Nath, 764.
——— *v.* Jessore Loan Company, 247.
Sugappa *v.* Govindappa, 774.
Suhashini Poddar *v.* Shreenath Chakravarti, 49, 270.
Sujjad Ahamed *v.* Ganga Charan, 737.
Sukdeo *v.* Jamna, 241, 253.
Sukh Lal *v.* Bishambhar, 16, 59, 61.
Sukhdeo Misr. *v.* Sheodial, 221, 471.
——— Pandey *v.* Remeshwar Prasad, 681.
Sukhi *v.* Gulam Safdar Khan, 417, 592.
Sukhpal Kuar *v.* Dasu, 273.
Sukhraj Rai *v.* Dip Narain, 691, 692.
Sukiuddin Saha *v.* Sonaulla, 516.
Sukumar Chandra *v.* Nagendra Bala Dasi, 637.
Sukumari *v.* Magneeram, 610.
Sulatu Das *v.* Jadu Nath Das, 652.
Suleman *v.* Perichavala, 230.
——— Haji *v.* Darabshaw, 734.
Sulin Mohan *v.* Raj Krishna, 9, 76.
Sulleman *v.* Patell, 278, 285, 287.
Sultan *v.* Nanu, 74.
——— Begum *v.* Debi Prasad, 217.
——— Kani Rowthen *v.* Mahomed Meera, 336, 338.
——— Muhammed *v.* Ladha, 407.
Sultanali *v.* Tyeb, 642.
Summers *v.* Griffiths, 332.
——— Salford Corporation, 663.
Sumsuddin *v.* Abdul Husein, 50.

S—*contd.*

Sundar *v.* Lalji, 300.
——— Bibi *v.* Raj Indar, 64.
——— ——— *v.* Rajendra Narain, 136.
——— Koer *v.* Sham Krishen, 401.
——— Lal *v.* Ghissa, 209, 210.
——— Malhar *v.* Bapuji, 406.
——— Singh *v.* Bholu, 426, 462.
Sundara *v* Sivalingham, 316, 338.
——— Reddiar *v.* Subbiah, 590.
Sundarachariar *v.* Narayana Ayyar, 380.
Sunder Deo *v.* Thakur Baldeo, 383.
——— Kuer *v.* Shah Udey Ram, 19, 200, 205.
——— Singh *v.* Bholu, 431.
——— ——— *v.* Ram Nath, 270.
——— ——— *v.* Ram Saran Das, 659, 702, 709, 739.
Sunderlal *v.* Gursaran, 262.
Sundermal *v.* J. C. Galstaun, 455.
Sundermull *v.* Landhuram, 702.
Sundrabai *v.* Jayawant, 59.
——— *v.* Shivnarayana, 184.
Sunil Kumar Kerr *v.* Sisir Kumar Kerr, 362.
Sunitabala Debi *v.* Dhara Sundari, 457, 760.
Sunkari Sitayya *v.* Mudaragaddi, 194.
Suppa Sokkaya *v.* Sappu Bhattar, 618.
Sura Laskhmiah *v.* Kothandarama, 184, 754.
——— Reddi *v.* Ram Narasu, 297.
Suraj Bunsi Koer *v.* Sheo Proshad, 181.
——— Bhan *v.* Hafiz Abdul, 19, 635, 709, 715.
——— Chandra *v.* Behari Lal, 713.
——— Narain *v.* Jagbali Suhkul, 474.
Surajmani *v.* Rabina, 81.
Surajmull Shroff *v.* Gopeeram, 376.
Suramma Nayuralu *v.* Suraiyya, 593.
——— ——— *v.* Surayya, 245.
Surandra *v.* Kitindra, 452.
Surapur *v.* Diwan Chand, 441.
Suratee Bara Bazaar Co. *v.* Municipal Corporation of Rangoon, 4.
Surayya *v.* Venkataraman, 611.
Surcome *v.* Pinniger, 286.
Surendra *v.* Khilindra, 514.
——— *v.* Rajendra, 212, 213.
——— Bahadur *v.* Behari Singh, 390.
——— Kumar Sen *v.* Chandratara Nath, 741.

S—*contd.*

Surendra Mohan *v.* Mohendra Nath, 48, 519.
———— ———— Roy Chaudhri *v.* Mahendranath Banerji, 376, 380, 518.
———— Narain *v.* Bhai Lal, 16.
———— ———— *v.* Dina Nath, 693.
———— ———— Singh *v.* Hari Mohan, 741.
———— ———— ———— *v.* Bhai Lal Thakur, 626, 631.
———— ———— Sinha *v.* Bijoy Singh, 8.
———— ———— Sarkar *v.* Poornachandra Mukherji, 631.
—— Nath Sen *v.* Dinabandhu Naik, 711.
Surendralal Kundu *v.* Ahmmad Ali, 591.
Surendranath Ghosh *v.* Haridas Biswas, 518.
———— Sarkar *v.* Poornachandra Mukherji, 648.
Surendro Keshub *v.* Doorga Soondery, 761.
Sures Chandra *v.* Lalit Mohan, 156, 157.
Suresh Chandra *v.* Jadas Chandra, 380.
Surja *v.* Nanda Lal, 213.
—— Narain *v.* Nanda Lal, 488, 714.
Surjiram *v.* Barhamdev, 421, 427, 460, 535.
———— Marwari *v.* Barhmdeo Pershad, 241, 367, 596, 613.
Surju Prasad *v.* Bhowani, 354.
———— ———— *v.* Ramsaran, 79.
Surnomoyee *v.* Denonath Gir, 631.
———— *v.* Koomar Purresh, 640.
Surpat Singh *v.* Sheo Prasad, 673.
Surplice *v.* Farnsworth, 675.
Sururijigar Begam *v.* Barada Kanta, 18.
Surya Narain *v.* Jogendra Narain, 401.
Suryanarayan Rao *v.* Basivireddy, 605.
Suryanarayana *v.* Rajah of Takkiah, 691.
———— *v.* Venkayya, 67.
Suryanarayanamurthi *v.* Satyanarayanamurthi, 344.
Suryaprakasa Rao *v.* Venkata Dikshitulu, 326.
Susai Lazar Villanarayya *v.* Ramaswami Naidu, 66.
Susil Chunder Neogy *v.* Birendrajit Shaw, 653, 707, 736.
—— Kumar Biswas *v.* Rajani Kanta, 692.
Susilaballa *v.* Dinabandhu, 501.
Sutton *v.* Sutton, 363.
—— *v.* Temple, 662.

S—*contd.*

Sutyabhama *v.* Krishna Chunder, 721.
Swain, *Re*, 129.
—— *Re*, Monckton *v.* Hands, 125.
Swami Chetty *v.* Ethirajulu, 379, 394.
Swaminath Iyer *v.* Ramnath Iyer, 557, 608.
Swaminatha *v.* Krishna, 197.
———— *v.* Ramaswami, 642.
———— *v.* Rukmani, 262.
———— *v.* Subbarama, 330.
Swansea Corporation *v.* Thomas, 682.
Swarna Kumar *v.* Prohlad Chandra, 95, 115, 194.
Swarnamoyee Debee *v.* Aoyajaddi, 718, 727.
Sweet *v.* Seager, 675.
Sweetmeat Automatic Delivery Co. *v.* Commissioners, 646.
Swinburne *v.* Milburn, 711.
———— Sutton *v.* Featherley, 762.
Syam Sunder *v.* Bajpai, 50, 460.
Syed Abbas Ali *v.* Misri Lall, 409.
—— Ahmad *v.* Magnesite Syndicate, 723.
—— Ajam *v.* Ananthanarayana, 644.
—— Ali *v.* Manik Chandra, 636.
—— —— Kazemini *v.* Manik Chandra, 234.
—— —— Zamin *v.* Syed Akbar Ali Khan, 755.
—— Ashgar *v.* Syed Mahomed, 80.
—— Hasan Baqar *v.* Thakur Sheo Narain Singh, 328.
—— Husain *v.* Bank of Upper India, 447.
—— Ibrahim *v.* Arumugathayee, 445, 494, 510, 618, 619.
—— Lutf Ali Khan *v.* Futteh Bahadoor, 214, 566.
—— Md. Haidar *v.* Prince Safdar Jah, 269.
—— Mehdi Ali Khan *v.* Chunni Lal, 358, 362, 604.
—— Mukhtar Ahmed *v.* Rani Sunder Koer, 663, 665.
—— Nawabali *v.* Mohammed Ramzan, 682, 736.
—— Nural Hossein *v.* Sheosahai, 208.
—— Sufdar *v.* Amzad Ali, 643.
—— Wajed *v.* Hafez Ahmed, 573, 788.
Symalarayudu *v.* Subbarayudu, 565.
Syrian Land Co. *v.* J. D. Rodrigues, 643.
Syud Bazayet Hossein *v.* Dooli Chand, 248.

T—*contd.*

T. N. Subsidiary Co. *v.* T. N. & Q. Bank, 776.
T. Sivithri *v.* M. Vasudevan, 759.
T. V. Sangham Ltd. *v.* Shanmugha Sundaram, 92.
Tabor *v.* Godfrey, 672.
Tacoordeen Tewarry *v.* Nawab Syed Ali Hossein Khan, 759.
Tafazzal Ahmed *v.* Masalat Khan, 640.
Tagore *v.* Tagore, 12, 48, 91, 103, 106, 122, 159.
Tahilram *v.* D'Mello, 387.
Taibai *v.* Wasudeorao, 555, 576, 578.
Tailby *v.* Official Receiver, 51, 58, 207, 388, 606, 772.
Taj Din *v.* Abdul Rahim, 643, 657.
Tajjobibi *v.* Bhagwan Prasad, 1, 430, 431, 435.
Talari Kevali *v.* Visvanathan, 246.
Talbot *v.* Frere, 408.
Talik Singh *v.* Galal Singh, 471.
Tamaya *v.* Timapa, 95, 96, 685, 686, 717, 723.
Tan Chew Hoe Neo *v.* Chee Swee Cheng, 219.
Tana Peena *v.* Mamakanta Kath, 374.
—— —— *v.* Mammakanthakath Uma, 447.
Tancred *v.* Delagoa Bay and East Africa Railway, 372.
Tangor Majhi *v.* Jaladhari, 239, 241, 246.
Tangya Fala *v.* Trimbak, 571.
Tanham *v.* Nicholson, 654, 655.
Tansukh Rai *v.* Shri Gopal, 474.
Tapassi *v.* Raja Ram, 261.
Tara Kumari *v.* Chandra Mauleshwar, 759.
—— Prasanna *v.* Nilmoni, 346.
—— Sundari *v.* Khedan Lal, 566, 573, 612, 615.
—— —— *v.* Saroda Charan, 64.
Tarabag Khan *v.* Nanak Chand, 19, 200.
Tarachand *v.* Brojo Gopal, 467.
—— *v.* Chiman, 365.
—— *v.* Lakshman, 80.
—— *v.* Narayan, 546.
—— *v.* Sher Singh, 7.
Tarachurn Chatterji *v.* Suresh Chunder, 135.
Tarakant *v.* Puddomoney, 237.
Tarakeshwar *v.* Shoshi, 122.
Taraknath *v.* Sanatkumar, 194.
Tarap Sheikh *v.* Kunja Behary, 692.
Tarini Charan Bose *v.* Deb Narayan Mistri, 700.
Tarkeshwar *v.* Kalka Pathak, 407.
Tarn *v.* Turner, 449, 550, 551.
Tarokessur Roy *v.* Soshi Shikhuressur, 156, 159.
Tarvadi *v.* Bai Kashi, 17.
Tata Iron & Steel Co., Ltd. *v.* Baidayanath, 778, 780.
—— *v.* Charles Joseph Smith, 460.
Tatayya *v.* Pichayya, 542.
Tate *v.* Leithead, 762.
Tatia *v.* Babaji, 44, 298, 360.
Tay Gyi *v.* Maung Yan, 489.
Tayabali *v.* Lilabai, 183.
Tayaramma *v.* Sitaramasami Naidu, 75.
Tayawa *v.* Durshidappa, 665, 668, 670.
Tayleur *v.* Wildin, 729.
Taylor *v.* Caldwell, 672.
—— *v.* Debar, 321.
—— *v.* Graham, 134, 149.
—— *v.* London and County Banking Co., 314, 384, 768.
—— *v.* Mostyn, 511.
—— *v.* Shun, 683.
—— *v.* Stibbert, 36.
—— *v.* Webb, 673, 674.
Teevan *v.* Smith, 395, 589.
Tehilram *v.* Kashibai, 328, 329.
Teja Singh *v.* Kalyan Das, 7.
—— —— *v.* Kalyan Das Chet Ram, 777.
—— —— *v.* Moti Singh, 92.
Tejendro Narain Singh *v.* Bakai Singh, 689.
Tejumal Josumal *v.* Rochalbai, 200.
Tekait Ram Chunder Singh *v.* Srimati Madho Kumari, 638.
Tench *v.* Cheese, 124, 125.
Tenison *v.* Sweeny, 621.
Tennant *v.* Trenchard, 457.
Terrell *v.* Murray, 695.
Terry and White's Contract, *In re*, 343.
Texas Co., Ld. *v.* Bombay Banking Co., 42.
Tez Chand *v.* Sri Kanth Ghose, 709.
Thackerakavil *v.* Noor Mahomed, 649.
Tha Dun *v.* Tha Zam, 438.
Thakar Das *v.* Malik Chand, 776.
—— —— *v.* Mst. Putli, 76, 362.
—— —— *v.* Mussammat Putli, 626.
—— —— *v.* Tekchand, 355.
—— Singh *v.* Jagat Singh, 358.
Thakardas *v.* Jaikishna, 247.

T—*contd.*

Thakoor Chunder Paramanick *v.* Ramdhone Bhattacharjee, 20, 82, 230.
Thakore Fatehsingji *v.* Bamanji, 638.
Thakur Badri Singh *v.* Hazari Singh, 247, 264.
——— Chowdhury *v.* Manrup Mahton, 471.
——— Jagmohan *v.* Mst. Sheoraj, 81, 156.
——— Prasad *v.* Gaya, 242, 250.
——— Singh *v.* Mst. Uttam Kaur, 56.
Thakurain Ritraj Koer *v.* Sarfaraz Koer, 671.
Thakurdas *v.* Sobhachad, 302.
Thakuri *v.* Kundan, 197.
Thamman Pande *v.* Maharaja of Vizianagram, 698.
Thammayya *v.* Rammanna, 254.
Than Chand *v.* Jagannath, 416.
Thanmul Sowcar *v.* Ramdoss, 524.
Thansukhdas *v.* Jhango, 276.
Thanunini *v.* Dhavala Polinaidu, 312.
Thasi Muthukannu *v.* Shunmugavchi, 148.
Thatched House, *Re*, 417.
Thavasi Ammal *v.* Salai Ammal, 676.
Thawardas Jethanand *v.* Seth Vishindas, 770, 779.
Thawerdas *v.* Seth Vishindas, 69.
The Arab, 525.
The Bengal Indigo Co. *v.* Mohunt Roghubur Das, 370.
Theberge *v.* Laudry, 3.
Thekkamannengath *v.* Kakkasseri, 495, 511.
Thellusson *v.* Woodford, 124, 169.
The Official Assignee *v.* M. E. Moola & Sons Ltd., 291, 303.
——— ——— ——— of Mardas *v.* Sampath Naidu, 211.
Thethalan *v.* The Eralpad Rajah, 191, 373, 679, 682, 683.
Thevaraya Reddy *v.* Venkatachalam, 543, 544, 548.
Theyagaraja *v.* Seshappier, 330.
Thiagar Raja *v.* Ramaswami, 544.
Thillai *v.* Ramanatha, 428.
Thimmanayanim *v.* Venkatappa, 64.
Thippa Ramaswami *v.* Krishnaswami, 508.
Thirthaswamiar *v.* Rangappayya, 724, 726, 731.
Thiruvadi Ayyangar *v.* P. Janaki, 568.
Thomas *v.* Hanuman Prasad, 320.
——— *v.* Packer, 738.
Thomas *v.* Wilberforce, 142.
——— Pillai *v.* Muthurama Chettiar, 263.
Thompson, *Re*, 109, 110, 112.
——— *v.* Hakewill, 625.
——— *v.* Holt, *Re*, 481.
——— *v.* Webster, 267, 273.
Thornber, *In re*, Crabtree *v.* Thornber, 126.
Thornton, *Ex parte*, 247.
Throne *v.* Cann, 562, 563, 566, 612, 615.
Thumbuswamy *v.* Mahomed Hoosain, 355, 365, 366, 367.
Thungavellu Chetty *v.* Mangathaye Ammal, 201.
Tika Ram *v.* Deoji Maharaj, 650, 715.
—— Rao *v.* Hari Rao, 278.
—— Sao *v.* Hari Lal, 4, 555, 577.
Tilak Brittial *v.* Rudeswar, 302.
Tilakdhari *v.* Gournarain, 245, 300.
——— Lal *v.* Khedan Lal, 31, 33, 207.
Tiloke Chand Surana *v.* J. B. Beattie & Co., 37, 225, 244.
Tilt, *Re*, Lampat *v.* Kennedy, 671, 672.
Timaji *v.* Rama, 532.
Timangowda *v.* Nenepgowda, 290.
Timmappa *v.* Lakshmanna, 347, 382.
——— *v.* Rama Venkanna, 679, 735.
Timmarsa *v.* Badiya, 728, 730.
Timmins *v.* Gibbins, 746.
Tin Couri Dassee *v.* Krishna, 156, 158, 160, 163.
Tinoodhan *v.* Trailokya, 239, 250, 253.
Tippaya *v.* Venkata, 370.
Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co., 512.
Tiruchurna *v.* Sanguvein, 641.
Tirugnana *v.* Nallatambi, 397, 403, 408, 433.
Tirumal Rao *v.* Syed Dastaghiri, 416.
Tiruvengada *v.* Venkatachala, 699.
Tituram *v.* Cohen, 83, 85.
Todd *v.* Flight, 674.
Tofaluddi *v.* Mahar Ali, 392, 604.
Peada *v.* Mahar Ali, 390.
Tokhan Singh *v.* Girwar, 358, 361.
Tolhurst *v.* Associated Portland Cement Manufacturers, 773.
Tollman *v.* Portbury, 728.
Tomlinson *v.* Harding, 300.
Tommey *v.* Rama Sahai, 63, 773
Toolsi Ram *v.* Munno Lall, 346.
Toon Chan *v.* P. C. Sen, 225.
Tooth *v.* Hallet, 781.

T—contd.

Topandas v. Jesaram, 499.
Topanmal v. Chanchanmal, 229.
Torbay Hotel v. Jenkins, 190, 191.
Torkington v. Magee, 771, 789.
Torrens v. Walker, 673, 697.
Torniano v. Young, 695.
Totaram v. Harischandra, 581, 582.
——— v. Ram Lal, 555, 573, 576, 577, 612.
Toulmin v. Steere, 562, 614, 615.
Towerson v. Jackson, 641.
Townsend v. Windham, 257.
Traders Miners Ltd. v. Dhirendranath, 286.
Treacher & Co., v. Mahomedally, 342.
Treloar v. Bigge, 686.
Trent v. Hunt, 375, 449, 450.
Tressillian v. Caniffe, 29.
Trevelyan v. White, 762.
Tribhovan v. Shankar, 301.
Tribhovandas v. Krishnaram, 359.
Tribbuvan Das v. Ganga Das, 118.
Tricomdas Cooverji v. Gopinathji Thakur, 322.
Triguna Sundari v. Radharani, 171.
Trimalrao v. Municipal Commissioners, 327.
Trimbak Ramchandra v. Shekh Gulam Zilani, 709.
Trimbuk Gungadhur v. Bhagwan Das, 477, 480.
——— Jivaji v. Sakharam, 401, 410.
Tripura Modern Bank v. Nabadwip, 388.
Tripurari Pal v. Jagat Tarini, 157.
Triuvengadam v. Sabapathi, 616.
Troilokya Nath v. Sarat Chandra, 737, 738.
Truscott v. Diamond Rock-Boring Co., 696.
Tufail Fatma v. Bitola, 567, 572.
Tukaram v. Atmaram, 295, 302.
——— v. Khandoji, 394.
——— v. Mumbhaji, 335.
Tukaram v. Ramchand, 354, 369, 370, 383.
Tulk v. Moxhay, 100, 101, 188.
Tulshi Pershad Singh v. Ram Narain Singh, 634.
——— Ram v. Gur Dayal Singh, 550.
——— ——— v. Sat Narain, 467.
Tulsi Ram v. Muna Koer, 370, 450, 451.
——— ——— v. Radha Kishan, 568.
Tulsidas v. Hanifa Bibi, 183.
——— v. Pralhad, 336.
Tulsiram v. Murlidhar, 322.
Tulsiram Rajaram v. Govinda Ramji 644.
Tuppan Nambudri v. Chinna Pari, 507.
Turner v. Bank of Bombay, 73.
——— v. Green, 332.
——— v. Harvey, 332.
——— v. Moon, 311, 312.
——— v. Stella Bond Ltd., 694.
Turney, *Re*, Turney v. Turney, 142.
Turof Sahib v. Esuf Sahib, 644.
Tweed v. Mills, 342.
Twopenny v. Young, 613.
Twyman v. Packard, 705.
Twyne's Case, 257, 260, 269, 271.
Tyabali v. Parpatibai, 380.
Tyars v. Alsop, 758.
Tyler, *Re*, Tyler v. Tyler, 130.

U

U Kyaw Zan v. Ah Doe, 174.
U Maung Nge v. P.L.S.P. Chettyar Firm, 275.
U Mya v. Chettyar Firm, 316.
U. P. Electric Supply Co., *In re*, 639.
U. P. Government v. Manmohan Das, 604.
U Pandawan v. U Sandima, 755. 764.
U Po Naing v. Burma Oil Co., 700.
U Po Shin v. Edward, 202.
U Pu Le v. Oo Kim Seng, 284.
U Pyinnya v. Maung Law, 12, 76.
U San v. Maung San, 380.
U Shwe Bwe v. Maung Thank Kya, 557.
U Shwe Bwa v. Maung Thauk, 608.
U Teza v. E Ma Gwye, 12, 76.
U Tha Nyo v. Maung Kyaw Tha, 644.
U Theta v. U Arsena, 49.
U Thinsin v. Kokye, 657.
U Thita v. U Areiseiuna, 747.
U Tho Nyo v. Chettyar, 336.
U Tin v. M.P.M. Chettyar Firm, 316, 327.
Ubedul Rahman v. Darbari, 702.
Uchit Mandar v. Gosain Singh, 472.
Udai Chand v. Nagina Singh, 462.
Udaram v. Ranu, 216.
Uday v. Katyani, 668.
——— Chunder v. Asutosh, 181.
Udaya Pratap v. Gourachandra Dyani, 657.
Udayana Pillai v. Senthivelu, 370, 380.
Udhab Chandra v. Narain, 684.
Udho Das v. Mehr Baksh, 201, 300, 337.
Udipi Seshagiri v. Seshamma, 95, 685, 717.

U—*contd.*

Udit Narain Misir *v.* Asharfi Lal, 539, 580.
Udoy Kumari *v.* Hari Ram, 62.
Ujagar Lal *v.* Lokendra Singh, 383, 452.
Ulfat Hossain *v.* Gayany Das, 8, 714.
—— Rai *v.* Gauri Shankar, 76, 295, 626.
—— —— *v.* Kanhaiya Lal, 406.
Ulfatunnissa *v.* Hossein Khan, 394.
Uma Jha *v.* Chetu, 301.
Uma Sunkur *v.* Tarini Chunder, 694.
Umamoyi *v.* Tarini Pershad, 237, 255.
Umar *v.* Sakharam, 499.
—— Ali *v.* Asmat Ali, 597, 598.
—— Kanta *v.* Kashiram, 9, 678.
Umartara Gupta *v.* Umacharan Sen, 498.
Umda *v.* Umrao Begam, 10, 455.
Umed Singh *v.* Babu Ram, 564.
Umedmal Motiram *v.* Davu, 301.
Umes Chunder *v.* Zahoor Fatima, 47, 244, 510.
Umesh Chunder *v.* Zahur Fatima, 53, 592, 596.
—— —— *v.* Chunchun, 10.
—— Chandra *v.* Dinabandhu, 409.
—— —— *v.* Hemangachandra, 532.
—— —— *v.* Khulna Loan Co., 493, 495.
—— —— *v.* Mathura Mohan, 473.
—— ——Mandal *v.* Hemangachandra, 525.
Ummar Sahib *v.* Vythilinga, 302.
Umrao *v.* Valiulla, 381.
—— Begum *v.* Rahmat Ilahi, 269.
—— Singh *v.* Baldeo Singh, 99.
—— —— *v.* Kacheru Singh, 80.
—— —— *v.* Kani Fatima, 263.
—— —— *v.* Punjab National Bank, 380.
Underhill *v*, Horwood, 707.
Underwood *v.* Wing, 152.
Unhamma *v.* Vaikunta, 721.
—— Devi *v.* Vaikunta, 649.
—— —— *v.* Vaikunta Hegde, 634, 722.
Unichaman *v.* Ahmed, 465, 471.
Unidi Rajaha *v.* Pemmasamy, 758.
Union Indian Sugar Mills Co., Ltd., In the matter of, 41.
Union of London and Smith's Bank, *In re*, 189.
United Dairies *v.* Public Trustee, 627, 687.
Unnamalai *v.* Gopalaswami, 523.
Unni *v.* Nagammal, 589.

U—*contd.*

Unnian *v.* Rama, 419.
Upendra *v.* Hukumchand, 391.
—— Chandra *v.* Mohori Lal, 238, 493, 501.
—— —— *v.* Tara Prosanna, 492, 494.
—— Krishna Mandal *v.* Ismail Khan Mahomed, 715.
—— Nath *v.* Dhubeshwar, 728.
—— —— *v.* Kali Charan, 347.
—— —— Samanta *v.* Saroda Prosad Ghose, 618.
—— Singh *v.* Meghmalli Singh, 715.
Upton *v.* Townend, 690, 691.
Usain Rowthen *v.* Nizurali, 676.
Usborne *v.* Usborne, 450.
Usharani Debi *v.* The Research Industries, Ltd., 633, 707.
Usman *v.* Abdul Rahaman, 357.
—— Khan *v.* Dasanna, 399.
Ussher, *Re*, Foster *v.* Ussher, 142.
Uthandi *v.* Raghavachari, 63, 357.
Utility Articles Manufacturing Co. *v.* Raja Bahadur Motilal Mills, 633, 650, 707.
Uttam Chandra *v.* Rai Krishna, 371.
—— Singh *v.* Hukam Singh, 392.
Uttamchandra Daw *v.* Rajkrishna Dalal, 415.
Uttamrao *v.* Gangaram, 264.

V.E.A.R.M. Firm *v.* A. K. R. M. M. K. Firm, 519.
V.E.R.M. A.R. Chettyar Firm *v.* Ma Joo Tean, 377, 519.
V.E.R.M.N.C.T. Chettyar *v.* A.R.A.R.R.M. Chettyar Firm, 17.
V.M.R.V. Chettyar Firm *v.* Asha Bibi, 376.
V.P.L. Firm *v.* E.K.S.M. Chettyar Firm, 265.
V.R.M.R.M. Firm *v.* Muhommad Kasim, 391.
V.R.S. Chettyar Firm *v.* Yaya, 461.
V.S. David *v.* Bangarth Rangaraju, 175.
Vacher & Sons Ld. *v.* London Society of Compositors, 3.
Vadamalai *v.* Subramania, 380.
Vadapalli *v.* Dronamraju, 737.
Vaddiparthi *v.* Appalanarasimhulu, 369, 382, 399.
Vadju *v.* Vadju, 397, 403, 408.
Vag *v.* Munisingh, 31.
Vagha *v.* Manilal, 654.

V—*contd.*

Vaguran *v.* **Rangayyangar, 59, 731.**
Vaidyanatha *v.* **Eggia, 64.**
Vaikuntam *v.* **Kallapiran, 184.**
Vairananda *v.* **Miyakan, 656.**
Valia *v.* **Anujani, 71.**
—— **Achan** *v.* **Ravunni, 507.**
Vallabhdas *v.* **Pranshankar, 480.**
Vaman *v.* **Khanderao, 638.**
—— **Pai** *v.* **Venkata Naika, 731.**
—— **Pandu** *v.* **Tukaram, 196.**
—— **Shripad** *v.* **Maki, 632, 634.**
Van Grutten *v.* **Foxwell, 91.**
Vani *v.* **Bani, 394.**
Vanneri *v.* **Patanattia, 368.**
Vanraj *v.* **Vallabhdass, 413.**
Varadarajulu *v.* **Dhanalakshmi, 9, 410, 412.**
—— **Chetty** *v.* **Dhanalakshmi, 495.**
Varahaswami *v.* **Ramachandra, 65.**
Varatha Pillai *v.* **Jeevarathammal, 301, 393, 638, 732.**
Varden Seth *v.* **Luckpathy, 375.**
—— —— **Sam** *v.* **Luckpathy, 30, 49.**
Vardon's Trust, *In re,* **166.**
Varjivandas *v.* **Maganlal, 764.**
Varlo *v.* **Faden, 127.**
Vasantrao *v.* **Nanabhai, 416.**
Vasava *v.* **Kelu, 543.**
Vasteva Halla *v.* **Mahabala Rao, 507.**
Vasudeo *v.* **Balaji, 597, 598, 599.**
—— *v.* **Bhau, 355, 365.**
—— *v.* **Janardhan, 259, 277.**
Vasudev *v.* **Shrinivasa, 367, 455, 456.**
—— **Daji** *v.* **Babaji Ranu, 709.**
Vasudeva *v.* **Krishna, 731.**
—— *v.* **Narasamma, 298, 329.**
Vasudevan *v.* **Kutti Aunna, 395.**
—— *v.* **Valia, 739.**
—— *v.* **Valia Chathu, 7, 677, 709.**
—— **Nambudripad** *v.* **Velia, 509.**
Vasudevapa *v.* **Krishna, 602.**
Vatakkathala Thottungal Chakkin Son Mathu *v.* **Achu & Others, 68.**
Vatsavaya *v.* **Poosapati, 70.**
Vaudeville Electric Cinema Ltd. *v.* **Muriset, 22, 23.**
Vaughton *v.* **Noble, 759.**
Vawdry *v.* **Geddes, 125, 142.**
Vedachar *v.* **Narasimha, 250, 253.**
Vedapuratti *v.* **Vallabha, 417.**
Vedayyasa *v.* **Madura Hindu Sabha, 590.**

V—*contd.*

Veera Pillai *v.* **Poonambala Pillai, 644, 745.**
Veerabhadra *v.* **Chiranjivi, 151.**
—— *v.* **Sri Vaithianathaswami, 631.**
Veerabhadrayya *v.* **Subbarayudu, 333.**
Veerakutty *v.* **Ramaswami, 245, 300.**
Veeranan *v.* **Annasawami, 648.**
Veerappa *v.* **Chandra Mereleshwara, 538.**
—— *v.* **Chinnas Muthu, 392.**
—— *v.* **Ma Tin, 377.**
—— *v.* **Subramania, 18, 19, 390.**
—— **Chetty** *v.* **Ma Tin, 24.**
Veerapuddayan *v.* **Mutta Karappa, 390, 391.**
Veeraraghava *v.* **Subba Reddo, 255.**
Veeraraghavayya *v.* **Kamaladevi, 194.**
Veerayya *v.* **Sivayya, 336, 342.**
Velayuda Mudali *v.* **Co-operative Rural Credit Society, 243.**
—— **Naicker** *v.* **Hyder Hussan, 411, 513, 548.**
—— **Reddi** *v.* **Narasimha, 621.**
Velayudan Chetty *v.* **Alangaran, 424, 457.**
Velayudhan *v.* **Nallathambi, 565.**
Velayutha *v.* **Govindaswami, 301, 316.**
—— **Chetty** *v.* **Govindswami, 298, 327.**
Velayuthan *v.* **Pillaiyar Chetti, 776.**
Velchand *v.* **Sitaram, 261.**
Vellayammal *v.* **Palaniyandi Ambulam, 211.**
Vellayappa Chettiar *v.* **Narayana, 330.**
—— **Rowthen** *v.* **Bava Rowthen, 317, 319, 320.**
Vellore Taluk Board *v.* **Gopalaswami, 339.**
Velu Rengasami *v.* **Bal Krishna, 452.**
Velusami *v.* **Bommachi, 231.**
Vencatavarada *v.* **Venkata, 477, 748.**
Vengu *v.* **Ragava, 649.**
Vengubai Ammal *v.* **Ramaswami, 504.**
Venkaji *v.* **Gopal, 50.**
—— **Krishna** *v.* **Lakshman Devji, 722.**
Venkanna *v.* **Official Receiver, Rajahmundry, 274.**
Venkappa *v.* **Akku, 355, 356.**
Venkat Subbiah *v.* **Juma Mosque, 365.**
Venkata *v.* **Bikkina, 357.**
—— *v.* **Lakshmi, 75.**
—— *v.* **Parvati, 366, 367.**
—— *v.* **Ranga, 613.**
—— *v.* **Secretary of State, 83.**
—— **Chetty** *v.* **Aiyanna Goundan, 710.**
—— **Gurunadha** *v.* **Kesava Ramiah, 68, 769.**

V—*contd.*

Venkata Lakshmamma v. Seetayya, 610.
——— Lakshminarayan v. Venkayya, 580.
——— Reddi v. Yellappa Chetty, 194, 195.
——— Reddy v. Kunjappa Goundan, 591.
——— Seetharamaya v. Venkataramayya, 553.
——— Sourayazulu v. Kannan Dhora, 592.
——— Subbiah Chetty v. Subba Naidu, 782, 783.
Venkatacha v. Rajagopala, 605.
Venkatachala Goundan v. Rungaratnam, 648.
Venkatachalam v. Setharam, 303.
——— v. Subramania, 776.
——— v. Venkataraman, 387.
Venkatachari v. Karuppan Chetty, 572.
Venkatachariar v. Narasimha, 634, 720.
——— v. Rangasami, 720, 724.
——— v. Srinivasa, 438.
Venkatacharyulu v. Venkatasubba, 2.
——— v. Venkatasubba Rao, 332, 639, 687.
Venkatachella v. Panjanardien, 596.
——— Chetty v. Srinivasa, 459.
Venkatachellam v. Audian, 634.
Venkatagiri v. Sadagopa, 593.
Venkatalingam v. Parthasarathi, 2, 612.
Venkatanarasammah v. Ramiah, 593.
Venkatanarasimha v. Dandamudi Kotayya, 648.
——— v. Subba Rao, 132.
Venkatanarasimhulu v. Peramma, 322.
Venkatanarayana v. Subbammal, 54.
Venkatanarayanasami v. Kani Ammal, 552.
Venkatapathiraja v. Subhadrayamma, 50.
Venkatappier v. Ramaswami, 227, 232.
Venkatarama v. Aiyasami, 160, 757.
——— v. Meera, 216.
——— v. Ramasami, 66, 69.
——— v. Venkata, 322.
——— Aiyar v. Rangiyan Chetty, 245.
——— ——— v. Krishnaswami Chettiar, 789.
——— Iyer v. Suppa Nadan, 358.
——— Reddi v. Rangiah Chetti, 245, 300, 580.
Venkataramana v. Gomaperty, 596.
——— v. Gundaraya, 724.
——— v. Krishna, 718.
Venkataramanier v. Ananda Chetty, 714.

V—*contd.*

Venkataramanna v. Brammanna, 90.
Venkataramayya v. Nagamma, 19, 390.
——— v. Nagamura, 390.
——— v. Narsing Rao, 377, 519.
Venkatarami Ayyar v. Rangaswami, 385.
Venkatarao v. Mahableshwar, 453, 465.
——— v. Zunkari Marwadi, 461.
Venkataratnam v. Varahaliah, 346, 368.
Venkatarayadu v. Narayanu, 166.
——— v. Venkataramayya, 62.
Venkatarayudu v. Subbamma, 752.
Venkatasabbayya v. Venkayya, 367.
Venkatasami v. Subramania, 369, 455, 456.
——— Naiken v. Rama Nathen Chettiar, 422, 459.
Venkatasamy Naick v. Kulandapuri, 678.
Venkatavaragappa v. Thirumalai, 676.
Venkatesh v. Bhujabuli, 557.
——— v. Bhujbali, 627.
——— v. Malappa, 292.
——— v. Maruti, 237, 241.
——— Narayan v. Krishnaji Arjun, 701.
Venkateshwara v. Kesava, 368, 369, 370.
——— v. Raman, 69.
Venkateswara Aiyar v. Somasundaram, 276.
Venkati Rama v. Pillati Rama, 750, 752, 753.
Venkatrama v. Elumalai, 252.
——— v. Rangiah, 253.
——— Ayyar v. Gopala Krishna Pillai, 548.
——— ——— v. Krishnaswamy Chettiyar, 774.
Venkatsubba Shrinivas v. Subba Rama, 750, 753, 761.
Venkayya v. Ramasami, 700, 701.
——— v. Venkataramayya, 524.
Venkiah v. Krishnamoorthy, 190.
Venkitaswamy v. Muthuswamy, 493, 494, 495.
Venkureddi v. Venku Reddi, 216, 217.
Venganan Chettiar & Sons v. Ramaswamy, 386.
Vernon v. Bethell, 399.
Verorpakshan v. Pulipre Tarwad, 417.
Vertannas v. Robinson, 709.
Veyathen v. Lakshiammal, 507.
Vidyaardhak Sangh Co. v. Ayyappa, 722.
Vijayabhusanammal v. Evalappa, 458.
Vilayat Husain v. Misran, 73.

V—*contd.*

Villa v. Petley, 86, 209, 377, 490, 738.
Village Joshi—Waman v. Balaji, 70.
Villers v. Beamont, 761.
Vinayak v. Kaniram, 271.
——— v. Moreshwar, 270.
——— Janardhan v. Mainai, 698.
Vinayakarao v. Gynoba, 37.
——— v. Bhondu, 663.
Vine v. Raleigh, 126, 127.
Virabhadraya v. Basangowda, 678.
Virappa v. Mahadevappa, 789.
Viraragava v. Krishnasami, 499.
Virarammal v. Rungayyangar, 634.
Virayya v. Hanmanta, 212.
Virchand v. Kumaji, 329, 330.
Virjibhan Das v. Besseswar Lal, 417.
Vishnu v. Shankareppa, 555.
——— v. Tatia, 489.
——— Atmaram v. Anant Vishnu, 734.
——— Chintamon v. Balaji, 721.
——— Mahadev v. Dagadu, 784.
——— Sakharam v. Kashinath, 399.
Vishvanath v. Bala, 338.
——— v. Yakub, 726.
Vishveshwar v. Mahableshwar, 59, 683, 705, 723.
Vishwanadhan v. Menon, 607.
Visvalinga v. Palaniappa, 369, 383.
Visvanada v. Raja Venkata, 266.
——— Reddi v. Venkata Reddi, 273.
Visvanath v. Bala, 319.
Visvanatha v. Vengamma, 531, 541.
Visvanathan v. Ethirajulu, 401.
Viswanath v. Chimmukutti, 384.
Viswanatha Reddi v. Raja Venkata Reddi, 273.
Vithabai Dattu Pattar v. Malhar Shankar, 56.
Vithal v. Daud, 430.
——— Narayan, case of, 373.
——— ——— v. Shriram, 445, 507.
——— ——— v. Shriram Savant, 683.
Vithalbowa v. Narayan Daji, 628, 639.
Vithaldas v. Tukaram, 572, 578.
Vithilinga Padayachi v. Vithilinga Mudali, 668.
Vithoba v. Chotalal, 468, 469.
Vithu v. Dhondi, 634, 649, 721, 722.
Vivian v. Moat, 721.
Vizagapatam Sugar Development Co. v. Muthurama Reddi, 284, 290.
Viziaran v. Vikram Dev, 640.

V—*contd.*

Volkart Bros. v. Vettivelu, 297, 742, 745.
*Vrajlal v. Venkataswami, 623.
Vrijbhukandas v. Dayaram, 228.
Vriti-Rajaram v. Ganesh, 70.
Vullabdas v. Gordhandas, 111.
Vyankapacharya v. Yamanasami, 202, 203.
Vyankataraya v. Shivrambhat, 94, 95, 96, 102, 685, 686, 723.
Vyraperumal v. Alagappa, 608.
Vythinadayyan v. Subramanya, 238.
Vyvyan v. Arthur, 187, 684.

W

Wade v. Coope, 553.
Wadell v. Wolfe, 339, 341.
Wadham v. Post Master General, 718.
Waghela Rajsangji v. Shekh Masludin, 2.
Wahajuddin v. Ali Ahmad, 116.
Wahid Ali v. Ashruf, 61, 364, 466.
Wahid-un-nissa v. Goberdan, 363.
Wainright v. Miller, 106, 161.
Wajahat Husain v. Ratan Lal, 422.
Wajed Ali v. Mst. Chundrabutty, 668.
Wajid Ali Khan v. Shafakat, 356, 357.
——— Khan v. Ewaz Ali Khan, 759.
Wake v. Hall, 22, 23.
Wales v. Carr, 492.
Wali Bandi v. Tabeya Bibi, 241, 247, 252.
Waliul Hassan v. Maharaj Kumar Gopal, 742.
——— Hussan Singh v. Maharaj Kumar Gopal, 745.
Walker, *Re, Ex parte*, Gould, 686, 723.
——— *In re*, 78.
——— v. Bradford Old Bank, 771.
——— v. Jones, 86.
——— v. Reeves, 678, 681, 683.
Walker's Case, 680.
Wallace v. Kelsall, 409.
Wallis, *Re, Ex parte*, Lickorish, 495, 512.
——— v. Hands, 664, 666, 667, 715.
Walpole *Re*, Public Trustee v. Canterbury, 125.
Walrond v. Hawkins, 728.
Walsh v. Lonsdale, 278, 289, 641.
——— v. Secretary of State, 112.
Walter v. Yalden, 714, 734.
Walton Harvey Ltd. v. Walker and Homfrays Ltd., 646.
Waman v. Balaji, 61.
——— v. Dhondiba, 36.

W—contd.

Waman Martand v. Commissioner, C. D., 334.
——— Ram Krishna v. Ganpat Mahadev, 49.
Wan Taikya v. M. S. S. Chettyar, 532.
Want v. Stallibrass, 340.
Warayam Singh v. Thakar Das, 273.
Ward v. Audland, 748.
——— v. Day, 727.
Wardle v. Oakley, 378.
Ware v. Lord Egmont, 30.
Warford Corporation's and A. S. Ware's Contract, *In re*, 318.
Waring v. Ward, 531.
Waris Khan v. Daulat Khan, 714.
Warner v. Jacob, 480, 481.
——— v. Murdoch, 10.
Warr v. Jones, 478.
Warren v. Rudall, *Ex parte*, Godfrey, 762.
Warrington v. Ward, 467.
Warwick v. Noakes, 690.
——— v. Warwick, 25.
Was Dev v. Dheru Mal, 7.
Wasdev v. Ferin Dhirumal, 347.
Washburn v. Burrows, 17.
Wasu Ram v. Mahomed Ramzan, 441, 506.
Watkins v. Administrator-General of Bengal, 127.
Watson v. Lane, 702.
——— v. Sree Kristo, 640.
——— & Co. v. Nistarini Gupta, 694.
Watts v. Symes, 562.
Wazir Ali v. Ali Islam, 597.
——— ——— v. Moti Chund, 447.
——— Devi v. Ram Chand, 81,
——— Hussain v. Beni Madho, 242.
——— Mahomed v. Har Prasad, 74.
Wazirey v. Mathura Prasad, 11.
Weale v. Olliver, 750.
Weatherall, *Ex parte*, 487.
——— v. Eastern Mortgage Agency, 487.
Webb v. Macpherson, 48, 303, 327, 328, 329, 330, 331, 338, 375.
——— v. Rorke, 398.
——— v. Russell, 713.
——— v. Smith, 525.
Webster v. Webster, 769.
Wedd v. Porter, 695, 738.
Wells v. Kingston Upon Hill Corporation, 645.
West v. Gwynne, 686.

W—contd.

West v. Reid, 26, 29, 30.
——— v. Williams, 521.
——— Ham v. Fourth Building Society, 3.
——— ——— Central Charity Board v. East London Water Works Co., 701.
——— Hopetown Tea Co., *In re*, 96, 723.
——— London Commercial Bank v. Reliance Permanent Bldg. Society, 482.
Western Counties Rly. Co. v. Windsor and Annapolis Rly. Co., 4.
——— Waggon & Property Co. v. West, 358, 521.
Westerton Public Trustee v. Gray, *Re*, 776.
Weston v. Metropolitan Asylum District (Managers), 689.
——— & Thomas's Contract, *Re*, 317.
Westzinthus, *Re*, 526.
Wetherall, *Ex parte*, 376.
Whaley, *In re*, Whaley v. Roerich, 23.
Wharton v. Masterman, 125.
Wheatley, *In re*, Smith v. Spence, 166.
Whistler v. Webster, 170, 763.
Whitbread v. Brockhust, 280.
——— v. Lord St. John, 143.
——— & Co., Ltd. v. Watt, 337.
Whitby v. Mitchell, 106.
Whitchurch v. Wainwright, 280.
White v. Baker, 146, 147.
——— v. Bijon Mansions Ltd., 324.
——— v. City of London Brewery Co., 512.
——— v. Metcalf, 486.
——— & Smiths Contract, *In re*, 312.
Whiteacre d. Boult v. Symonds, 730.
Whitefield, *In re*, 160.
Whitehead v. Clifford, 716.
Whiteley v. Delaney, 562.
Whitemore v. Whitemore, 343.
Whitings Settlement, *Re*, 161.
Whitworth v. Rhodes, 479.
Wi Matuas Will, *Re*, 3.
Wight v. Hopetown, 711.
Wigram v. Buckley, 246.
Wilberforce's Trusts, *In re*, 349.
Wilchick v. Marks and Silverstona, 674.
Wilkes v. Saunion, 512.
Wilkinson v. Colley, 654.
——— v. Hall, 632, 657.
——— v. Joughim, 761.
——— v. Rogers, 700.
——— v. Wilkinson, 148.
Willett & Argenti, *In re*, 313.

W—*contd*.

William Arratoon Lucas *v.* Bank of Bengal, 384.
——— Brandts Sons & Co. *v.* Dunlop Rubber Co., 775.
——— Grant *v.* Robinson, 636.
——— White *v.* Tyndall, 625.
Williams *v.* Bosanquet, 372, 374, 678, 679, 681, 683.
——— *v.* Burrell, 670.
——— *v.* Clark, 137, 143.
——— *v.* Earle, 684, 685, 686.
——— *v.* Gabriel, 666.
——— *v.* Glenton, 344.
——— *v.* Hensman, 219.
——— *v.* Morgan, 452, 453.
——— *v.* Owen, 365.
——— *v.* Taperell, 630.
——— & Newcastle's (Duchess) Contract, *In re*, 324, 325, 338.
——— *Re*, Cunliffe *v.* Williams, 166.
——— *Re*, Williams *v.* Williams, 142.
Willis *v.* Barron, 759.
Willmott *v.* Barber, 233, 235.
Wills *v.* Stradling, 281.
Wilmers Trusts, *In re*, Moore *v.* Wingfield, 103.
Wilson *v.* Brett, 30.
——— *v.* Duguid, 137.
——— *v.* Finch Hatton, 662.
——— *v.* Greenwood, 102.
——— *v.* Hart, 28, 684.
——— *v.* Love, 689.
——— *v.* Rosenthal, 686, 718.
——— *v.* Tavenar, 646.
——— *v.* Thornbury, 171.
——— *v.* Townshend (Lord), 167.
——— *v.* Wilson, 375.
Wiltshear *v.* Cottrell, 20, 22.
Winfrey & Chatterton's Agreement, *In re*, 686.
Winter *v.* Winter, 753.
Winterscale *v.* Sarat Chandra, 636.
Wintle, *Re*, Tucker *v.* Wintle, 142.
Wise *v.* Whitburn, 324.
Witham *v.* Bullock, 683.
Wolff *v.* Vanderzee, 480.
Wollaston *v.* King, 168.
Wolverhampton Corporation *v.* Emmons, 100.
——— & Waisall Rly. Co. *v.* London & N. W. Rly. Co., 101.
Wolveridge *v.* Steward, 683.

W—*contd*.

Womesh Chunder *v.* Raj Narain Roy, 698, 713.
Wood *v.* Dixie, 266, 271.
Woodhouse *v.* Jenkins, 666.
Woods & Lewis' Contract, *In re*, 344.
——— *v.* Townley, 151.
Woomesh Chunder *v.* Gooroodoss Roy, 272.
Wordsley Brewery Co. *v.* Halford, 653.
Worthington *v.* Wiginton, 171.
Wrexham, Mold, etc., *Re*, 556, 571.
Wride *v.* Dyer, 650.
Wright, *Ex parte*, 378.
——— *v.* Carter, 759, 760.
——— *v.* Hale, 10.
——— *v.* Lawson, 697.
——— *v.* Smith, 702, 739.
——— *v.* Stavert, 645.
——— *v.* Vanderplank, 760.
Wrightson, *In re*, 505.
——— *In re*, Battie Wrightson *v.* Thomas, 137.
Wrigley *v.* Gill, 511.
Wutzler *v.* Sharpe, 84.
Wyatt *v.* Cole, 738.
Wyllie *v.* Pollen, 41.
Wynn *v.* Conway Corporation, 711.
Wynne *v.* Fletcher, 150.

Yacub Khan *v.* Guljar Khan, 18, 391.
Yad Ram *v.* Umrao Singh, 452.
Yadavendra *v.* Srinivasa, 68, 358, 361.
Yakub Ali *v.* Kishen, 537.
Yamnabai *v.* Nanabhai, 183.
Yamunabai *v.* Maroti, 590.
Yandle & Sons *v.* Sutton, 311.
Yashvant *v.* Vithal, 363, 364, 380, 381.
——— *v.* Vithoba, 406.
Yates *v.* Hambly, 433.
——— *v.* Plumbee, 412.
——— *Re*, Bacheldor *v.* Yates, 478.
Yellowby *v.* Gower, 695.
Yeo Htean Sew *v.* Abuzaffar, 453.
Yeoland Consols Ltd., *Re*, 763.
Yeshvant *v.* Vithal, 454.
Yeshwadabai *v.* Ramchandra, 234, 235.
Yethirajulu *v.* Mukunthu, 219.
Yorkshire Banking Co. *v.* Mullan, 450.
Young *v.* Ashley Gardens Properties Ltd., 686.
——— *v.* Kitchin, 782.

Y—*contd.*

Young *v.* Liverpool Assessment Committee, 645.
——— & Harstons' Contract, *In re*, 344.
Yousaf *v.* Poleplogo, 628.
Yusuf Ali *v.* Hira, 700.
Yusuf Khan *v.* Misal Khan, 111.

Zafar Ahsan *v.* Zubaida Khatun, 76, 362, 422, 423, 626.
Zahanna Mahal *v.* Parneshri Das, 59.
Zahid Ali *v.* Kedar Nath, 435.
Zaibunnissa Bibi *v.* Maharajah Parbu Narain Singh, 427.
Zal Rustomjee *v.* Anjuman, 191.
Zamindar *v.* Subbaraya, 358.
——— Bomaya *v.* Virappa, 207.

Z—*contd.*

Zamindar of Etiyapuram *v.* Chidambaram, 4.
——— of Karvetnagar *v.* Trustee of Tirumalai, 550.
——— of Polavaram *v.* Maharaja of Pittapuram, 19, 297, 390, 392.
——— of Vizianagram *v.* Behara Surya-narayana, 664.
Zamir *v.* Daulat Ram, 63.
Zarif-un-nissa *v.* Shafiq-ur-zaman Khan, 200, 204.
Zia-ud-din *v.* Fakhir-ud-din, 720.
Zick *v.* London United Tramways Ltd., 715.
Zimbler *v.* Abraham, 632.
Zollikofer & Co. *v.* Official Assignee, 214.
Zubeda *v.* Sheo Charan, 439.
Zulfiquar Ali *v.* Suraj Prasad, 403.
Zungabai *v.* Bhawani, 201, 202.

THE

TRANSFER OF PROPERTY ACT

Act No. IV of 1882

(As Amended by Act XX of 1929 and Act V of 1930.)

An Act to amend the law relating to the Transfer of Property by Act of Parties.

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows :—

Preamble.—The true place of a preamble in a statute was at one time the subject of conflicting decisions. In *Mills* v. *Wilkins* (a) Lord Holt said—"The preamble of a statute is no part thereof, but contains generally the motives or inducement thereof." On the other hand it was said that "the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and the mischiefs it was intended to remedy" (b). The modern rule lies between these two extremes and is that where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it; but where the enacting part is ambiguous, the preamble can be referred to to explain and elucidate it (c). In *Powell* v. *Kempton Park Race Course Co.* (d) Lord Halsbury said—"Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment." This rule has been applied to Indian statutes also by the Privy Council (e), and by the Courts in India (f).

Headings to groups of sections.—The headings above different groups of sections in the Act have the effect of preambles to those sections and may be referred to as an aid to construction (g).

Define and amend.—The Act was intended to define and amend the existing law and not to introduce any new principle (h). The Indian Succession Act and the Indian Contract Act had already been passed and the chief objects of this Act were first to bring

(a) (1794) 6 Mod. 62.

(b) 4 Co. Inst. 330 (1).

(c) Per Tekchand, J., in *Raj Mal* v. *Harnam Singh* (1928) 9 Lah. 260, 104 I.C. 661, ('28) A.L. 35, citing *Doe* v. *Brandling* (1828) 7 B. & C. 643; *Fellowes* v. *Clay* (1843) 4 Q.B. 313 and the *Sussex Peerage* case (1844) 11 Cl. & Fin. 85; *Nga Hoong* v. *The Queen* (1857) 7 M.I.A. 72, 4 W.R. 109 P.C.

(d) (1899) A.C. 143, 157.

(e) *Secretary of State* v. *Maharaja of Bobbili* (1920) 43 Mad. 529, 46 I.A. 302, 54 I.C. 154 ("the section must govern").

(f) *Mani Lall Singh* v. *Trustees for the Improvement of Calcutta* (1918) 45 Cal. 343, 44 I.C. 770; *Nepra* v. *Sayer Pramanik* (1928) 55 Cal. 67, 103 I.C. 662, ('27) A.C. 763; *Sital Chandra* v. *Delanny* (1916) 20 Cal. W. N. 1158, 34 I.C. 450; *Keshab Panda* v. *Bhobani* (1913) 18 Cal. L. J. 137, 21 I.C. 586; *Girja Nandan* v. *Hanuman Das* (1927) 49 All. 25, 99 I.C. 161, ('27) A.A. 1 F.B.

(g) *Dwarka Nath* v. *Tafazar* (1917) 44 Cal. 267, 39 I.C. 64; *Ram Shanker* v. *Ganesh Prasad* (1907) 29 All. 385.

(h) ... *Bibi* v. *Bhagwan Prasad* (1894) 16 ... 1. 295.

the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution on death and thus to furnish the complement of the work commenced in framing the law of testamentary and intestate succession; and secondly to complete the code of contract law so far as it relates to immoveable property (*i*).

Act not exhaustive.—The Act is not exhaustive and it does not profess to be a complete code (*j*). This is apparent from the omission of the word "consolidate", which occurs, for instance, in the preamble to the Indian Evidence Act, 1872 (*k*). In any case not covered by the Act the Court is entitled to apply rules of English law which are not inconsistent with the Act (*l*) as the rule of justice, equity and good conscience (*m*). But in any case covered by the Act, the Act must be applied (*n*). Some of the sections inserted or amended by the Amending Act of 1929 were borrowed from the Law of Property Act, 1925, and as to their construction it is permissible to refer to English decisions under that Act. But as to cases not covered by the Transfer of Property Act, decisions of the English Courts under the Law of Property Act, 1925, or other English statutes relating to property which were passed in that year will rarely represent rules of English law or be applicable as rules of justice, equity and good conscience. See Appendix V.

By act of parties.—These words exclude transfer by operation of law, *i.e.*, by sale in execution (*o*), forfeiture, insolvency or intestate succession. It also limits the scope of the Act to transfers *inter vivos* and excludes testamentary succession. See sec. 2, cl. (d).

Rules of interpretation of statutes.—Before discussing the provisions of the Act in detail it is advisable to state the principal rules for the interpretation of statutes.

(1) A cardinal rule of interpretation of statutes, which is often referred to as the golden rule is that *the grammatical sense of the words* used should be adhered to, technical words being construed according to their technical meaning, and other words in their most ordinary and popular acceptation (*p*).

(2) "It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to *the previous state of the law* on the subject or to the English law upon which it may be founded; but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended" (*q*).

(3) If the meaning is clear the Court is not at liberty to look to *the presumed intention of the legislature.* The question for the Court is not what the Legislature meant,

(*i*) Whitley Stokes Anglo-Indian Codes, Vol. I, p. 726.

(*j*) *H. V. Low & Co., Ltd.* v. *Pulin Beharilal Sinha* (1933) 59 Cal. 1372, 143 I.C. 193, ('33) A.C. 154; *Satyabadi* v. *Harabati* (1907) 34 Cal. 223, 228; *Shafikul Huq* v. *Krishna Gobinda* (1919) 23 Cal. W. N. 284, 47 I.C. 423; *Bhupendra* v. *Mst. Wafiunnissa* (1917) 2 Pat. L.J. 298, 39 I.C. 564; *Kishori Lal* v. *Krishnakamini* (1910) 37 Cal. 877, 882, 5 I.C. 509; *Jalendra* v. *Rangpur Tobacco Co.* (1924) 80 I.C. 20, ('24) A.C. 990, 991; *Venkatalingam* v. *Parthasarathy* (1942) A.M. 558. See *Irrawady Flotilla Company* v. *Bhugwandas* (1891) 18 I.A. 121, at p. 129 [a case on the Contract Act where the preamble is exactly in the same terms].

(*k*) *Collector of Gorakhpur* v. *Palakdhari* (1890) 12 All. 1, 25.

(*l*) *Mayashankar* v. *Burjorji* (1925) 27 Bom. L.R. 1449, 91 I.C. 976, ('26) A.B. 21; *Kalyan Das* v. *Jan Bibi* (1928) 51 All. 454, 112 I.C. 765, ('29) A.A. 12, 14; *Maharaja of Jeypore* v. *Rukmini* (1919) 42 Mad. 589, 598, 46 I.A. 109, 50 I.C. 631.

(*m*) *Maharaja of Jeypore* v. *Rukmini, supra*; *Waghela Rajsanji* v. *Shekh Masludin* (1887) 11 Bom. 551, 14 I.A. 89. See also *Muhammad Raza* v. *Abbas Bandi* (1932) 59 I.A. 236, 246, 137 I.C. 321, ('32) A.PC. 158.

(*n*) *Venkatacharyulu* v. *Venkatasubba* (1925) 48 Mad. 821, 824, 90 I.C. 725, ('25) A.M. 55. See *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 I.A. 114, at p. 123.

(*o*) *Dinendronath Sanyal* v. *Ramcoomar Ghose* (1881) 7 Cal. 107, 8 I.A. 65, 75.

(*p*) *Queen Empress* v. *Abdullah* (1885) 7 All. 385, 398 F.B.

(*q*) *Abdur Rahim* v. *Mahomed Barkat Ali* (1928) 55 Cal. 519, 55 I.A. 96, 108, 108 I.C. 261, ('28) A. PC. 16.

but what its language means, *i.e.*, what the Act has said that it meant (*r*). In *Salomon* v. *Salomon & Co.* (*s*) Lord Watson said—"Intention of the Legislature is a common but very slippery phrase, which properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity what the Legislature intended to be done, or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication." In *Administrator-General of Bengal* v. *Prem Lal Mullick* (*t*) their Lordships of the Privy Council said—"A positive enactment, in a statute of 1874, cannot be qualified or neutralized by indications of intention gathered from previous legislation upon the same subject."

(4) When the literal construction would lead to some *absurdity, repugnance* or *inconsistency* the grammatical sense may be modified so as to avoid that difficulty but no further (*u*). For it is a well-known rule that a *casus omissus* cannot be supplied by a Court of Law (*v*). In *Crawford* v. *Spooner* (*w*) the Judicial Committee of the Privy Council said—"We cannot aid the Legislature's defective phrasing of the Act; we cannot add and mend and by construction make up deficiencies which are left there."

(5) *The literal construction ought not to prevail if it is opposed to the intention of the Legislature* as apparent from the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated (*x*).

(6) *The construction should be as far as possible beneficial*, that is, to suppress the mischief and advance the remedy, if this can be done without violence to the language of the section (*y*).

(7) The *Crown* is not bound by a statute unless directly (*z*) or by necessary implication referred to (*a*). Necessary implication means that if the Crown were not bound by the Act, the legislation would be unmeaning (*b*).

(8) *If two statutes are apparently inconsistent*, an effort should be made to reconcile them. In *Ebbs* v. *Boulnois* (*c*) James, L.J., said—"It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other."

(9) *If two statutes are irreconcilable the latter prevails* (*d*).

(10) *A general Act must not be construed so as to derogate from a special Act* (*e*). In *Barker* v. *Edger* (*f*) Lord Hobhouse said—"The general maxim is *generalia specialibus*

(*r*) Maxwell Interpretation of Statutes, 6th Ed., p. 10.
(*s*) (1897) A.C. 22, 38.
(*t*) (1895) 22 I.A. 107, 116, 22 Cal. 788.
(*u*) *Grey* v. *Pearson* (1857) 6 H.L.C. 61; *Deo Narain* v. *Kukur Bind* (1902) 24 All. 319; *Madan Chandra* v. *Jaki* (1902) 6 Cal. W.N. 377; *Aiyasamier* v. *Venkatachela* (1917) 40 Mad. 989, 1000, 37 I.C. 741; *Prometho Nath* v. *Kali Prasanna* (1901) 28 Cal. 744; *Dial Singh* v. *Gurdwara Sri Akal Takht, Amritsar* (1928) 9 Lah. 649, 110 I.C. 164, ('28) A.L. 325; *Vacher & Sons Ld.* v. *London Society of Compositors* (1913) A.C. 107, 117.
(*v*) *Gurdial Singh* v. *Central Board & Local Committee, Amritsar* (1928) 9 Lah. 689, 696, 112 I.C. 769, ('28) A.L. 337.
(*w*) (1846) 6 Moo. P.C. 1.
(*x*) Per Lord Selborne in *Caledonian Rly. Co.* v. *North British Rly. Co.* (1881) L.R. 6 App. Cas. 114, 122; *Rex* v. *Halliday* (1917) A.C. 260, 303.
(*y*) *Middlesex Justices* v. *R.* (1884) 9 App. Cas. 757, 778.
(*z*) *Attorney-General* v. *Donaldson* (1842) 10 M. & W. 117; *Attorney-General* v. *Newman* (1815) 1 Price 438; *Ganpat Putaya* v. *The Collector of Kanara* (1876) 1 Bom. 7, 9; *Secretary of State* v. *Mathurabhai* (1890) 14 Bom. 213.
(*a*) *Theberge* v. *Laudry* (1876) 2 App. Cas. 102; *Re Wi Matua's Will* (1908) A.C. 448 P.C.
(*b*) *Gorton Local Board* v. *Prison Commissioners* (1904) 2 K.B. 165n, at p. 167, per Day, J.; *Province of Bombay* v. *Municipal Corporation of the City of Bombay* (1946) 73 I.A. 271.
(*c*) (1875) 10 Ch. App. 479, 484. See *Kalyanasundaram* v. *Karuppa* (1927) 54 I.A. 89, 95, 50 Mad. 193, 100 I.C. 105, ('27) A.P.C. 42.
(*d*) *Luby* v. *Warwickshire Miners' Association* (1912) 2 Ch. 371; *West Ham* v. *Fourth Building Society* (1892) 1 Q.B. 654.
(*e*) *Kamalammal* v. *Peeru Meera* (1897) 20 Mad. 481; citing *Queen* v. *Champneys* (1871) L.R. 6 C.P. 384; *Garnett* v. *Bradley* (1878) 3 App. Cas. 944, 950; *Hawkins* v. *Gathercole* (1850) 6 De G.M. & G. 1.
(*f*) (1898) A.C. 748, 754.

non derogant. When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

(11) *Statutes encroaching upon private rights* must be strictly construed so as to save those rights as far as possible (*g*). An intention to take away property without compensation should not be imputed to a Legislature, unless it be expressed in unequivocal terms (*h*).

(12) *Statutes affecting substantive law or vested rights are not retrospective, unless expressed to be so*; but statutes affecting procedure may properly have retrospective effect attributed to them unless that construction be textually inadmissible (*i*). *The principles affecting the retrospective operation of statutes* have been stated as follows (*j*):

1. Legislative enactments have no retrospective effect, unless explicitly stated to be so in the enactments themselves.
2. Amending statutes should not be construed as having retrospective effect, if they affect vested rights.
3. Statutes which are declaratory or explanatory are to be construed as having retrospective effect as they give an authoritative explanation of the words, phrases or clauses used in a statute, and whenever the statute has to be applied the explanation also should be applied.
4. No recital in a declaratory or amending statute can render void that which has been declared by the Courts to have been rightly done under the law.
5. Statutes which affect a mere procedure are retrospective in their nature.

The Transfer of Property Act, however, expressly enacts in sec. 2 (c) that it is not retrospective.

The retrospective operation of changes introduced by the Transfer of Property Amendment Act, 1929, has been fully considered by the Full Bench of the Patna High Court with reference to sec. 92 of the main Act (*k*).

(13) *Proceedings of the Legislative Council* are excluded from consideration in the judicial construction of an Act. The *debates in the Legislative Council, reports of Select Committees and statements of objects and reasons* annexed to a bill may not be referred to (*l*). The Privy Council when construing sec. 68 of the Indian Companies Act, 1882, said that "no statement made on the introduction of the measure, or its discussion can be looked at as affording any guidance as to the meaning of the words" (*m*).

(*g*) *Suratee Bara Bazaar Co.* v. *Municipal Corporation of Rangoon* (1927) 5 Rang. [illegible], 107 I.C. 849, ('28) A.R. 87; *Western Counties Rly. Co.* v. *Windsor & Annapolis Rly. Co.* (1882) 7 App. Cas. 178.

(*h*) *Commissioner of Public Works (Cape Colony)* v. *Logan* (1903) A.C. 355; *Gopeshwar Pal* v. *Jiban Chandra* (1914) 41 Cal. 1125, 1140, 24 I.C. 37.

(*i*) *Colonial Sugar Refining Co.* v. *I*[illegible] [illegible]5) A.C. 369; *Delhi Cloth & General Co.* v. *Income Tax Commissioner* [illegible] I.A. 421, 425, 30 Bom. L.R. 60, 106 I.C. 156, ('27) A.P.C. 242; *Mohammad Abdussamad* v. *Kurban* (1904) 26 All. 119, 31 I.A. 30, 37; *Manjhoori* v. *Abel Mahomed* (1913) 17 Cal. W.N. 389, 19 I.C. 793; *Ramakrishna* v. *Subbaraya* (1915) 38 Mad. 101, 18 I.C. 64; *Smithies* v. *National Association of Operative Plasterers* (1909) 1 K.B. 310, 319; *Henshall* v. *Porter* (1923) 2 K.B. 193; *Falcon* v. *Famous Players Film Co.* (1926) 1 K.B. 393 on app. (1926) 2 K.B. 474; *Gardner* v. *Lucas* (1878) 3 App. Cas. 582, 603.

(*j*) *Balaji Singh* v. *Gangamma* (1927) 51 Mad. L.J. 641, 643, 99 I.C. 148, ('27) A.M. 85 (per Devadoss, J.).

Tika Sao v. *Hari Lal* (1940) 19 Pat. 752, 189 I.C. 513, (1940) A.P. 385 (F.B.).

Administrator-General v. *Premlal* (1895) 22 Cal. 788, 22 I.A. 107, 118; *Queen Empress* v. *Sri Churn* (1895) 22 Cal. 1017; *Kadir* v. *Bhawani* (1892) 14 All. 145; *Queen Empress* v. *Bal Gangadhar Tilak* (1898) 22 Bom. 112; *Zamindar of Ettiyapuram* v. *Chidambaram* (1920) 43 Mad. 675, 687, 58 I.C. 871; *Raj Mal* v. *Harnam Singh* (1928) 9 Lah. 260, 104 I.C. 661, ('28) A.L. 35; *Gurdial Singh* v. *Central Board & Local Committee, Amritsar* (1928) 9 Lah. 689, 113 I.C. 769, ('28) A.L. 337; *Rex* v. *West Riding of Yorkshire County Council* (1906) 2 K.B. 676, 716; *Mahant Shantanand Gir* v. *Basudevanand* (1930) 52 All. 619, 125 I.C. 477, ('30) A.A. [illegible] F.B.

(*m*) *Krishna Ayyangar* v. *Nella Perumal* [illegible] 43 Mad. 550, 47 I.A. 33, 42, 56 I.C. [illegible]

(14) *Marginal notes* to the sections are not to be referred to for the purpose of construction. The Privy Council described this as a well-settled rule (*n*); but the Allahabad High Court and since then the Calcutta High Court have held that marginal notes may be referred to when they have been inserted with the assent of the Legislature (*o*).

(15) *Illustrations* are instances of the practical application of the written law and make nothing law which would not be law without them (*p*). As they explain the meaning of the section they are useful as aids to construction, but they cannot control the plain meaning of the section (*q*). In a case from the Straits Settlements (*r*), the Privy Council said—"And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute should not be thus impaired."

(16) "It is an error to rely on *punctuation* in construing Acts of the Legislature" (*s*).

(*n*) *Balraj Kunvar* v. *Jagatpal Singh* (1904) 26 All. 393, 31 I.A. 132, 142-143; *Balaji Singh* v. *Gangamma* (1927) 51 Mad. L.J. 641, 99 I.C. 143, ('27) A.M. 85, citing *Attorney-General* v. *Great Eastern Rly. Co. Ltd.* (1879) 11 Ch. D. 449.

(*o*) *Ram Saran Das* v. *Bhagwat Prasad* (1929) 51 All. 411, 113 I.C. 442, ('29) A.A. 53; *Abdul Hakim* v. *Fazu Mia* (1934) I.L.R. 62 Cal. 266.

(*p*) Whitley Stokes Anglo Indian Codes, Vol. I, P. xxv.

(*q*) *Koylash Chunder* v. *Sonatun* (1880) 7 Cal. 132.

(*r*) *Mahomed* v. *Yeoh* (1916) 43 I.A. 256, 263, 19 Bom. L.R. 157, 39 I.C. 401; *Sopher* v. *Administrator General of Bengal* (1944) 71 I.A. 93.

(*s*) *Maharani of Burdwan* v. *Murtunjoy* (1887) 14 I.A. 30, 35, 14 Cal. 365, 372, suggested probably by the observations of Willes, J., in *Claydon* v. *Green* (1868) L.R. 3, C.P. 511, at p. 522. But does the *ratio decidendi* of the English cases apply in India where punctuation forms part of the clauses as passed in the Legislature?

S. 1

CHAPTER I.

Preliminary.

Short Title.

1. This Act may be called the Transfer of Property Act, 1882.

Commencement.

It shall come into force on the first day of July, 1882:

Extent.

It extends in the first instance to all the Provinces of India except Bombay, East Punjab and Delhi (*t*).

But this Act or any part thereof may by notification in the official Gazette be extended to the whole or any part of the said Provinces by the Provincial Government concerned.

And any Provincial Government may, ... from time to time, by notification in the official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Provincial Government from all or any of the following provisions, namely :—

Sections 54, paragraphs 2 and 3, 59, 107 and 123.

Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1908, under the power conferred by the first section of that Act or otherwise.

Amendment.—The only change made by the Transfer of Property (Amendment Act, 20 of 1929, is to substitute the number of 1908 for 1877, the former being the year of the last Registration Act.

Extent.—The phrase "the whole of British India" (which has now been substituted by the expression "all the Provinces of India") included the Scheduled Districts (*t*). "British India" was defined in the General Clauses Act as "all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor-General of India, or through any Governor or other officer subordinate to the Governor-General in Council." The words "British India" therefore excluded territories of Native States (*u*), such as the Kathiawar States (*v*). Aden was within British India (*w*), but not Singapore (*x*). Acts 14 and 15 of 1874 declared not only

(*t*) *Krishnachandra* v. *President* (1929) 52 Mad. 1, 115 I.C. 824, ('28) A.M. 1161.

(*u*) *[illegible]rama* v. *Bir* (1868) P.R. 191.

(*v*) *Hemchand* v. *Azam Sakarlal* (1906) 8 Bom. L.R. 129, 33 Cal. 219, 33 I.A. 1.

(*w*) Aden Laws Regulation, 1891, s. 2.

(*x*) Straits Settlements Act, 1861, s. 1.

Aden, but also the Laccadive, Andaman and Nicobar islands and Ajmere and Merwara in Rajputana to be parts of British India. Territories ceded by Native States not in full Sovereignty but for limited purposes such as the establishment of a civil station (y) or for Railway administration (z), are not part of British India. As the Act did not apply to the Punjab, it does not apply to the province of Delhi which was carved out of the Punjab in 1915 (a). By the India (Adaptation of Existing Indian Laws) order, 1947, references to British India are to be read as references to all the Provinces of India.

Subsequent extension of the Act.—The Act has been extended as from the 1st January 1893 to the territories other than Scheduled Districts administered by the Government of Bombay (b); and as from the 1st January 1915 to the Province of Sind (c); and with effect from the 22nd December 1924 to the whole of Burma except certain specified areas (d). The Act has been declared in force in the Pargana of Manipur (e), and in Panth Piploda (f). By Orders issued under the Extra Provincial Jurisdiction Act, 1947, the Act has been extended to the territories of Indian States merged in the Provinces.

Power of Provincial Government.—In view of the decision of the Privy Council in *Empress* v. *Burah* (g) there can be no doubt as to the validity of the power conferred on Provincial Governments to vary the extent of the Act. But the power to extend particular sections of the Act to a particular area does not enable a Provincial Government to give the sections so extended a different operation to that which they had in the Act itself read as a whole, and to abrogate in the area to which the extension applies a rule of law till then in force there, expressly left unaffected by the Act. Thus it is a rule of Mahomedan law that a gift is not valid unless possession is given, and this rule was expressly preserved by sec. 129 of the Act. In 1904 the Government of Lower Burma extended sec. 123 to the Pegu District, the effect of which was that a Mahomedan gift was required to be effected by a registered document. It was held by the Privy Council that this did not abrogate the rule as to delivery of possession, and that a Mahomedan gift, though effected by a registered document, was not valid if it was not accompanied by delivery of possession (h).

Application of provisions of Act, where Act does not apply, as rules of justice, equity and good conscience.—As to provinces where the Act has not been applied, it was contended in one case before the Privy Council that the principles of the Act should be followed in preference to English practice (i); as to this their Lordships said that they were not prepared to dissent from that contention, but they expressed no judicial opinion upon it. In the Punjab where the Act is not in force its provisions as to matters of principle are followed as rules of justice, equity and good conscience (j), but this does not apply to provisions which embody technical rules (k). The Act does not apply to the North-West Frontier Province, but its principles govern cases arising

(y) *Empress* v. *Chimanlal* (1912) 14 Bom. L.R. 876, 17 I.C. 584 (Wadhwan); *Queen Empress* v. *Abdul* (1886) 10 Bom. 186 (Rajkote); *Hossein Ali* v. *Abid Ali* (1893) 21 Cal. 177 (Secunderabad).

(z) *Muhammad Yusuf-ud-din* v. *Queen Empress* (1897) 25 Cal. 20, 31, 24 I.A. 137, 145.

(a) *Ralli Brothers* v. *Punjab National Bank* (1930) 11 Lah. 564, 129 I.C. 21, ('30) A.L. [illegible].

Bombay Rules and Orders, Vol. II, p. 194.

Bombay Rules and Orders, Vol. II, p. 195.

Burma Gazette, 1924, Part I, p. 1062.

Manipur Laws Regulation, 1929, 2 of 1929.

Panth Piploda Laws Regulation, 1929, 1 of 1929.

(1877) 4 Cal. 172, 5 I.A. 178.

Ma Mi v. *Kallander Ammal* (1927) 5 Rang. 7, 54 I.A. 23, 100 I.C. 82, ('27) A. PC. 22.

Kader Moideen v. *Nepean* (1898) 26 Cal. 1, 5, 25 I.A. 241, 245.

Bhagwan v. *Bunyadi* (1902) P.R. 85; *Ali* v. *Ghulam* (1915) P.R. 103, 30 I.C. 526; *Jhuman* v. *Dulia* (1923) 4 Lah. 439, 79 I.C. 248, ('23) A.L. 646; *Dulia Singh* v. *Bela Singh* (1924) 78 I.C. 874, ('25) A.L. 92; *Mohammad Abdullah* v. *Mohammad Yasin* (1933) 141 I.C. 877, ('33) A.L. 151; *Tarachand* v. *Sher Singh* (1936) A.L. 944; *Was Dev* v. *Dheru Mal* (1940) A.L. 291.

(k) *Teja Singh* v. *Kalyan Das* (1925) 6 Lah. 487, 91 I.C. 778, ('25) A.L. 575; *Kanwar Ram* v. *Ghugi* (1928) 108 I.C. 57, ('28) A.L. 148; *Ratan Chand* v. *Smail* (1933) 149 I.C. 663, ('33) A.L. 821.

among residents of that province (*l*). The Act has also been followed in cases arising before the Act. Thus sec. 108 (h) has been applied to a kanomdar entitling him to remove trees planted by himself (*m*) and sec. 63 to a mortgagee's claim to accessions in a mortgage of 1859 (*n*).

Specified sections.—The sections specified refer to transactions to be effected by registered instruments. They extend to every Cantonment in British India (*o*). They cannot apply where the Registration Act is not in force. They have been extended as from the 1st January 1908 to Aden and Sheikh Othman (*p*). The power to exclude territories from their operation has never been exercised.

Repeal of Acts.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Saving of certain enactments, incidents, rights, liabilities, &c.

(a) the provisions of any enactment not hereby expressly repealed:

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force:

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability: or

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction:

and nothing in the second chapter of this Act shall be deemed to affect any rule of **Muhammadan** law.

Amendment.—The only amendment made in this section by the amending Act 20 of 1929 is to omit the words "Hindu" and "or Buddhist" in the last paragraph of the section. The result is that Chapter II also now applies to Hindus and Buddhists.

Nothing herein contained.—These words refer to the whole Act and not to this section only (*q*).

Clause (a):—Enactments not expressly repealed.—The Act does not apply to patnis which are governed by the Patni Regulation, Bengal Regulation 8 of 1819 (*r*). A

(*l*) *Gulab Singh* v. *Secretary of State* (1934) 153 I.C. 231, ('34) A. Pesh. 101; *Saifulla Khan* v. *Chaman Lal* (1935) 160 I.C. 986, (1936) A. Pesh. 43; *Fazal Karim* v. *Mohd. Karim* (1942) 201 I.C. 164, (1942) A. Pesh. 43; *Roshan Lal* v. *Arjan Dev* (1942) 203 I.C. 300, (1942) A. Pesh. 68; *Chela Ram* v. *Messrs. Gopi Chand* (1942) 203 I.C. 526, (1942) A. Pesh. 88.

(*m*) *Vasudevan* v. *Valia Chathu* (1901) 24 Mad. 47.

(*n*) *Gopi Lal* v. *Abdul Hamid* (1928) 26 All. L.J. 387, 116 I.C. 91, ('28) A.A. 361.

(*o*) Cantonments Act, 2 of 1924, s. 267; *Gurdas Mal* v. *Punjab Sindh Bank Ltd.* (1933) 147 I.C. 942, ('33) A.L. 972.

(*p*) Bombay Rules and Orders, Vol. II, p. 194.

(*q*) *Ulfat Hossein* v. *Gayani Dass* (1909) 36 Cal. 802, 3 I.C. 994; *Prosunno Nath* v. *Kali Prosunno* (1901) 28 Cal. 744, 750; contra *Naba Krishna* v. *Mohit Kali* (1909) 9 I.C. 840.

(*r*) *Surendra Narain Sinha* v. *Bijoy* [illegible] (1925) 52 Cal. 655, 90 I.C. 785, ('25) 962. Cf. sec. 9 below.

surrender of land by razinama and kabulayet under the Bombay Land Revenue Code is not affected by the provisions of the Act and is not void for want of registration (*s*). The effect of clause (a) is to maintain in tact the statutory force which the Legislature has given to local usage in the Punjab and Oudh (*t*).

Clause (b):—Saving of incidents of contract and of property.—A right of partition is an incident of property held in joint tenancy or tenancy in common which is not affected by the Act and partition may be made orally (*u*). Another such incident would be a right of pre-emption. A mortgagor under a mortgage of 1846 is entitled by Bengal Regulation 34 of 1803 to have interest limited to 12 per cent. per annum and this right is not disturbed by the Act (*v*). The English rule of Equity is that a mortgagee is entitled to be reimbursed for all costs reasonably incurred in respect of the mortgage security (*w*); and this has been described as an implied term of a mortgage saved by this clause (*x*). See now Code of Civil Procedure, 1908, O.34, r.10.

Clause (c):—Saving of rights and liabilities created before the Act.—This clause follows the general rule that in the absence of a clear indication to the contrary, statutes affecting substantive rights are not retrospective. All rights, liabilities and remedies constituted before the Act came into force are left in precisely the same position as if the Act had not been passed. Thus a mortgage executed before the Act is not invalid because it does not comply with the requirement of sec. 59 as to attestation (*y*).

The provisions of the Act do not apply to a tenancy created before the Act (*z*). Section 108 (j) is not retrospective, and a tenancy, which was not transferable before the Act, does not become so, by virtue of that section (*a*). The provisions of sec. 108 (o) as to waste do not apply to a lease executed before the Act (*b*). Similarly sec. 111 (d) has no application to leases executed before the Act, and a mokarari lease granted before the Act is not extinguished by merger in a patni subsequently granted (*c*). The Judicial Committee have observed that the provision as to forfeiture in sec. 111 (g) is by virtue of sec. 2 not retrospective although it in substance places in statutory form a rule already existing in India (*d*). A landlord's right to eject a tenant who holds on a periodic tenancy is a substantive right, and, in a suit filed before the Act to eject a tenant it is sufficient if reasonable or customary notice is given (*e*).

The same rule applies if the legal relation has been constituted under one of the Acts or Regulations repealed by the section. In this respect the Act covers the same ground as sec. 6 of the General Clauses Act. If the mortgage is before the Act and subject to Bengal Regulation 34 of 1803, the mortgagee cannot claim more than the maximum of interest allowed by that Regulation (*f*). A usufructuary mortgagee on a mortgage before the Act may institute a suit for sale, although such a suit is not allowed by this Act (*g*).

(*s*) *Motibhai* v. *Desaibhai* (1917) 41 Bom. 170, 38 I.C. 838.

(*t*) Whitley Stokes Anglo-Indian Codes, Vol. I, p. 746; The Punjab Laws Act 4 of 1872; The Oudh Laws Act 18 of 1876.

(*u*) *Gyannessa* v. *Mobarakannessa* (1898) 25 Cal. 210.

(*v*) *Samar Ali* v. *Karim-ul-lah* (1886) 8 All. 402.

(*w*) *National Provincial Bank* v. *Games* (1886) 31 Ch. D. 582.

(*x*) *Varadarajulu* v. *Dhanalakshmi* (1914) 16 Mad. L.T. 365, 26 I.C. 184.

(*y*) *Jati Kar* v. *Mukunda Deb* (1912) 39 Cal. 227, 230, 11 I.C. 884.

(*z*) *Hiramoni* v. *Annoda Prosad* (1906) 7 Cal. L.J. 553; *Madhab Chandra* v. *Bejoy Chand* (1901) 4 Cal. W. N. 574; *Ananda* v. *Gobinda* (1916) 20 Cal. W.N. 322, 33 I.C. 545; *Chota Nagpur Banking Association* v. *Kumar Kamakhya Narayan* (1928) 7 Pat. 341, 109 I.C. 306, ('28) A.P. 481; *Durga Nikarini* v. *Gobordhan* (1914) 19 Cal. W.N. 525, 527, 24 I.C. 183.

(*a*) *Hari Nath* v. *Raj Chandra* (1897) 2 Cal. W. N. 122; *Madhu Sudan* v. *Kamini* (1905) 32 Cal. 1023, 1029; *Umakanta* v. *Kashiram* (1914) 23 I. C. 246; *Ananda* v. *Gobinda*, supra; *Sarada Kanta* v. *Nabin Chandra* (1927) 54 Cal. 338, 97 I. C. 317 ('27) A. C. 39; *Sulin Mohan* v. *Rajkrishna* (1921) 25 Cal. W. N. 420, 60 I. C. 826, ('21) A. C. 582.

Meghlal v. *Rajkumar* (1907) 34 Cal. 358, 370.

Hirendra Nath Dutt v. *Hari Mohan Ghosh* (1914) 18 Cal. W. N. 860, 22 I. C. 966; *Ram Bisnen Dutt* v. *Haripada* (1919) 23 Cal. W. N. 830, 51 I. C. 389.

(*d*) *Maharaja of Jeypore* v. *Rukmini Pattamadevi* (1919) 42 Mad. 589, 46 I. A. 109, 50 I. C. 631.

(*e*) *Ambabai* v. *Bhau* (1896) 20 Bom. 759.

(*f*) *Samar Ali* v. *Karimullah* (1886) 8 All. 402.

(*g*) *Nanu* v. *Raman* (1893) 16 Mad. 335; *Narasappa* v. *Samarcharlu* (1896) 19 Mad. 232, 334. See *Golabi* v. *Raghunath* (1884) A. W. N. 269.

Again when proceedings for foreclosure had been completed under the Bengal Regulation 17 of 1806, the consequent suit for foreclosure would be governed by that Regulation and not by this Act (*h*). But if the legal relation had been created *after* the Act, the Act will apply; and an *assignment* of a mortgage after the Act will be governed by the Act, although the mortgage was executed before the Act came into force (*i*).

Both this clause and sec. 6 of the General Clauses Act refer to substantive rights and not to procedure, for no one has a vested right to any form of procedure (*j*). The clause is not a disabling provision, for it is intended to preserve existing rights (*k*). A mortgagee coming into Court after the commencement of the Act to enforce a mortgage must follow the *procedure* enjoined by the Act, even though the mortgage be before the Act (*l*). The word "relief" in this clause like the words "right" and "liability," denotes a substantive right. There is a clear distinction between a relief and the procedure for obtaining that relief (*m*). Thus the mortgagee's remedy or relief is the right to sell the property mortgaged. That is a substantive right, but the procedure for obtaining that relief is a suit for sale under sec. 67 and not by execution of a money decree for the debt. The repealed sec. 99 of this Act, now replaced by the Code of Civil Procedure, Order 34, rule 14, is a matter of procedure and is therefore retrospective (*n*).

A rule of procedure cannot revive a right which has been lost. A mortgagee under a mortgage of 1865 took proceedings under Bengal Regulation 17 of 1806, but failed to sue for possession, so that his right to possession was lost by adverse possession in 1878. He could not afterwards sue for foreclosure under sec. 67 relying on the 60 years' rule in the Limitation Act. Lord Hobhouse said: "The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right. And in effect the clear enactment is the other way, for section 2, clause (c), of the Transfer Act says that nothing therein shall affect any right or liability arising out of a legal relation constituted before this act comes into force, or any relief in respect of such right or liability" (*o*).

Clause (d):—Transfer by operation of law.—The Act, but for certain exceptions referred to below, does not apply to transfers by operation of law, but is limited, as stated in the preamble, to transfers "by act of parties." A transfer by operation of law is not validated or invalidated by anything contained in the Act (*p*). Transfers by operation of law occur in cases of testamentary and intestate succession, forfeiture, insolvency and court-sales. A purchaser at a court-sale acquires title by operation of law (*q*), and at such sales title is transferred without a registered deed (*r*); and a purchaser of a debt at an execution sale is not affected by sec. 135 (*s*). When property vests in an Official Receiver on insolvency, there is a transfer by operation of law and no deed is necessary; but when the Official Receiver sells the property of the insolvent that has vested in him the sale is a

(*h*) *Umesh Chunder* v. *Chunchun* (1888) 15 Cal. 357; *Mahabir Prasad* v. *Gangadhur* (1887) 14 Cal. 599; *Baij Nath* v. *Moheshwari* (1887) 14 Cal. 451; *Gokul Singh* v. *Brijlal* (1885) A. W. N. 130.

(*i*) *Lala Jagdeo* v. *Brij Behari* (1886) 12 Cal. 505; *Rathnasami* v. *Subramanya* (1888) 11 Mad. 56, 60.

(*j*) *Javanmal* v. *Muktabai* (1890) 14 Bom. 516; *Wright* v. *Hale* (1860) 6 H. & N. 227; *Costa Rica Republic* v. *Erlanger* (1876) 3 Ch. D. 62, 69; *Warner* v. *Murdoch* (1877) L. R. 4 Ch. D. 750, 752.

(*k*) *Bikkina* v. *Adabala* (1916) 30 Mad. L. J. 338, 341, 34 I. C. 475.

(*l*) *Rameshwar Koer* v. *Mahomed Mehdi Hussein Khan* (1899) 26 Cal. 39, 25 I. A. 179; *Ganga Sahai* v. *Kishen Sahai* (1884) 6 All. 262 F. B.; *Bhobo Sundari* v. *Rakhal Chunder* (1885) 12 Cal. 583 F. B.; *Umda* v. *Umrao Begam* (1889) 11 All. 367; *Mata Din* v. *Kasim Husain* (1891) 13 All. 432 F. B.; *Bikkina* v. *Adabala*, *supra*; *Shiva* v. *Jaru* (1892) 15 Mad. 290; *Kaveri* v. *Ananthayya* (1887) 10 Mad. 129.

(*m*) *Bhobo Sundari* v. *Rakhal Chunder*, *supra*; *Kaveri* V. *Ananthayya*, *supra*; *Ram Prashad* v. *Ram Prasad* (1901) 5 O. C. 231.

(*n*) *Bai Ganga* v. *Rajaram Atmaram* (1911) 35 Bom. 248, 10 I. C. 815.

(*o*) *Srinath Das* v. *Khetter Mohun* (1889) 16 Cal. 693, 16 I. A. 85. See also *Dhondi* v. *Lakshman* (1929) 31 Bom. L. R. 1287, 122 I. C. 862, ('30) A. B. 55.

(*p*) *Prematha Nath* v. *Kali Prasanna* (1901) 28 Cal. 744.

(*q*) *Dinendronath Sannyal* v. *Ramcoomar Ghose* (1881) 7 Cal. 693, 8 I. A. 65, 75.

(*r*) *Balaji* v. *Dajiba* (1880) 2 C. P. L. R. 187.

(*s*) *Krishnan* v. *Perachan* (1892) 15 Mad. 382.

transfer by act of parties to which the Act applies (*t*), and a registered deed is necessary if the property is tangible immoveable property of the value of Rs. 100 and upwards—sec. 54. A different view seems to have been held by the Oudh Court in *Wasirey* v. *Mathura Prasad* (*u*). In that case it was held that a sale by an official receiver which has been sanctioned by the Court is a Court sale and no sale deed is necessary to effect it. An assignment by a Court of a security bond for the purpose of a suit for realization is not a transfer to which the Act applies (*v*). A pleader is entitled to purchase a claim under a life insurance policy at a Court sale, although a purchase by private treaty of such a claim would be invalid under sec. 136 of this Act (*w*). A mortgage by the liquidator of a limited liability company though sanctioned by the Court, is not a transfer in execution of a decree or order of a Court so as to be exempt, by virtue of this clause, from the provisions of the Act (*x*).

A transferee of a lessor is entitled to have rent apportioned under sec. 36 of this Act ; but there can be no apportionment when the transferee is an execution purchaser at a court-sale (*y*). For instance if *A* sells to *B* his house which is let at a monthly rent of Rs. 500 payable on the last day of each month, and the sale takes place on the 15th of June—then *A* and *B* are each entitled to half the rent payable on the last day of June, *i.e.*, Rs. 250 each. But if the sale were a court-sale, *B* would take the whole of the rent, *i.e.*, Rs. 500.

But although sec. 2 (d) makes the Act inapplicable to transfers by operation of law, the principle of some section, *e.g.*, sec. 36 (*z*) and sec. 53 (*a*), has been applied to such transfers.

Exception as to sec. 57 and Chapter IV of the Act.—An exception is made with reference to sec. 57 and Chapter IV as the latter provides for the transfer and extinction of a mortgagor's interest by a decree of the Court, and the former provides for the discharge of incumbrances by order of a Court.

Mahomedan law.—Sec. 2 says that "nothing in the second Chapter of this Act shall be deemed to affect any rule of Muhammadan law." The reason for this provision is that some of the rules of that law differ from the general rules as to the transfer of property enacted in Chapter II. Thus a Mahomedan may settle property in perpetuity for the benefit of his descendants provided there is an ultimate gift in favour of Charity; see the Wakf Validating Act, 1913, to which retrospective effect has been given by the Musalman Wakf Validating Act, 1930. This rule is not affected by secs. 13 and 14 of the Act. The Mahomedan law of gifts is expressly saved by sec. 129. Under that law writing is not essential to the validity of a gift (*b*), but delivery of possession or of such possession as the subject of the gift is susceptible of is necessary for a transfer by way of gift (*c*).

Although sec. 2 saves rules of Mahomedan law it does not follow that the general rules in Chapter II cannot apply to Mahomedan transfers. These general rules are

(*t*) *Basava Sankaran* v. *Anjaneyulu* (1927) 50 Mad. 135, 99 I.C. 8, ('27) A.M. 1; *Narasappa* v. *Hussain Sab* (1934) 67 Mad. L.J. 746, 152 I.C. 968, ('35) A.M. 55; *Gurbakhsh Singh* v. *Sardar Singh* (1934) 16 Lah. 178; *Lal Khan* v. *Official Receiver* (1937) 18 Lah. 721.

(*u*) (1938) 14 Luck. 404, 179 I.C. 126, (1939) A.O. 55.

(*v*) *Ram Saran* v. *Yudhistar* (1931) 53 All. 786, 133 I.C. 904, ('31) A.A. 389, F.B.; *Mani Devi* v. *Anpurna Dai* (1942) 22 Pat. 114, 206 I.C. 126, (1943) A.P. 218.

(*w*) *National Insurance Co.* v. *Haridas Bosu* (1927) 46 Cal. L.J. 225, 104 I.C. 729, ('27) A.C. 691.

(*x*) *Motilal Shivlal* v. *Poona Cotton & Silk Mfg. Co.* (1917) 19 Bom. L.R. 602, 41 I.C. 246.

(*y*) *Satyendranath* v. *Nilkantha* (1894) 21 Cal. 383. [A case in which the lessee's interest was sold].

(*z*) *Shivaprasad* v. *Prayag Kumari* (1934) 61 Cal. 711, 154 I.C. 479, ('35) A.C. 39.

(*a*) *Akramunissa Bibi* v. *Mustafa-un-nissa Bibi* (1929) 51 All. 595, 116 I.C. 445, ('29) A.A. 238; *Chatra Mal* v. *Mt. Majidan* (1934) 15 Lah. 849, 150 I.C. 888, ('34) A.L. 460.

(*b*) See *Kamar-un-Nisa Bibi* v. *Hussaini Bibi* (1880) 3 All. 267 [P.C.].

(*c*) *Sadik Husain* v. *Hashim Ali* (1916) 38 All. 627, 43 I.A. 212, 36 I.C. 104; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1906) 28 All. 439, 33 I.A. 68; *Mohammad* v. *Fakhr Jahan* (1922) 49 I.A. 195, 209, 44 All. 301, 315, 68 I.C. 254, ('22) A.PC. 281.

excluded only if there is an inconsistent rule of Mahomedan law. Where there is no inconsistent rule of Mahomedan law, the sections in Chapter II apply *proprio vigore*, for all that sec. 2 says is that nothing in Chapter II shall be deemed to *affect* any rule of Mahomedan law. But in any case not covered either by the sections in Chapter II or by Mahomedan law, the English law is applied on the ground of justice, equity and good conscience (*d*).

Hindu law.—The Act as it stood before the Amending Act, 20 of 1929, also saved rules of Hindu law. The word "Hindu" has been omitted as the differences between that law and the Act have now been removed. These differences were:—

(1) The rule in *Tagore* v. *Tagore* (*e*) and *Chandi Charan* v. *Sidheswari* (*f*) that bequests and transfers in favour of unborn persons are wholly void, was in conflict with secs. 13, 14 and 20. The Hindu law on this subject had been modified by the Hindu Disposition of Property Act, 15 of 1916, Madras Act 1 of 1914, and Act 8 of 1921, which validated such transfers. These Acts have been amended by secs. 11, 12 and 13 of Act 21 of 1929 and the effect of the amendments is that subject to the limitations in Chapter II of this Act and in secs. 113, 114, 115 and 116 of the Indian Succession Act, 1925, no transfer *inter vivos* or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition. The Act is in consonance with these amendments and so the word "Hindu" is omitted in this section.

(2) Another difference was the rule enacted in secs. 15 and 16 of the Act before the amendment in 1929, that if a transfer to a class fails as to some of its members by reason of remoteness, it fails as to the whole class. This is not Hindu law and the sections have been amended so as to accord with that law.

Gifts to Hindu women are subject to special rules of construction, but these are not inconsistent with the Act. See note "Different intention" under sec. 8. It was at one time thought, at any rate by the Bombay High Court, in cases (*g*) before the Act that possession was necessary to complete the title of the transferee. But this supposed difference was removed by the judgment of the Privy Council in *Kalidas* v. *Kanahya Lal* (*h*).

Rule of damdupat.—The Hindu rule of damdupat, under which interest exceeding principal cannot be received at any one time, ceases to operate from the date of a suit on a mortgage (*i*). There are conflicting decisions as to whether the rule applies in the case of mortgages governed by the Transfer of Property Act, it being held in Madras that it does not (*j*) and in Bombay and Calcutta (*k*) that it does. The amendment of sec. 2 (d) by Act 20 of 1929 does not affect those decisions. For a fuller discussion of the rule of damdupat, see Mulla's Hindu Law.

Buddhist law.—Before 1929 the Act saved rules of Buddhist law, but the words "or Buddhist" which occurred in sec. 2 (d) have now been omitted. It may be observed that by sec. 13 of the Burma Laws Act 13 of 1928, Buddhist law is applied only if the parties are Buddhist and the question for decision is one regarding succession, inheritance, marriage or caste or any religious usage or institution. The rules of the Vinaya prohibit a Buddhist monk from holding property or from entering into any pecuniary transaction; but these rules do not affect the Contract Act or the Transfer of Property Act and a

(*d*) *Muhammad Raza* v. *Abbas Bandi* (1932) 59 I.A. 236, 137 I.C. 321, ('32) A.P.C. 158.
(*e*) (1872) 9 Beng. L.R. 37, 7 I.A. Sup. Vol. 47.
(*f*) (1889) 16 Cal. 71, 15 I.A. 149.
(*g*) *Lallubhai* v. *Bai Amrit* (1877) 2 Bom. 299; *Hasha* v. *Ragho* (1882) 6 Bom. 165; *Santaya* v. *Narayan* (1883) 8 Bom. 182; *Bai Suraj* v. *Dalpatram* (1882) 6 Bom. 380.
(*h*) (1896) 11 I.A. 218, 11 Cal. 121. See *Narayen* v. *Laxuman* (1905) 29 Bom. 42, 44.
(*i*) *Dhondshet* v. *Ravji* (1898) 22 Bom. 86; *Hari Lall Mullick, in the matter of* (1906) 33 Cal. 1269.
(*j*) Not applicable—*Madhava* v. *Venkata* (1903) 26 Mad. 662.
(*k*) *Sesoombai* v. *Manordas* (1911) 35 Bom. 199, 8 I.C. 649, and *Kunja Lal* v. *Narsamba Debi* (1915) 42 Cal. 826, 31 I.C. 6.

Buddhist monk is competent to contract and is not disqualified from being a transferee under sec. 6 (h) (3) (*l*).

Crown Grants.—Crown grants are exempted from the operation of the Act by the Crown Grants Act, 15 of 1895, sec. 2. See Appendix IV.

Interpretation-clause.

3. In this Act, unless there is something repugnant in the subject or context—

"immoveable property" does not include standing timber, growing crops, or grass (*pp. 15-18*):

"instrument" means a non-testamentary instrument (*p. 18*):

"attested" in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary (*pp. 18-20*):

"registered" means registered in a Province under the law for the time being in force regulating the registration of documents (*p. 20*):

"attached to the earth" means (*p. 20*)—

(a) rooted in the earth, as in the case of trees and shrubs (*p. 21*);

(b) imbedded in the earth, as in the case of walls or buildings (*p. 22*); or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached (*p. 25*):

"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession,

(1) *U Pyinnya* v. *Maung Law* (1929) 7 Rang. 677, 121 I.C. 705, ('29) A. R. 354 F.B., overruling *U Teza* v. *E Ma Gyee* (1927) 5 Rang. 626, 106 I.C. 201, ('28) A. R. 8.

either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent (*p. 25*);

" a person is said to have notice " of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it (*p. 25*).

Explanation I.—Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 *of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated (p. 32):*

Provided that—

(1) *the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,*

(2) *the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section* 51 *of that Act, and*

(3) *the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section* 55 *of that Act (p. 34).*

Explanation II.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof (p. 35).

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact material (p. 39):

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud (*p. 42*).

(1) **Amendments.**—The only amendment made in this section by the Amending Act of 1929 is in the definition of notice. Prior to the amendment the definition was as follows :—

> "And a person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229."

This definition has been amended and supplemented by three Explanations which are new and which settle the law in several matters of great importance which will be discussed in detail in the note on that part of the section. For the present it is sufficient to say that Explanation I sets forth the conditions that must be satisfied in order that registration of a deed should operate as notice of that deed; that Explanation II enacts that actual possession is notice of the title of the person in possession; and that in Explanation III the omission of the reference to sec. 229, Indian Contract Act, makes it clear that, in the absence of fraud, a principal is affected with notice of facts of which his agent has constructive notice.

Explanation I was subsequently further amended by sec. 2 of the Transfer of Property (Amendment) Act, 1930 (5 of 1930), to provide for cases in which the property is situate in several districts, and for cases in which the deed is registered in a district other than that in which the property is situate, under sec. 30 (2) of the Indian Registration Act.

Immoveable Property.

(2) **Immoveable property.**—The distinction between moveable and immoveable property was explained by Holloway, J., in an old Madras case (*m*) as follows :—"Moveability may be defined to be a capacity in a thing of suffering alteration of the relation of place. Immoveability incapacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immoveable. Certain things such as a piece of land are in all circumstances immoveable. Others such as trees attached to the ground are, so long as they are so attached, immoveable: when the severance has been effected they become moveable."

The definition of "immoveable property" in the General Clauses Act is not exhaustive. That definition is as follows :—"Immoveable property shall include land benefits to arise out of land, and things attached to the earth."

The Transfer of Property Act defines the phrase "attached to the earth" but gives no definition of immoveable property beyond excluding standing timber, growing crops and grass. These are no doubt excluded because they are only useful as timber, corn and fodder after they are severed from the land. Before they are so severed they pass on transfer of the land under sec. 8 as things attached to the earth.

A "benefit to arise out of land" is an interest in land and therefore immoveable property. The first Indian Law Commissioners in their report of 1879 said that they had "abstained from the almost impracticable task of defining the various kinds of interests in immoveable things which are considered immoveable property." The

(*m*) *Subby Kurtaya* v. *Goondakull* (1872) 6 Mad. H.C. 71.

Registration Act, however, expressly includes as immoveable property benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries. The definition of immoveable property in the General Clauses Act applies to this Act (n). The following have been held to be immoveable property:—a *varashasan* or annual allowance charged on land (o), a right to collect dues at a fair held on a plot of land (p); a hat or market (q); a right to possession and management of a saranjam (r); a malikana (s); a right to collect rent or jana (t); a life interest in the income of immoveable property (u); a right of way (v); a ferry (w); and a fishery (x). On the other hand a royalty is not immoveable property (y); nor a right to recover maintenance though charged on land (z); nor the right of a purchaser to have the land purchased registered in his name (a).

With reference to the Limitation Act the Privy Council said that the words immoveable property were used as something less technical than "real," and included all that would be real property under English law and possibly more, and that if the nature and quality of the property can only be determined by Hindu law and usage, the Hindu law may properly be invoked for the purpose (b). Accordingly a todagiras hak or an inamdar's right to an annual payment from a village is immoveable property (c). For the same reason a priest's right to recover dues at a funeral (d); a right granted by the Peshwas to levy toll on exports of grain (e); and a right of assessment (f) have been held to be immoveable property. On the other hand a pala or turn of worship is moveable property (g). A *yajman vritti* though treated as immoveable property is not immoveable property in the proper sense of the word and the assignment of a right to collect offerings from yajmans for a period of years is not a lease (h). A vested remainder is immoveable property (i).

An equity of redemption is immoveable property (j), and so is the mortgagee's interest in the immoveable property mortgaged (k). There are many conflicting decisions

---

(n) See sec. 4 of the General Clauses Act, 1897; *Babu Lal* v. *Bhawani* (1912) 9 All. L. J. 776, 15 I. C. 32.

(o) *Keshav* v. *Vinayak* (1899) 23 Bom. 22; *Collector of Thana* v. *Hari Sitaram* (1882) 6 Bom. 546 F. B.

(p) *Sikander* v. *Bahadur* (1905) 27 All. 462.

(q) *Surendra Narain* v. *Bhai Lal* (1895) 22 Cal. 752; *Golam Mohiuddin* v. *Parbati* (1909) 36 Cal. 665, 1 I. C. 520. But see *Province of Bengal* v. *Hingal Kumari* (1945) 60 Cal. 184 where it was held that a hat of the kind then described was not land or immoveable property.

(r) *Narayan* v. *Vasudeo* (1891) 15 Bom. 247.

(s) *Churaman* v. *Balli* (1887) 9 All. 591; *Hurmusi Begum* v. *Hirdaynarain* (1878) 5 Cal. 921.

(t) *Babu Lal* v. *Bhawani*, *supra*; *Bhudeb Chandra* v. *Bhikshukur Palta-Naik* (1942) 196 I. C. 837, (1942) A. P. 120; *Daw Yai* v. *U Men Sin* (1940) 187 I. C. 762, (1940) A. R. 102.

(u) *Natha* v. *Dhunbaiji* (1899) 23 Bom. 1; *Moolla & Sons* v. *Rangoon Official Assignee* (1936) A. PC. 230.

(v) *Bejoy Chandra* v. *Bunku Bihari* (1908) 13 Cal. W. N. 451, 4 I. C. 116.

(w) *Krishna* v. *Akilanda* (1885) 13 Mad. 54, sec. 2 (6) of Registration Act.

(x) *Parbutty* v. *Mudho Paree* (1876) 3 Cal. 276; *Fadu Jhala* v. *Gour Mohun* (1892) 19 Cal. 544 F. B.; *Ram Gopal* v. *Nurumuddin* (1893) 20 Cal. 446; *Shibu Haldar* v. *Gupi Sundari* (1897) 24 Cal. 449; *Bhundal Panda* v. *Pandol Pos Patil* (1888) 12 Bom. 221, sec. 2 (6) of Registration Act.

(y) *Krishna* v. *Kurunda Collieries* (1922) 65 I. C. 673, ('22) A. P. 36.

(z) *Altaf Begam* v. *Brij Narain* (1929) 51 All. 612, 618, 116 I. C. 855, ('29) A. A. 281.

(a) *Bhikaji* v. *Pandu* (1895) 19 Bom. 43.

(b) *Maharana Futtehsangji* v. *Desai Kallianraiji* (1874) 1 I. A. 34, 50-51, 13 Beng. L. R. 254, 21 W. R. 178 P. C., approving *Krishnabhat* v. *Kapabhat* (1870) 6 Bom. H. C. 137 and *Balwantrao* v. *Purushotam* (1873) 9 Bom. H. C. 99; *Collector of Thana* v. *Krishnanath* (1881) 5 Bom. 322, 6 Bom. 546.

(c) *Maharana Futtehsangji* v. *Desai Kallianraiji*, *supra*.

(d) *Raghoo* v. *Kashy* (1883) 10 Cal. 73; *Sukh Lal* v. *Bishambhar* (1917) 39 All. 196, 37 I. C. 661.

(e) *Krishnaji* v. *Gajanan* (1909) 33 Bom. 373, 2 I. C. 489.

(f) *Madhavrao* v. *Kashibai* (1910) 34 Bom. 287, 5 I. C. 599.

(g) *Eshan Chander* v. *Monmohini* (1879) 4 Cal. 683; *Jati Kar* v. *Mukunda* (1912) 39 Cal. 227, 11 I. C. 884; *Narasingha* v. *Prolhadman* (1919) 46 Cal. 455, 47 I. C. 25; *Nitya Gopal* v. *Nani Lal* (1920) 47 Cal. 990, 56 I. C. 19; *Jagdeo Singh* v. *Ram Saran Pande* (1927) 6 Pat. 245, 97 I. C. 332, ('27) A. P. 7.

(h) *Kodulal* v. *Beharilal* (1932) 137 I. C. 136, ('32) A. S. 60.

(i) *Sethamaya* v. *Vallipalli* (1939) A. M. 802.

(j) *Mahalaxu* v. *Kusaji* (1894) 18 Bom. 739; *Parashram* v. *Govind* (1897) 21 Bom. 226; *Kanti Ram* v. *Kutbuddin* (1895) 22 Cal. 33.

(k) *Paresh Nath* v. *Nabagopal* (1902) 29 Cal. 1 F. B.; *Sohan Lal* v. *Mohan Lal* (1928) 50 All. 986, 115 I. C. 177, ('28) A. A. 726; *Jang Bahadur* v. *Bhagatram* (1930) 52 All. 232, 122 I. C. 409, ('30) A. A. 110.

as to whether a mortgage debt is immoveable property, but since a mortgage debt has been excluded from the definition of an actionable claim by Act 2 of 1900, it seems that a mortgage debt is to all intents and purposes immoveable property (*l*), though for the purposes of attachment it is treated as moveable property (*m*). A Full Bench of the Rangoon High Court has said that a mortgage, being a transfer of an interest in immoveable property, is immoveable property and that a suit to enforce a mortgage is a suit for land under the Letters Patent of the Chartered High Courts (*n*).

(3) Standing timber.—Standing timber are trees fit for use for building or repairing houses (*o*). This is an exception to the general rule that growing trees are immoveable property (*p*). A fruit bearing tree would not be standing timber and would be classed as immoveable property (*q*); but the benefit of an agreement for the felling of trees to be converted into charcoal would be moveable property (*r*). A mango tree is immoveable property unless according to the custom of the locality it is used for building in which case it would be standing timber (*s*). A mahua tree is not standing timber (*t*) nor palm or date-trees used for the purpose of drawing toddy (*u*). A neem or shisham is standing timber and is not immoveable property (*v*). A babul tree is timber (*w*).

(4) Growing crops.—These are not limited to annual crops or emblements as they are called in English law. Growing crops have been held to include all vegetable growths which have no existence apart from their produce such as pan leaves (*x*) and sugar-cane (*y*).

(5) Grass.—Grass is moveable property, but it would appear that a right to cut grass would be an interest in land and therefore immoveable property. A sale of growing grass to be mown and made into hay by the purchaser has been held in English law to be an interest in land (*z*), but not so if the vendor has to cut the grass and deliver it to the purchaser (*a*). The definition does not make this distinction. In a Madras Full Bench case (*b*) Collins, C.J., said—"It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land" (*b*).

(5A) Moveable property.—There is no definition in the Act of moveable property, but moveable property has been defined in the General Clauses Act to mean "property of every description except immoveable property." Standing timber, growing crops and grass are excluded from the definition of immoveable property in this Act and are included in the definition of moveable property in the Indian Registration Act.

(*l*) *Sakhiuddin* v. *Sonaullah* (1918) 22 Cal. W. N. 641, 45 I. C. 986; *Perumal* v. *Perumal* (1921) 44 Mad. 196, 61 I. C. 461, ('21) A. M. 137; *Official Receiver* v. *Lakshman* (1921) 41 Mad. L. J. 453, 68 I. C. 752, ('21) A. M. 681; *Elumalai* v. *Balakrishna* (1921) 44 Mad. 965, 968, 66 I. C. 168, ('22) A. M. 344 (equitable mortgage); *Banarsi Das* v. *Ramchander* (1933) 141 I. C. 421, ('33) A. L. 210.

(*m*) *Tarvadi* v. *Bai Kashi* (1904) 26 Bom. 305; *Nataraja* v. *South Indian Bank* (1914) 37 Mad. 51, 18 I. C. 91; *Debendra* v. *Rup Lal* (1885) 12 Cal. 546; *Karim-un-nissa* v. *Phul Chand* (1893) 15 All. 134; *Lal Umrao* v. *Lal Singh* (1924) 46 All. 917, 80 I. C. 890, ('24) A. A. 796.

(*n*) *V. E. R. M. N. C. T. Chettyar* v. *A. R. A. R. R. M. Chettyar Firm* (1934) 12 Rang. 370, 151 I. C. 519, ('34) A. R. 250.

(*o*) *Krishnarao* v. *Babaji* (1900) 24 Bom. 31.

(*p*) *Sukry* v. *Goondakull* (1871) 6 Mad. H. C. 71.

(*q*) *Alisaheb* v. *Mohidin* (1911) 13 Bom. L. R. 874, 12 I. C. 375; *Kalwaru* v. *Ram Adhin* (1912) 10 All. L. J. 516, 17 I. C. 910; *Sakharam* v. *Vishram* (1895) 19 Bom. 207, 208; *Moti Singh* v. *Deoki Singh* (1936) 160 I. C. 1054, ('36) A. P. 46.

(*r*) *Alisaheb* v. *Mohidin*, *supra*.

(*s*) *Nahanchand* v. *Modi* (1907) 31 Bom. 183, 197; *Krishnarao* v. *Babaji*, *supra*; *Bodhe Ganderi* v. *Ashloka Singh* (1926) 5 Pat. 765, 96 I. C. 779, ('27) A. P. 1.

(*t*) *Chandi* v. *Sat Narain* (1925) 81 I. C. 650, ('25) A. O. 108.

(*u*) *Sukry* v. *Goondakull*, *supra*; *Moti Singh* v. *Deoki Singh* (1936) 160 I. C. 1054, (1936) A. P. 66.

(*v*) *Nanke Lal* v. *Ram Bharose* (1938) A. A. 115.

(*w*) *Ram Kumar* v. *Krishna Gopal* (1946) A. O. 106.

(*x*) *Atmaram* v. *Doma* (1897) 11 C. P. L. R. 87.

(*y*) *Kalka* v. *Chandan* (1888) 10 All. 20.

(*z*) *Crosby* v. *Wadsworth* (1805) 6 East. 602.

(*a*) *Washbourn* v. *Burrows* (1847) 1 Exch. 107.

(*b*) *Seeni Chettiar* v. *Santhanathan* (1897) 20 Mad. 58 F. B.

Instrument.

(6) Instrument.—The definition excludes a will. The word instrument is used in the sense defined in *Somu* v. *Rangammal* (*c*) as being not only evidence of the transaction but the transaction itself.

Attested.

(7) Attested.—The definition of the word "attested" was inserted by the Transfer of Property (Amendment) Act, 1926 (27 of 1926), and was further amended by the insertion of the words "and shall be deemed always to have meant" by the Repealing and Amending Act, 1927, to show that the definition had retrospective effect.

In English law attestation implies that the attesting witness was *present* at execution and can testify that the deed was executed voluntarily by the proper person (*d*). Before 1912 the Courts in India were sharply divided as to whether the word is used in this narrow sense in the Transfer of Property Act or whether it includes *attestation on admission of execution* as in the Indian Succession Act. The Allahabad and Bombay High Courts put the latter which was the wider construction upon the word (*e*), while the Madras and Calcutta High Courts favoured the narrower construction (*f*), subject perhaps to relaxation in the case of pardanashin women (*g*). In 1912, however, the Privy Council in the case of *Shamu Patter* v. *Abdul Kader* (*h*) held that an attesting witness must have seen the executant sign. The Transfer of Property (Validating) Act 26 of 1917 was passed to validate instruments attested on admission of execution in reliance on the Allahabad and Bombay decisions. *Shamu Patter*'s case was followed until the enactment of Act 27 of 1926 which inserted in the Transfer of Property Act a definition including attestation on acknowledgment of execution (*i*). This Act being declaratory of the law was held in the under-mentioned case (*j*) to be retrospective. In other cases, however, it was said that the words "attest means" cannot have the same meaning as "attest always meant" (*k*), and the Legislature by Act 10 of 1927 further amended the definition by adding after the word "means" the words "and shall always be deemed to have meant." This makes it clear that the definition is retrospective (*l*). A party to a deed is not competent to be an attesting witness (*m*), but if not a party to the deed a person interested in the transaction may be an attesting witness (*n*). An illiterate witness may attest the signature of the executant by making his mark (*o*).

(*c*) (1871) 7 Mad. H. C. 13, approved in *Lakshmamma* v. *Kameshwara* (1890) 13 Mad. 281, 286.

(*d*) *Freshfield* v. *Reed* (1842) 9 M. & W. 404; *Seal* v. *Claridge* (1881) 7 Q. B. D. 516, 519.

(*e*) *Ganga* v. *Shiam Sundar* (1904) 26 All. 69; *Ramji* v. *Bai Parvati* (1903) 27 Bom. 91.

(*f*) *Girindra* v. *Bejoy* (1899) 26 Cal. 246; *Abdul* v. *Salimun* (1900) 27 Cal. 190; *Shamu Patter* v. *Abdul* (1908) 31 Mad. 215.

(*g*) *Harmongal Narain* v. *Ganaur Singh* (1907) 13 Cal. W. N. 40, 31 I. C. 109; *Surur Jigar Begum* v. *Barada Kanta* (1910) 37 Cal. 526, 5 I. C. 539.

(*h*) (1912) 35 Mad. 607, 39 I. A. 218, 16 I. C. 250.

(*i*) *Badri Prasad* v. *Abdul Karim* (1913) 35 All. 254, 19 I. C. 451; *Padarath* v. *Ram Nain* (1915) 37 All. 474, 42 I. A. 163, 30 I. C. 366; *Paramasiva* v. *Krishna* (1918) 41 Mad. 535, 43 I. C. 983; *Sama Rao* v. *Vennajee* (1923) 46 Mad. 64, 71 I. C. 153, ('23) A. M. 36; *Ganga Pershad* v. *Ishri Pershad* (1918) 45 Cal. 748, 45 I. A. 94, 46 I. C. 1.

(*j*) *Balaji* v. *Gangamma* (1927) 51 Mad. L. J. 641, 99 I. C. 142, ('27) A. M. 31.

(*k*) *Nepra* v. *Sayer Pramanik* (1925) 55 Cal. 67, 103 I. C. 662, ('27) A. C. 763; *Girja Nandan* v. *Hanuman Das* (1927) 49 All. 25, 99 I. C. 161, ('27) A. A. 1 F. B., dissenting from *Mohammadi Bibi* v. *Kasi* (1926) 96 I. C. 775, ('25) A. A. 725. The decision in *Balbhaddar* v. *Lakshmi Bai* (1930) 28 All. L. J. 623, 125 I. C. 507, ('30) A. A. 669 turned on the peculiar facts of the case.

(*l*) *Abinash Chandra* v. *Dasarath* (1929) 56 Cal. 598, 114 I. C. 84, ('29) A. C. 123; *Veerappa* v. *Subramania* (1929) 52 Mad. 123, 116 I. C. 867, ('29) A. M. 1 F. B.; *Motilal* v. *Kasambhai* (1928) 29 Bom. L. R. 1384, 105 I. C. 864, ('28) A. B. 16; *Yacubkhan* v. *Guljarkhan* (1928) 52 Bom. 219, 111 I. C. 287, ('28) A. B. 267; *Firm S. M. A. R. A. L.* v. *R. M. M. A. Firm* (1927) 5 Rang. 772, 109 I. C. 468, ('28) A. R. 101; *Balbhaddar* v. *Lakshmi Bai* (1930) 28 All. L. J. 623, 125 I. C. 507, ('30) A. A. 669; *Durgawati* v. *Jagannath* (1928) 27 All. L. J. 1091, 118 I. C. 663, ('29) A. A. 680.

(*m*) *Seal* v. *Claridge* (1881) 7 Q. B. D. 516, 519.

(*n*) *Durga Din* v. *Suraj Baksh* (1931) 7 Luck. 41, 134 I. C. 402, ('31) A. O. 235 F. B.

(*o*) *Narasamma* v. *Venkataramayya* (1935) 58 Mad. 220, 68 Mad. L. J. 1[illegible], 154 I. C. 777, ('35) A. M. 176; *H. R. M. Firm* v. *Ma E Nye* (1937) 172 I. C. 412, (1937) A. R. 296; *Hiralal* v. *Gokul* (1944) A. A. 61.

The section requires that the attesting witness should have signed in the presence of the executant (*p*). Where the executant, a pardanashin lady, sitting behind a curtain, put her hand out and made her thumb impression on the deed in sight of the witness and then her husband signed and then the attesting witnesses signed as attesting witnesses the Privy Council have held that the witnesses signed "in the presence of the executant" and the document was duly attested (*q*). It is also necessary that the attesting witness should have signed for the purpose of authenticating the signature of the executant (*r*), and not as a scribe (*s*) or as a person merely indicating his consent to the transaction (*t*). A scribe, however, may perform a dual role. He may be an attesting witness as well as the writer. The fact that he signed as an attesting witness must be properly proved (*u*). Where, however, in the presence of the executant it was stated that he had executed the deed and the executant did not contradict such statement, it was held that there was a sufficient acknowledgment (*v*). It is not necessary that the attesting witness must sign at any particular place (*w*). The signatures of the Registering Officer and of attesting witnesses on the Registration endorsement, although made *alio intuitu* to satisfy the requirements of the Registration Act, have been held in some cases (*x*) to be a valid attestation, if affixed in the presence of the executant. But in some it has been held that it is not a valid attestation (*y*). See note "Attested" under sec. 59.

Mere attestation does not effect an estoppel, for attestation does not fix an attesting witness with knowledge of the contents of the document (*z*). Attestation does not of itself imply consent (*a*); though there may be circumstances which show that the attesting witness had knowledge of the contents of the document he attested and consented (*b*). An attesting witness is not estopped by his mere signature unless it can be established by independent evidence that to the signature was attached the express condition that it was intended to convey something more than a mere witnessing to the execution, and was meant as involving consent to the transaction (*c*). See note

(*p*) *Abinash Chandra* v. *Dasarath*, *supra*, criticising *Radha Mohan* v. *Nripendra Nath* (1928) 47 Cal. L. J. 118, 105 I. C. 422, ('28) A. C. 154; *Veerappa Chetiar* v. *Subramania Ayyar*, *supra*; *Zamindar of Polavaram* v. *Maharaja of Pittapuram* (1931) 54 Mad. 163, 135 I. C. 17, ('31) A. M. 140; *Ramanathan* v. *Delhi Batcha* (1931) 60 Mad. L. J. 302, 131 I. C. 840, ('31) A. M. 335; *Mushrafi Begam* v. *Lala Kundan Lal* (1933) 9 Luck. 12, 144 I. C. 860, ('33) A. O. 365.

(*q*) *Lala Kundan Lal* v. *Musammat Musharrafi Begam* (1936) 63 I. A. 326.

(*r*) *Paramasivte* v. *Krishna* (1918) 41 Mad. 535, 43 I. C. 983.

(*s*) *Abinash Chandra* v. *Dasarath*, *supra*; *Badri Prasad* v. *Abdul Karim* (1913) 3 All. 254, 19 I. C. 451; *Jadunandan* v. *Surajdeo* (1930) 52 All. 434, 132 I. C. 37, ('30) A. A. 228; *Rambahadur* v. *Ajodhya* (1916) 1 Pat. L. J. 129, 34 I. C. 370.

(*t*) *Sarkar Barnard* v. *Alak Manjary* (1924) 26 Bom. L.R. 737, 88 I.C. 170, ('25) A.P.C. 89.

(*u*) *Alagappa Chettiar* v. *Ko Kala Pai* (1940) 188 I. C. 759, (1940) A. R. 134.

(*v*) *Amir Hussain* v. *Abdul Samad* (1937) A. A. 646.

(*w*) *Kadarbhai* v. *Fatmabai* (1944) A. B. 25.

(*x*) *Veerappa Chetiar* v. *Subramania*, *supra*; *Ram Charan* v. *Bhairon* (1931) 53 All. 1, 131 I. C. 241, ('31) A. A. 101; *Sarada Prasad* v. *Triguna Charan* (1922) 1 Pat. 300, 90 I. C. 402, ('22) A. P. 402; *Ramanathan* v. *Delhi Batcha*, *supra*; *Venkataramayya* v. *Nagamma* (1931) Mad. W. N. 1242, 136 I. C. 243, ('32) A. M. 272; *Nalina Basu* v. *Joharlal Sarkar* (1934) 61 Cal. 525, 38 C. W. N. 753, 151 I. C. 1063, ('34) A. C. 772; *Harkisandas* v. *Dwarkadas* (1936) A. B. 94, 161 I. C. 374; *Kanchedilal* v. *Jabbarsha* (1936) 166 I. C. 686, (1936) A. N. 171; *Parshotam Ram* v. *Kesho Das* (1943) 25 Lah. 495.

(*y*) *Lachman Singh* v. *Surendra Bahadur Singh* (1932) 54 All. 1051, 1932 All. L. J. 653, 139 I. C. 1, ('32) A. A. 527; *Chandrani* v. *Lala Sheo* (1931) 132 I. C. 337, ('31) A. O. 146; *Firm S. M. A. R. A. L.* v. *R. M. M. A. Firm supra*; *Mt. Mushrafi Begam* v. *Kundan Lal*, *supra*; *Ma Thien Shin* v. *Ma Ngwe Su* (1939) 182 I. C. 924, (1939) A.R. 211.

(*z*) *Raj Lukhee* v. *Gokool Chunder* (1869) 13 M. I. A. 209, 229; *Banga Chandra* v. *Jagat Kishore* (1916) 44 Cal. 186, 43 I. A. 249, 36 I. C. 420; *Hari Kishan* v. *Kashi Pershad* (1914) 42 Cal. 876, 42 I. A. 64, 27 I. C. 674; *Hamidmiya Sarfudin* v. *Nagindas Jivanji* (1933) 57 Bom. 709, 35 Bom. L. R. 252, 148 I. C. 385, ('33) A. B. 217; *Fazal Hussain* v. *Jivan Shah* (1933) 14 Lah. 369, 141 I. C. 454, ('33) A. L. 551; *Sunder Kuer* v. *Shah Udey Ram* (1944) A. A. 42; *Suraj Bhau* v. *Hafiz Abdul* (1944) A. L. 1; *Rajammal* v. *Sabapathi* (1945) A. PC. 82.

(*a*) *Pandurang* v. *Markandeya* (1922) 49 Cal. 334, 49 I. A. 16, 65 I.C. 954, ('22) A. PC. 20.

(*b*) *Tarabag Khan* v. *Nanak Chand* (1932) 138 I. C. 263, ('32) A. L. 566; *Bhagwat Rai* v. *Gorakh Rai* (1934) 150 I. C. 765, ('34) A. P. 93. See cases under note (*z*) above.

(*c*) *Pandurang* v. *Markandeya*, *supra*.

"Consent express or implied" under section 41. Attestation need not be in any particular form, a mere signature is sufficient (*d*).

Registered.

(8) **Registered.**—The registration must be valid according to the law for the time being in force. Thus if the description is not sufficient to identify the property (*e*), or if there is a fraud on the law of registration (*f*), or if the property is situate in a different circle (*g*), or if the deed was not presented by the proper person (*h*), or if the description is insufficient to identify the property (*i*), the registration is void.—See Mulla's Indian Registration Act, 3rd Ed., p. 110.

Attached to the earth.

(9) **Attached to the earth.**—The phrase "attached to the earth" occurs in the definition of immoveable property in the General Clauses Act, and also in this Act in sec. 8 with reference to the legal incidents of immoveable property which pass, without express mention, on transfer; and again in sec. 108(h) with reference to things a lessee may remove. The present section (s. 3) defines the expression "attached to the earth" as including (a) things rooted in the earth such as trees, (b) things imbedded in the earth such as buildings, and (c) things attached to what is so imbedded, such as doors and windows.

(10) **English and Indian law of fixtures.**—The English law as to fixtures is based on the maxim *quicquid plantatur solo, solo cedit* (*j*) as to trees, and *quicquid inaedificatur solo, solo cedit* (*k*) as to buildings, and the application of these maxims is varied by a mass of exceptions in favour of a tenant and in a favour of trade fixtures. The term fixture has no precise meaning in English law and is not found in *Termes de la Ley* (*l*), but it is generally applied to something annexed to the freehold. The classification as immoveable property of things attached to the earth bears some analogy to the English law of fixtures, but the maxims on which the English law is founded do not generally apply in India. Long before the Transfer of Property Act was en[illegible] *Paramanick*'s case (*m*) settled that it was the common law of India that bui[illegible] other improvements do not by the mere accident of their attachment to the soil [illegible] the property of the owner of the soil. The general rule laid down by a Full B[illegible] the Calcutta High Court in that case was as follows :—

> "We think it should be laid down as a general rule that, if he who [illegible] the improvement is not a mere trespasser, but is in possession under any *bona* [illegible] title or claim of title, he is entitled either to remove the materials restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the

(*d*) *Abinash Chandra* v. *Dasarath* (1929) 56 Cal. 598, 114 I. C. 84, ('29) A. C. 123.

(*e*) *Baij Nath* v. *Sheo Sahoy* (1891) 18 Cal. 556; *Narasamma* v. *Subbarayudu* (1895) 18 Mad. 364; *Nahar Lal* v. *Baij Nath* (1928) 32 Cal. W. N. 241, 113 I. C. 855, ('28) A. C. 385.

(*f*) *Harendra Lal* v. *Hari Dasi* (1914) 41 Cal. 972, 41 I. A. 110, 23 I. C. 637; *Biswanath* v. *Chandra* (1921) 48 Cal. 509, 48 I. A. 127, 63 I. C. 770, ('21) A. PC. 8; *Akshayalingam* v. *Ramayya* (1929) 120 I. C. 876, ('29) A. M. 426.

(*g*) *Jogini Mohan* v. *Bhoot Nath* (1904) 31 Cal. 146.

(*h*) *Mujibunnissa* v. *Abdul Rahim* (1901) 23 All. 233, 28 I. A. 15; *Halima Bee Bee* v. *Khairunnissa* (1925) 3 Rang. 398, 91 I. C. 644, ('26) A. R. 17; [illegible] *Lachmi Prasad* (1931) 10 Pat. 481, [illegible] I. A. 58, 131 I. C. 321, ('31) A. PC. [illegible]

(*i*) *Nahar Lal* v. *Baij Nath*, *supra*.

(*j*) *i.e.*, whatever is planted in the soil falls into, or becomes part of the soil.

(*k*) *i.e.*, whatever is built in the soil falls into, or becomes part of the soil. Another reading substitutes *fixatur* (is fixed to) for *inaedificatur* (is built in).

(*l*) per Campbell, C. J., in *Wiltshear* v. *Cottrell* (1853) 1 E. & B. 674, 682.

(*m*) *Thakoor Chunder Paramanick* v. *Ramdhone* [illegible]

Jatindranath (1927) 54 Cal. [illegible] 218, 102 I. C. 193, ('27) A. PC. 135; *Mirtinjai Bakhsh Singh* v. *H*[illegible] 9 Luck. 149, 145 I. C. 627, ('33) [illegible]

> benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

The Mahomedan law is the same (n). The Indian Legislature has departed from the English law of fixtures in sec. 2 of the Mesne Profits and Improvements Act, 11 of 1855, corresponding to sec. 51 of this Act (o), and again in sec. 108 (h) of this Act dealing with the lessee's right to remove fixtures (p). The Act inclines rather to the law as recognized by Hindu and Mohamedan jurisprudence (q).

Things rooted in the earth.

(11) Things rooted in the earth.—Trees and shrubs are immoveable property according to the definition in the General Clauses Act, but this definition is subject to the exception made in this Act as to standing timber. In *Rustomjee Eduljee Shet* v. *Collector of Thana* (r), the Judicial Committee said that the trees upon the land were part of the land and that the right to cut down and sell those trees was incident to the proprietorship of the land. Trees growing out of a garden wall belong to the owner of the garden (s). A mortgage with possession of a fruit bearing tree with the intention that the mortgagee is to enjoy the fruit but not fell the tree is a mortgage of immoveable property (t).

Trees and shrubs may be sold apart from the land, to be cut and removed as wood, and in that case they are moveable property (u). But if the transfer includes the right to fell the trees for a term of years, so that the transferee derives a benefit from further growth, the transfer is treated as one of immoveable property (v). But the fact that a permit to fell trees extends over a period of several years does not necessarily imply that the transferee is to enjoy the benefit of further growth, and a permit to fell and remove trees for four years has been held to be a grant of moveable property (w). A right to collect lac from trees has been held to be immoveable property (x).

In English law an unconditional sale of growing trees to be cut by the purchaser, has been held to be a sale of an interest in land (y); but not so if it is stipulated that they are to be removed as soon as possible (z). In *Morgan* v. *Russell* (a) an agreement to sell all the slag and cinder forming part of the soil on certain premises was held to be a contract to grant an interest in land. This was followed in a Madras case (b) where an agreement under which the plaintiff was given the right to remove soil and earth from the defendant's land, and was to level the plots after removal was held to be an agreement for sale of an interest in land.

Things imbedded in the earth.

(12) Things imbedded in the earth.—A house being imbedded in the earth immoveable property and this is so even if it is sold for enjoyment as a house with an

(n) *Secretary of State for Foreign Affairs* v. *Charlesworth Pilling & Co.* (1902) 26 Bom. 1, 28, I.A. 121.

(o) *Ismail Kani Rowthan* v. *Nazarali Sahib* (1903) 27 Mad. 211.

(p) *Chaturbhuj* v. *Bennett* (1905) 29 Bom. 323; *Beni Ram* v. *Kundan Lall* (1899) 21 All. 496, 26 I.A. 58; *Silabai* v. *Sambhu* (1914) 38 Bom. 716, 28 I.C. 140.

(q) *Mafiz Sheikh* v. *Rashik Lal Ghose* (1910) 37 Cal. 815, 6 I.C. 796.

(r) (1867) 11 M.I.A. 295.

(s) *Iqbal Husen* v. *Nand Kishore* (1902) 24 All. 294.

(t) *Shiv Dayal* v. *Pattu Lal* (1933) 54 All. 437, 140 I.C. 491, ('33) A.A. 50.

(u) *Mathura Das* v. *Jaibir* (1906) 28 All. 277; *Mammikutti* v. *Puzhakkal* (1906) 29 Mad. 353; *Alisaheb* v. *Mohidin* (1911) 13 Bom. L.R. 874, 12 I.C. 375; *Natesa* v. *Tangavelu* (1915) 38 Mad. 883, 885, 23 I.C. 102.

(v) *Seeni Chettiar* v. *Santhanathan* (1897) 20 Mad. 58 F.B.; *Reference* (1889) 12 Mad. 203 F.B.; *Sukry Kurdepa* v. *Goondakull* (1872) 6 Mad. H.C. 71, *Cf. Jones* v. *Flint* (1839) 10 Ad. & El. 753.

(w) *Rajendra* v. *Malhoo Khan* (1929) 112 I.C. 156, ('29) A.O. 93.

(x) *Parmanandy* v. *Birkhu* (1909) 5 Nag. L.R. 21, 1 I.C. 908.

(y) *Scorell* v. *Boxall* (1827) 1 Y. & J. 396.

(z) *Marshall* v. *Green* (1875) 1 C.P.D. 35.

(a) (1909) 1 K.B. 357.

(b) *Kanjee and Mooljee Bros.* v. *Shanmugam Pillai* (1933) 56 Mad. 169, 139 I.C. 870, ('32) A. M. 734.

S. 3 option to pull it down (c). In English law it has been said that the general rule is that whatever is annexed to the freehold becomes part of the realty under the maxim *quicquid plantatur solo, solo cedit* (d). This maxim does not apply in India; nevertheless the question whether a chattel is imbedded in the earth so as to become immoveable property is decided by the same principles as those which determine what constitutes an annexation to the land in English law. This is a question which it is often difficult to determine. The classic instance is an anchor which may be imbedded in the land temporarily to hold a ship or permanently to support a suspension bridge. In *Holland* v. *Hodgson* (e) Blackburn J., said:

> "There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, *viz.*, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight it is generally to be considered a mere chattel see *Wiltsher* v. *Cottrell* (f) and the cases there cited. But even in such a case if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt* v. *Gregory* (g). Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones if deposited in a builders' yard and for convenience sake, stacked on the top of each other in the form of a wall, would remain chattels. On the other hand an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed to the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the ship owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended, lying on those who assert they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

The two tests therefore are (1) the degree or mode of annexation and (2) the obj of annexation.

(13) Mode of annexation.—In *Wake* v. *Hall* (h) Lord Blackburn said—"the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land it affords a strong ground for thinking that it was intended to be annexed in perpetuity

(c) *Punnayya* v. *Venkatappa* (1926) 91 I.C. 754, ('26) A.M. 843.

(d) *Elwes* v. *Maw* (1802) 3 East 38; 2 Sm. L.C. Vol. II, Ed. 13, p. 193.

(e) (1872) L. R. 7 C.P. 328, 334 (looms attached to the floor and beams of a worsted mill held to be fixtures); *Vaudeville Electric Cinema Ltd.* v. *Muriset* (1923) 2 Ch. 74 (tip up seats affixed to the floor of a cinema are part of the building).

(f) (1853) 1 E. & B. 674 (a granary by its own weight on straddles built the land).

(g) (1866) L.R. 3 Eq. 382 (tapestry, pictures in panels, statutes, heavy vases, garden seats, frames filled with satin and attached to the walls, all essentially part of a mansion house).

(h) (1883) 8 A.C. 195, 204.

to the land; and as Lord Hardwicke said in *Lawton* v. *Lawton* (i) "You shall not destroy the principal thing by taking away the accessory to it." Thus looms attached to the floor and beams of a mill (j), or tip up seats fastened to the floor of a cinema (k), or advertisement hoardings firmly imbedded in the earth have been held to be part of the land (l). But cisterns merely standing by their own weight (m), or brewer's vats resting on brickwork and timber (n), or tapestries which can be removed without structural injury to the house (o) have been held to be chattels.

(14) Object of annexation.—The object of annexation is the more important consideration (p). This is a question of fact to be determined by the circumstances in each case, an important element being the nature of the interest in the land possessed by the person who causes the annexation. Thus if a tenant for years or a tenant for life fixes tapestry to a wall, it may readily be inferred that he did not intend them to become fixtures (q) though the circumstances may show that he did so intend (r). Such an intention is more readily inferred in the case of a tenant in fee simple (s). Articles which may be removed without structural damage and even articles merely resting by their own weight are fixtures if they are added with the intention of permanently improving the premises. Thus in *Monte* v. *Barnes* (t) the tenant in fee simple of a house subject to a mortgage removed fixed grates from the various rooms of a house and substituted heavy 'dog grates' and it was held that he did so with the object of improving the house, and that they were fixtures which passed to the mortgagee. So a gas engine fastened by bolts and nuts to a concrete floor by a tenant in fee simple subject to a mortgage (u), and looms in a mill fastened to beams (v) and machinery fastened by bolts and nuts to concrete beds have been held to be fixtures belonging to a mortgagee (w). Looms in a mill fastened to the floor pass under an assignment of fixed machinery (x).

(15) The same tests in Indian law.—The same two tests as to mode of annexation and object of annexation have been applied in India. In a case under the Registration Act, Jenkins, C.J., held that machinery was not immoveable property as it had been erected by a monthly tenant (y). Greater stress is however laid on the mode of annexation for in *Chatturbhuj* v. *Bennett* (z) the court said that anything to be a fixture must be attached to the earth as that expression is defined in s. 3 of the Transfer of Property Act. A hut is immoveable property (a), even if it is sold with an option to pull it down (b). A mortgage of the superstructure of a house though expressed to be "exclusive of the land beneath" creates an interest in immoveable property (c), for it is permanently attached to the ground on which it is built. Similarly oil and flour mills and the machinery used in working them are fixtures (d). But a corrugated iron shed which rested by its own weight on the foundation prepared for it is a chattel which may be removed by a lessee (e).

(16) Trade fixtures.—With a view to encourage trade there has been in English law a relaxation of the rules with reference to trade fixtures. These are regarded as

---

(1743) 3 Atk. 15.
Holland v. *Hodgson* (1872) L. R. 7 C. P. 328.
Vaudeville Electric Cinema Ltd. v. *Muriset* (1923) 2 Ch. 74.
Provincial Bill Posting Co. v. *Lowmoor Iron Co.* (1909) 2 K. B. 344.
Mather v. *Fraser* (1856) 2 K. & J. 536.
Horn v. *Baker* (1808) 9 East. 215.
Leigh v. *Taylor* (1902) A. C. 157.
Spyer v. *Phillipson* (1931) 2 Ch. 183.
Leigh v. *Taylor*, *supra*.
D'Eyncourt v. *Gregory* (1866) L. R. 3 Eq. 382.
In re Whaley. *Whaley* v. *Roerich* (1908) 1 Ch. 615.
(1901) 1 K. B. 205.
Hobson v. *Gorringe* (1897) 1 Ch. 182.
Holland v. *Hodgson*, *supra*.
(w) *Reynolds* v. *Ashby* (1904) A.C. 466.
(x) *Boyd* v. *Shorrock* (1867) L.R. 5 Eq. 72.
(y) *Macleod* v. *Kikabhoy* (1901) 25 Bom. 659, 666.
(z) (1905) 29 Bom. 323.
(a) *Nathu Miah* v. *Nand Rani* (1872) 8 Beng. L.R. 508, 17 W.R. 809; *Deno Nath* v. *Adhor* (1879) 4 Cal. W.N. 470.
(b) *Punayya* v. *Venkatappa* (1926) 91 I.C. 764, ('26) A.M. 343.
(c) *Narayana Pillay* v. *Ramasawmy* (1875) 8 Mad. H.C. 100.
(d) *Miller* v. *Brindabun* (1877) 2 Cal. 946; *Amratlal* v. *Keshavlal* (1926) 28 Bom. L.R. 939, 96 I.C. 696, ('26) A.B. 495.
(e) *Chatturbhuj* v. *Bennett*, *supra*.

accessory to the business and not as an annexation to the premises. Thus soap boiling vats (*f*); engines for working collieries (*g*); machinery and buildings erected on a colliery by miners working under a local custom (*h*) are not fixtures. Similarly in India distillery vats in a house have been held to be moveables as they are for trade purposes and not for the beneficial enjoyment of the house (*i*). But this principle has no application where the articles are affixed by persons who are themselves owners of the land (*j*).

Moveable Property.

Moveable property.—There is no definition in the Act of moveable property, but moveable property has been defined in sec. 2 (9) of the Indian Registration Act, 1908, as follows:—"Moveable property includes standing timber, growing crops and grass, fruit upon and juice in trees and property of every description, except immoveable property."

(17) Hire purchase agreement.—The existence of a hire purchase agreement does not affect the question of the intention of the annexation (*k*). This has been decided in cases where the contest was between the mortgagee of the premises and the person who had hired the machine to the mortgagor.

Illustration.

A gas engine was let out on the hire purchase system under an agreement in writing which provided that it should not become the property of the hirer until the payment of all the instalments, and should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to the land of the hirer by bolts and screws to prevent it from rocking, and was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land. It was held that the engine was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; and consequently that it passed to the mortgagee as part of the freehold: *Hobson* v. *Gorringe* (1897) 1 Ch. 182.

Attached to what is so imbedded.

(18) Attached to what is so imbedded.—The attachment must be as the section says for the permanent beneficial enjoyment of that to which it is attached. Thus the doors, windows and shutters of a house are attached to the house, which is imbedded in the earth, for the beneficial enjoyment of the house. They form part of the house and have no separate existence (*l*). So also with the moveable parts of fixed machinery. But if the attachment is not intended to be permanent the articles attached do not form parts of the house, *e.g.*, window blinds and sashes (*m*), and ornamental articles such as pier glasses and tapestry fixed by a tenant for life (*n*).

A curious case is reported in the Solicitors Journal (*o*), where a hired machine which rested by its own weight on the floor was driven by an engine which was a fixture imbedded in the earth. The machine could be lifted and bodily taken away but it was claimed that

---

(*f*) *Poole's case* (1703) 1 Salk. 368.
(*g*) *Lawton* v. *Lawton* (1743) 3 Atk. 15.
(*h*) *Wake* v. *Hall* (1883) 8 App. Cas. 195.
Narayana Su v. *Balaguruswami* (1924) 45 Mad. L.J. 385, 79 I.C. 833, ('24) A.M. 187; *Veerappa Chetty* v. *Ma Tin* (1925) 88 I.C. 1011, ('25) A.R. 250.
(*j*) *Mather* v. *Fraser* (1856) 2 K. & J. 536; *Fisher* v. *Dixon* (1845) 12 Cl. & F. 312; *Climie* v. *Wood* (1869) L.R. 4 Ex. 328.
(*k*) *Hobson* v. *Gorringe* (1897) 1 Ch. 182, 195.
(*l*) *Climie* v. *Wood* (1869) L.R. 4 Exch. 328, 329 Ex. Ch.; *Peru Bepari* v. *Ronuo* (1884) 11 Cal. 164; *Queen Empress* v. *Sheikh Ibrahim* (1890) 13 Mad. 518; *Purshotama* v. *Municipal Council* (1891) 14 Mad. 467.
(*m*) *Rex.* v. *Hedges* (1802) 2 East. P.C. 590 N.
(*n*) *Leigh* v. *Taylor* (1902) A.C. 157.
(*o*) *Northern Press and Engineering* v. *Shepherd* (1908) 52 Sol. J. 715.

it was a fixture because it was attached to the engine. Eve, J., however repelled this contention and said—"With regard to the indirect attachment to the motive power, if I were to hold that that constituted a fixture, then every motive power would be a connection which would change a chattel into a fixture." The same conclusion would be arrived at under this section, for the machine is not attached for the beneficial enjoyment of the engine and it is the engine that is subordinate to the machine. If a thing is embedded in the earth or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immoveable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. The question in each case is to be decided according to the circumstances. In one case an oil engine as part of a cinema on the premises leased was held not to be immoveable property (*p*).

The machinery of a cotton baling press which was placed in a building to shelter it from the weather is moveable property, for though the building is embedded in the earth the machinery was not put there for the beneficial enjoyment of the building (*q*).

Actionable claim.

(19) Actionable claim.—The definition of actionable claim was originally in sec. 130. The chapter on actionable claims was remodelled by Act 2 of 1900 and the definition was amended and inserted in this section. The definition is explained in the notes to sec. 130.

Notice.

(20) Notice.—The equitable doctrine of notice which controls unconscionable transactions is recognized in various sections of this Act. For instance in sec. 39 if a transfer is made of property out of which a person has a right to receive maintenance, the transferee takes subject to that right if he had notice of it, but not otherwise. Again in sec. 40 if *A* conveys to *C* property, which he had by a previous contract agreed to sell to *B*, then *B* can enforce the contract against *C*, if *C* had notice of it, but not otherwise. If *C* had notice of the prior contract, he purchases with knowledge that it was unconscionable of *A* to sell to him, and it is therefore unconscionable of him to buy. To the same effect is the second illustration to clause (b) of sec. 27 of the Specific Relief Act, 1872, and sec. 91 of the Trusts Act, 1882.

Notice may be either *express* or *constructive*, while notice to an agent is sometimes called *imputed* notice in so far as it affects the principal.

(21) Express notice.—Express notice or actual notice is notice whereby a person acquires actual knowledge of the fact. It must be definite information given in the course of the negotiations by a person interested in the property, for a person is not bound to attend to vague rumours or statements by strangers (*r*). Notice must be given in the same transaction, for notice given in a previous transaction may have been forgotten (*s*). Mere casual conversation is not enough, and in *Lloyd* v. *Banks* (*t*), Lord Cairns said that an incumbrancer who alleges that a trustee has notice of his incumbrance must prove "that the mind of the trustees has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it." A mere statement either in Court or somewhere else that some person claims title is not sufficient notice to an auction purchaser of a deed if it is not disclosed at the auction sale (*u*), but when such an assertion is made to the intending

(*p*) *Subramaniam* v. *Chidambaram* (1940) 527, 51 M. L. W. 155, (1940) M.W.N. 38, 190 I.C. 325.

(*q*) *Meghraj* v. *Krishna Chandra Bhattacharji* (1924) 46 All. 286, 78 I.C. 243, ('24) A.A. 385.

(*r*) *Barnhart* v. *Greenshields* (1853) 9 Moo. P.C. 18, 36; *Ashiq Husain* v. *Chaturbhuj* (1928) 50 All. 328, 108 I.C. 152, ('28) A.A. 159.

(*s*) *Warwick* v. *Warwick* (1745) 3 Atk. 291, 294.

(*t*) (1868) L.R. 3 Ch. 488, 490.

(*u*) *Nursing* v. [illegible] (1883) 10 Cal. 609; *Jolland* v. [illegible] (1797) 3 Ves. 478.

purchaser, it is sufficient to put him to further inquiry as to the interest or title claimed (*v*), and so it would amount to constructive notice of facts which such inquiry would have disclosed (*w*).

(22) Constructive notice.—Constructive notice is the equity which treats a man who ought to have known a fact, as if he actually does know it. A well-known case on the subject is *Jones* v. *Smith* (*x*) where the following classic passage occurs in the judgment of Vice-Chancellor Wigram:—

> "It is, indeed, scarcely possible to declare *a priori* what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe, I may, with sufficient accuracy for my present purpose and without danger assert that the cases in which constructive notice has been established resolve themselves into two classes; first, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice; and secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice......The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which in truth related to the subject in dispute without his knowing that such was the case but that he had actual notice that it did so relate. The proposition of law, which the second class of cases proceeds, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge—a purpose, which if proved, would clearly shew that he had a suspicion of the truth and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestae* would suggest to a prudent mind; if mere want of caution as distinguished from fraudulent and wilful blindness is all that can be imputed to the purchaser—there the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a bona fide purchaser, without notice."

But Courts of equity had extended the doctrine from cases of fraudulent turning away to cases of gross negligence, and in a later case (*y*) Wigram, V. C., stated that there might be a degree of negligence so gross (*crassa negligentia*) that a Court of Justice might treat it as evidence of fraud although (morally speaking) the party charged might be perfectly innocent. In truth, fraud and negligence are mutually exclusive conceptions but Courts of equity extended their jurisdiction from fraud to negligence and included gross negligence in the doctrine of constructive notice. In this respect the section follows the English law. See note "Gross negligence," p. 30 below.

Constructive notice has been said to arise from an irrebuttable presumption of notice. In *Plumb* v. *Fluitt* (*z*), Eyre, C. B., said: "Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted." Such a presumption, which is said to be

---

(*v*) *Gobind Chunder* v. *Doorgapersaud* (1874) 22 W.R. 248.

(*w*) *Jones* v. *Smith* (1841) 1 Hare 43.

(*x*) *Supra* at p. 55; *Doorga* v. *Ramey Madhub* (1880) 7 Cal. 199, 201.

(*y*) *West* v. *Reid* (1843) 2 Hare 249, 257-258.

(*z*) (1791) 2 Anst. 432, 438.

indisputable (a), can arise only in a case in which the party seeking the benefit of that doctrine has acted innocently. The doctrine of constructive notice will not be applied where the party seeking the benefit of that doctrine has been guilty of secrecy or fraud in the transaction with constructive notice of which he seeks to affect a purchaser; and therefore a vendor who is bound to disclose an incumbrance cannot plead that the purchaser had constructive notice of it (b). A decree-holder bringing his judgment debtor's property to sale cannot set up a mortgage to himself which he has not disclosed and plead that its registration was constructive notice to the purchaser (c). The doctrine of constructive notice may be applied as against Government (d).

This legal presumption of knowledge arises from—
(1) Wilful abstention from an inquiry or search.
(2) Gross negligence.
(3) Registration [*Explanation I*].
(4) Actual possession [*Explanation II*].
(5) Notice to an agent [*Explanation III*].

(23) Wilful abstention from an inquiry or search.—These words recall the expression used by Wigram, V. C., in the passage quoted above (p. 26) from his judgment in *Jones* v. *Smith* (e). In the corresponding sec. 3 of the Conveyancing Act (English), 1882, now replaced by sec. 199 of the Law of Property Act, 1925, the words are "If such inquiries and inspection had been made as ought reasonably to have been made by him." With reference to the duty of a purchaser to investigate title, Lord Selborne, in *Agra Bank* v. *Barry* (f), said:—

> "But this, if it can properly be called a duty, it is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing bona fide in the proper and usual manner for his own interest, ought by himself or his solicitor, to follow with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with bona fide dealing, to avoid knowledge of the true state of the title."

The Calcutta High Court following this case have construed the words "wilful abstention from an inquiry or search" to mean such abstention as would show want of bona fides (g). Thus a person refusing a registered letter cannot afterwards plead ignorance of its contents (h). The principle that means of knowledge is equivalent to knowledge has been applied to a banker's pass book so as to fix a customer with knowledge and ratification of entries therein (i). If a purchaser omits to inspect title deeds, he may be affected with notice of all facts which he would have discovered upon a proper investigation of title (j). Similarly omission by a purchaser to inspect entries in the Record of Rights will amount to wilful abstention from inquiry under this section (k). Where a charge was registered, but the agent of a subsequent mortgagee omitted to look into the

---

(a) *Hewitt* v. *Loosemore* (1851) 9 Hare 449, 456; *Ashiq Husain* v. *Chatarbhuj* (1928) 50 All. 828, 108 I.C. 152, ('28) A.A. 159.
(b) *Hormasji* v. *Mankuvarbai* (1879) 12 Bom. H.C. 262; *Morgan* v. *Govt. of Haidarabad* (1888) 11 Mad. 419.
(c) *Ramchandra* v. *Jairam* (1898) 22 Bom. 686; *Dhondo* v. *Raoji* (1896) 26 Bom. 290. See notes to Mulla's Code of Civil Procedure, 1908, under O. 21, r. 66.
(d) *Secretary of State* v. *Dattatrya* (1901) 3 Bom. L.R. 923.
(e) (1841) 1 Hare 43, 45.
(f) (1874) L.R. 7 H.L. 135, 157.
(g) *Joshua* v. *Alliance Bank* (1895) 22 Cal. 185, 203.
(h) *Lootf Ali* v. *Pearee Mohun* (1871) 16 W.R. 223; *Jogendro Chunder* v. *Dwarka Nath* (1888) 15 Cal. 681; *Ismail Khan* v. *Kali Krishna* (1901) 6 Cal. W.N. 134, 137.
(i) *Balakrishna Pramanik* v. *Bhawanipur Banking Corporation* (1932) 59 Cal. 662, 138 I.C. 653, ('32) A.C. 521; *M'Kenzie* v. *British Linen Co.* (1881) 6 A.C. 82, 92; *Jacobs* v. *Morris* (1902) 1 Ch. 816, 830.
(j) *Mahomed Yunus Khan* v. *Court of Wards, Balarampur Estate* (1937) C.W.N. 432, 167 I.C. 962, ('37) A.O. 301.
(k) *Harilal* v. *Mulchand* (1928) 52 Bom. 883, 113 I.C. 27, ('28) A.B. 427.

register of the Registrar, the mortgagee was deemed to have had constructive notice of the charge (*l*). But where a charge was not registered, in the record of rights which a purchaser was bound to search, he would not be held to have had constructive notice thereof by his omission to inquire elsewhere *e.g.*, the Mamlatdar's office (*m*).

Illustration.

B borrows money from *C* and deposits with *C* by way of equitable mortgage the sale deed by which he had purchased a property from *A*. The sale deed recites that part of the purchase money had been retained by *B* to pay *A*'s debts. *B* had not paid these debts and *C* makes no inquiry as to whether he had done so. *C* has constructive notice of *A*'s lien for unpaid purchase money, and the mortgage is subject to *A*'s lien: *Alwar Chetty* v. *Jagannatha Aiyar* (1928) 54 Mad. L.J. 109, 108 I.C. 291.

Actual notice of a deed is constructive notice of the contents of the deed and of all other deeds to which it refers as affecting the same property. Thus when a deed of sale referred to a partition deed, under which the house had fallen to the vendor's share, the purchaser was affected with notice of a right of pre-emption reserved in the deed of partition (*n*) Before the passing of the Law of Property Act, 1925, a person taking a lease had constructive notice of restrictive covenants entered into by the freeholder (*o*). A person who agrees to buy a lease has constructive notice of the covenants in the lease but only if he had an opportunity of inspecting it (*p*). The Calcutta High Court, however, has held that a person acquiring a lease by private transfer should call for the title deed of the vendor and has constructive notice of a term in the lease providing for a high rate of interest on arrears of rent (*q*). When executors borrowed money on an equitable mortgage of the testator's title deeds, the mortgagee was held to have constructive notice of a charge on the property mortgaged, created by the will under which the executors represented the estate, for if he had investigated the title, he would have had notice of the will and its contents (*r*). The abstension from inquiry must be designed and due to a desire to avoid an inquiry which would lead to ultimate knowledge. An omission to make inquiries is not sufficient (*s*).

Illustration.

S left his house and land to his sons by his first wife, and appointed them executors of his will. He left Rs. 30,000 to his sons by his second wife, charged on the aforesaid house and land. The sons by the first wife borrowed Rs. 52,000 from the bank and deposited the title deeds of the house and land with the bank by way of equitable mortgage to secure the loan. The will was not among the documents of title deposited. When the bank enforced their mortgage and brought the house and land to sale, the sons of the second wife claimed that their charge had precedence. If the bank had made inquiry as to how the mortgagors derived title from *S*, they would have had cognisance of the will. The bank had therefore constructive notice of the charge, and the claim of the sons by the second wife prevailed over the mortgage: *Bank of Bombay* v. *Suleman* (1909) 33 Bom. 1, 35 I.A. 139, 1 I.C. 369.

In the case last cited the mortgagors did not deal with the bank as executors. If they had dealt as executors the bank would have been entitled to assume that they were acting

(*l*) *Renukabai* v. *Bhosan* (1939) 185 I.C. 33 (1939) A.N. 152.

(*m*) *Lakshman* v. *Secretary of State* (1939) A.B. 183, 41 Bom.L.R. 257, 182 I.C. 635.

(*n*) *Rajaram* v. *Krishnasami* (1893) 16 Mad. 301; *Abdul Razak Routher* v. *Abdul Rahiman Sahib* (1933) 65 Mad. L.J. 390, 149 I.C. 237 ('33) A.M. 715.

(*o*) *Wilson* v. *Hart* (1866) 1 Ch. 463; *Patman* v. *Harland* (1881) 17 Ch. D. 353. But see now s. 44 L.P.A. 1925.

(*p*) *Reeve* v. *Berridge* (1888) 20 Q.B.D. 523; *Molyneux* v. *Hawtrey* (1903) 2 K.B. 487.

(*q*) *Hamiduddin Khan* v. *Ramani Kant Roy* (1932) 56 Cal. L.J. 590, 143 I.C. 117, ('33) A.C. 321.

(*r*) *Bank of Bombay* v. *Suleman* (1909) 33 Bom. 9, 35 I.A. 139, 1 I.C. 369.

(*s*) *Kausalai Ammal* v. *Sankara Muthiah* (1941) N.W.N. 621, 53 M.L.W. 744, (1941) M.L.J. 815, (1941) A.M. 707.

for the purpose of administration (*t*). But even in that case the bank would have been affected with notice, if the circumstances of the transaction (*e.g.*, the fact that the mortgage was to secure advances to the mortgagors personally) were such as to afford evidence that the executors were committing a breach of trust (*u*).

On the other hand notice to a purchaser by his title papers in one transaction will not be notice to him in a subsequent and independent transaction in which the instruments containing the recitals are not necessary to his title (*v*). This principle was enunciated by Lord Redesdale in *Hamilton* v. *Royse* (*w*), and quoted with approval by Smith, M. R., in *Tressilian* v. *Caniffe* (*x*), as follows : "If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase."

Illustration.

If *B* buys two properties X and Y from *A*, leaves part of the purchase money unpaid and then sells X to *C* and informs *C* of *A*'s charge for unpaid purchase money then *C*'s purchase of X will be subject to *A*'s charge. But if in the following year *C* also purchases Y from *B*, and *B* omits to inform *C* of *A*'s charge, the information *C* received when purchasing X will not operate as notice so as to make his purchase of Y subject to *A*'s charge.

There is a well recognized distinction between deeds which must affect the property and deeds which may or may not affect it. Omission to inspect a deed which necessarily affects title and forms a link in the chain of title involves constructive notice and a purchaser will not be excused even if the vendor has expressly stated that the deed contains nothing affecting title (*y*). But a purchaser is not presumed to know instruments which are neither directly nor presumptively connected with the title and may only by possibility affect it (*z*). If the deed does not necessarily affect the property and the purchaser is told that it does not, he may rely on such an assurance (*a*). Thus in *Jones* v. *Smith* (*b*) the intending mortgagee inquired of the mortgagor and his wife if any settlement had been made on their marriage and was told that a settlement had been made which did not include the husband's property. The mortgagee accepted this assurance and was not affected with notice that the property mortgaged was in fact included in the marriage settlement.

Generally speaking constructive notice will not be inferred unless some specific circumstance can be shown as a starting point of an inquiry which if prosecuted would have led to the discovery of the fact (*c*). If the purchaser is informed that there are charges he will be affected with notice of all charges which he could have ascertained on inquiry (*d*). If he knows that rents are paid to some person other than the vendor, he will be affected with notice of that person's right (*e*). If he has knowledge that the deeds of title are in the possession of a third party, he has constructive notice why they are there.

(*t*) *Gostaranee De* v. *Narendra Krishna De* (1933) 60 Cal. 394, 144 I.C. 187, ('33) A.C. 429.

(*u*) *Hill* v. *Simpson* (1802) 7 Ves. 152 ; *Goolam Hossein* v. *Bank of Bombay* (1905) 7 Bom. L.R. 407.

(*v*) *Bepin Krishna* v. *Priya Brata* (1921) 26 Cal. W.N. 36, 66 I.C. 345, ('21) A.C. 780.

(*w*) (1804) 2 Sch. & Lef. 315, 327.

(*x*) (1855) 4 Ir. Ch. Rep. 399.

(*y*) *Patman* v. *Harland* (1881) 17 Ch. D. 353.

(*z*) *West* v. *Reid* (1843) 2 Hare 249, 261.

(*a*) *English and Scottish Mercantile Investment Co.* v. *Brunton* (1892) 2 Q. B. 700.

(*b*) (1841) 1 Hare 43.

(*c*) *Ram Coomar* v. *McQueen* (1872) 11 Beng. 46, 54, I.A. Sup. Vol. 40, 45.

(*d*) *Jones* v. *Williams* (1857) 24 Beav. 47.

(*e*) *Hunt* v. *Luck* (1902) 1 Ch. 428.

So if the mortgagor says that the deeds are in the possession of the bank for safe custody, and the mortgagee makes no further inquiry of the bank, he will be affected with notice of the pledge if the deeds prove to be pledged to the bank (*f*).

Illustration.

A borrows Rs 7,000 from *B* on an equitable mortgage of 10 bhigas of land and deposits the original title deeds with *B*. *A* then sells 2 bhigas of the said land to *C* for Rs. 4,700 and gives a copy of the title deeds to *C* for inspection. *C* asked for the original deeds and *A* said that he had not got them but promised to show them in a few days. *A* failed to do so and *C* made no further inquiry. *C* is affected with constructive notice of the equitable mortgage: *Kshetranath* v. *Harasukdas* (1927) 31 Cal. W.N. 703, 102 I.C. 871, ('27) A.C. 538.

(24) Gross negligence.—Mere negligence or "want of caution", to quote the phrase used by Wigram, V.C., in *Jones* v. *Smith* (*g*), is not penalized with constructive notice. The phrase 'gross negligence' was invented by Courts of Equity in order to extend their jurisdiction. Equity cannot interfere with the legal title except in cases of trusts fraud or accident. Negligence is not fraud, for negligence implies indolence and indifference while fraud is active dishonesty. But in extreme cases Courts of Equity got over the difficulty by assuming that the negligent person had wilfully shut his eyes to circumstance, which called for enquiry. On this assumption gross negligence was evidence of a fraudulent design which gave the Court of Equity jurisdiction to interfere (*h*). So in a passage already referred to Wigram, V.C., said that gross negligence was "a degree of negligence so gross (*crassa negligentia*) that a Court of Justice may treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent" (*i*). Again in *Ware* v. *Lord Egmont* (*j*) Lord Cranworth said—"The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." In more modern times the Courts in England have departed from the doctrine thus laid down in the earlier equity cases in two respects. First the adjectives 'gross' and 'culpable' as applied to negligence have been subjected to considerable criticism. Lord Cranworth himself said in the later case of *Colyer* v. *Finch* (*k*): "Cases are very difficult to deal with when you are obliged to use vituperative epithets of that sort in order to enunciate a principle." In *Wilson* v. *Brett* (*l*) the same learned Judge said that gross negligence is ordinary negligence with a vituperative epithet. Romer, J. in *The City Equitable Fire Insurance Company*'s case (*m*) explained that the real distinction between gross negligence and ordinary negligence lies in the difference between the extent of duty to take care imposed in each case. Secondly the equitable doctrine that gross negligence is negligence which amounts to fraud has also been departed from. It was criticised by Fry, L.J., in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (*n*) as involving an inconsistency, for fraud "leads men to do or omit doing a thing not carelessly but for a purpose." Negligence does not as in the Common law import the existence of a duty to the public, for as Fry, L.J., said in the case last cited title deeds are not analogous to ferocious dogs which the owner is under a general duty to keep in safe custody. Lord Cranworth had said in *Colyer* v. *Finch* (*o*)

(*f*) *Imperial Bank of India* v. *U Rai Gyaw* (1923) 50 I.A. 283, 1 Rang. 637, 51 Cal. 86, 76 I.C. 910, ('23) A.P.C. 211. See also *Varden Seth Sam* v. *Luckpathy* (1862) 9 M.I.A. 307; *Puran Ram* v. *Mohan Meetha* (1944) A.P.C. 22.

(*g*) (1841) 1 Hare 41, 55.

(*h*) *Martinez* v. *Cooper* (1826) 2 Russ. 198, 217; *Farrow* v. *Rees* (1840) 4 Beav. 18; *Evans* v. *Bicknell* (1801) 6 Ves. 174, 191.

(*i*) *West* v. *Reid* (1843) 2 Hare 249, 257.

(*j*) (1854) 4 De G.M. & G. 460, 473.

(*k*) (1856) 5 H.L. C. 905, 924.

(*l*) (1843) 11 M. & W. 113.

(*m*) (1925) Ch. 407, 426.

(*n*) (1884) 26 Ch. D. 482, 489.

(*o*) *Supra.*

that "what constitutes gross negligence is always excessively difficult either to define, or by way of anticipation, to illustrate." In *Dixon* v. *Muckleston* (p) Lord Selborne referred gross negligence to the doctrine of estoppel. "But it must be something," said Lord Selborne, "which raises a positive equity against him, upon the principle which in equity, as distinct from law, is conveniently designated by the term 'estoppel'. In other words, the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations if it be a case of express representation—he is not entitled to deny being bound by the natural consequences of his own acts, if it be a case of positive acts—he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the case. By one or other of those means he may have armed another person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power."

This is a correct statement of the principle and the rule that is followed in England with reference to the postponement of legal mortgages is that laid down by Lord Lindley in *Oliver* v. *Hinton* (q) that "to deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate, it is not in my opinion essential that he should have been guilty of fraud ; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority." This case was followed by the Calcutta High Court in *Lloyds Bank Ltd.* v. *P. E. Guzdar & Co.* (r). Dissenting from the dictum of Jenkins, J., in *Munindra Chandra* v. *Troylucko Nath* (s) that "gross neglect" in sec. 78 of this Act means neglect that amounts to evidence of fraud.

Cases of gross negligence which estops a man from denying that he had notice of a fact generally also fall under the heading "Wilful abstention from an inquiry or search" or under "Registration." Thus if a purchaser is informed that the deeds of title are in the possession of a bank for safe custody and omits to make further inquiry of the bank, that is gross negligence which will affect him with notice if the deeds prove to be pledged with the bank (t). Again the Privy Council have said that omission to search the register kept under the Registration Act may amount to gross negligence so as to attract the consequences which result from notice (u). This ruling has been applied to omission to search the revenue register (v). Omission to inspect title of property which a purchaser has contracted to buy may amount to gross negligence (w), but not so omission to inspect title of an adjoining property which *prima facie* the vendor is under no obligation to produce (x). Under the provisions of the U.P. Municipal Act, it was once held that it was no part of the duty of a purchaser to inquire whether the Municipal taxes in respect of a house sold in execution of a decree were paid before the sale. The omission to inspect the Municipal registers on the part of the purchaser was, therefore, held not to

(p) (1872) 8 Ch. 155, 160.
(q) (1899) 2 Ch. 264, 274. See also *Bailey* v. *Barnes* (1894) 1 Ch. 25, at p. 35.
(r) (1929) 56 Cal. 868, 121 I.C. 625, ('30) A.C. 22.
(s) (1898) 2 Cal. W.N. 750.
(t) *Imperial Bank of India* v. *U Rai Gyaw* (1923) 50 I.A. 283, 1 Rang. 637, 51 Cal. 86, 76 I.C. 910, ('23) A.PC. 211.
(u) *Tilakdhari Lal* v. *Khedan Lal* (1920) 47 I.A. 239, 48 Cal. 1, 57 I.C. 465, ('21) A.PC. 112 ; *Punjab Banking Co.* v. *Muhammad Hasan Khan* (1925) 6 Lah. 344, 89 I.C. 815, ('25) A.L. 542 ; *Parbhu Lal* v. *Chatter* (1925) 88 I.C. 898, ('25) A.A. 557 ; *Kali Din* v. *Madho* (1923) 77 I.C. 862, ('23) A.A. 169 ; *Ghulam Muhammad* v. *Mirza* (1924) 5 Lah. 368, 84 I.C. 174, ('25) A.L. 25 ; *A. L. R. M. Chettiar Firm* v. *L. P. R. Chettiar Firm* (1926) 4 Rang. 238, 98 I.C. 19, ('26) A.R. 195.
(v) *Vaz* v. *Muni Singh* (1929) 117 I.C. 565, ('29) A.R. 84.
(w) *Doorga* v. *Baney Madhub* (1880) 7 Cal. 199, 201 ; *Ram Charan* v. *Joy Ram* (1912) 17 Cal. W. N. 10, 16 I.C. 825 ; *Mahomed Yusuf Khan* v. *Court of Wards, Balarampur Estate* (1937) O.W.N. 488, 167 I.C. 962, (1937) A.O. 301.
(x) *Chaturbhuj* v. *Mansukhram* (1925) 27 Bom. L. R. 73, 86 I.C. 19, ('25) A.B. 183.

be a constructive notice of the nonpayment of such taxes. But this decision was overruled in appeal in which it was held that any person purchasing property within the municipal limits was bound to inquire whether any municipal taxes in respect of the property are in arrears (*y*).

Cases in which priority is lost by gross negligence are cited under sec. 78. For the present one illustration may suffice :—

Illustration.

G deposited title-deeds of his house in Calcutta with bank *N* to secure an overdraft in his account. Subsequently *G* represented to the bank that he wished to sell his house in order to clear his overdraft. According to the usual practice the bank should have delivered the title-deeds to their solicitor in order to arrange for their inspection by the solicitor of the prospective purchaser. But *G* represented that if the prospective purchaser knew that the deeds were pledged he would beat him down in price and asked that the deeds be returned to him. Bank *N* complied and departing from the usual practice returned the deeds to *G*. *G* then mortgaged the house to another bank *L*. Bank *N* was guilty of gross negligence which enabled *G* to induce bank *L* to advance money on the house as if it was unincumbered. The mortgage of bank *N* was postponed to the mortgage of bank *L*: *Lloyds Bank Ltd.* v. *P. E. Guzdar & Co.* (1929) 56 Cal. 868, 121 I.C. 625, ('30) A.C. 22.

Sale of part of property.—Under the proviso to sec. 55 (3), on selling part of the property the seller is entitled to retain all the documents of title. Having regard to this provision, the purchaser of a part would not be held guilty of negligence in allowing the title-deeds to remain with the seller. It would, however, be prudent of a purchaser of part, not getting the deeds, to stipulate that he should be allowed to endorse notice of the sale on the deeds retained by the seller. As registration is constructive notice the risk to the purchaser is slight, but in the abscence of a statutory provision making it compulsory to endorse notice of sale of part of the property on the documents retained, there is scope for the seller committing fraud on a third party, *e.g.*, by depositing title-deeds with intent to create security thereon.

Registration when notice.

(25) Registration as notice—Explanation I.—Explanation I supersedes the former case law as to whether registration of a document under the Registration Act is constructive notice of its contents. The Bombay and Allahabad High Courts had held that registration is notice (*z*). The Madras High Court had held that registration is not notice on the ground that if the Legislature had so intended it would have said so (*a*). The Calcutta High Court in some cases took the same view as Madras (*b*); but the prevailing view in Calcutta was that whether registration operates as notice depends upon the circumstances of each case, *i.e.*, whether or not the omission to search the register taken with the facts of the case would amount to gross negligence so as to attract

(*y*) *Ramjilal* v. *Municipal Board, Lucknow* (1936) 12 Luck. 353, 164, I.C. 1034, (1937) A.O. 31, *in appeal Lucknow Municipal Board* v. *Ramjilal* (1941) A.O. 305; *Nawal Kishore* v. *Agra Municipality* (1948) A.A. 115 overruling (1940) All. 669.

(*z*) *Lakshmandas* v. *Dasrat* (1882) 6 Bom. 168; *Dundaya* v. *Chenbasapa* (1885) 9 Bom. 427; *Chhaganlal* v. *Dareppa* (1890) 14 Bom. 506; *Narayan* v. *Bapu* (1892) 17 Bom. 741; *Bai Mahundas* v. *Moti* (1894) 18 Bom. 464; *Chunilal* v. *Ramchandra* (1898) 22 Bom. 213; *Dina* v. *Nathu* (1902) 26 Bom. 538; *Churaman* v. *Balli* (1887) 9 All. 591; *Janki Prasad* v. *Kishen Dat* (1894) 16 All. 478; *Nand Kishore* v. *Anwar* (1908) 30 All. 82; *Saiyed* v. *Muhammad* (1909) 31 All. 523, 526, 3 I.C. 506.

(*a*) *Shan Maun Mull* v. *Madras Building Co.* (1892) 15 Mad. 268; *Madras Building Co.* v. *Rowlandson* (1889) 13 Mad. 383; *Damodara* v. *Somasundara* (1889) 12 Mad. 429, 435; *Rangasami* v. *Annamalai* (1908) 31 Mad. 7, 10.

(*b*) *Inderdawan* v. *Gobind* (1896) 23 Cal. 790, *Preonath* v. *Ashutosh* (1900) 27 Cal. 358, 362. See also *Joshua* v. *Alliance Bank of Simla* (1895) 22 Cal. 185; *Nanda Lal* v. *Abdul Aziz* (1916) 43 Cal. 1052, 1064, 34 I.C. 115.

the consequences which result from notice (*c*). The Privy Council in *Tilakdhari Lal* v. *Khedan Lal* (*d*) reviewed all the Indian decisions, and approved of the decision of Sir Lawrence Jenkins in *Manindra* v. *Troylucko Nath* (*e*) that the question was not one of law but of fact to be determined according to the circumstances of each case. Their Lordships stated that they were impressed with the view that though registration had been held for two centuries not to operate as notice in England, yet the Indian Legislature when framing different Registration Acts and the definition of notice in the Transfer of Property Act had omitted to enact the principle that registration is notice. This omission has now been supplied. The definite rule now enacted the effect of which is to oblige all purchasers to exercise diligence in examining titles recorded in the register avoids the uncertainty and the risk of perjury involved in taking parole evidence as to whether the omission to search the register should in any particular case be attributed to gross negligence. It also fulfils the chief object of registration, which is to provide a record on which every person dealing with property can rely for a full and complete account of all transactions by which his title may be affected (*f*). The rule that registration amounts to notice has been adopted in England by sec. 198 of the Law of Property Act, 1925.

In the Punjab where the Act is not in force, it has been held that the question whether registration operates as notice depends upon the facts of each case (*g*).

Where a document is not compulsorily registrable its registration does not amount to constructive notice (*h*).

(26) Any person acquiring.—These words indicate that registration is notice to transferees subsequent to the registration, (*i*) while the registration of a subsequent transaction is not notice to prior transferees (*j*).

In an Allahabad case (*k*) Sir John Edge said that any reasonably prudent man who was bringing a suit on a mortgage ought to search the registry in order to ascertain what were the dealings with the property whether the dealings were anterior to or subsequent to his mortgage. This observation goes too far, and it can only have reference to the joinder of parties to the suit. Subsequent incumbrances cannot affect a title that has vested. A prior mortgagee ought to join a subsequent incumbrancer in a suit for sale; but if he does not do so the result is that the decree is not binding on the encumbrancer (*l*).

The registration of a puisne mortgage is not notice to a prior mortgagee (*m*). Nor is registration of a submortgage notice to the mortgagor (*n*).

Illustration.

1. *A* mortgages property to *B* who grants a submortgage to *C*. *A* in ignorance of the submortgage pays the mortgage debt to *B*. The fact that the submortgage is

(*c*) *Monindra* v. *Troylucko Nath* (1899) 2 Cal. W.N. 750; *Bunwari* v. *Ramjee* (1902) 7 Cal. W.N. 11; *Atul Kristo* v. *Mutty Lal* (1899) 3 Cal. W.N. 30.

(*d*) (1920) 47 I.A. 239, 48 Cal. 1, 57 I.C. 465, ('21) A.PC. 112; *Ashiq Husain* v. *Chaturbhuj* (1828) 50 All. 328, 108 I.C. 152, ('28) A.A. 159; *Maung Hlaw* v. *M. M. S. Chettyar Firm* (1933) 145 I.C. 118, ('33) A.R. 153.

(*e*) (1899) 2 Cal. W.N. 750.

(*f*) Ghose Vol. I, p. 473; Story Equity Jurisprudence, Art. 534.

(*g*) *D.A.V. College Reg. Society* v. *Umrao* (1935) 157 I.C. 92, ('35) A.L. 410; *Gopal Singh* v. *Thakur Singh* ('35) A.L. 313; *Ghulam Fatma* v. *Kachore Singh* (1940) A.L. 269.

(*h*) *Hirachand* v. *Kashinath* (1942) A.B. 339, 44 Bom. L.R. 227.

(*i*) *Baba Ram Chandra* v. *Kondo Jagua* (1939) 184 I.C. 797, (1940) A.N. 7.

(*j*) *Tilakdhari Lal* v. *Khedan Lal* (1920) 47 I.A. 239, 48 Cal. 1, 57 I.C. 465, ('21) A.PC. 112.

(*k*) *Janki Prasad* v. *Kishen Dat* (1894) 16 All. 478, 481.

(*l*) See *Het Ram* v. *Shadi Lal* (1918) 45 I.A. 130, 40 All. 407, 45 I.C. 798, ('18) A.PC. 34. See Mulla's Code of Civil Procedure, notes to O. 34, r. 1.

(*m*) *Ram Narain* v. *Bandi Pershad* (1904) 31 Cal. 737, 742. Cf. *Ashiq Husain* v. *Chaturbhuj* (1928) 50 All. 328, 108 I.C. 152, ('28) A.A. 159.

(*n*) *Sahadev* v. *Shekh Papa* (1905) 29 Bom. 199; *Parbhu Lal* v. *Chattar* (1925) 88 I.C. 398, ('25) A.A. 557.

registered does not amount to notice of the submortgage to *A* so as to vitiate the payment: *Sahadev* v. *Shekh Papa* (1905) 29 Bom. 199.

An equitable mortgage by deposit of title-deeds is entitled to priority over a subsequent registered mortgage, for it is a perfected conveyance and not merely an oral agreement to which sec. 48 of the Registration Act applies (*o*). Express provision is now made in this behalf by a proviso inserted in that section of the Registration Act by Act 21 of 1929.

Required by law to be registered.—Registration is not notice when there is no duty to search the register. *A* mortgages his goods to *B* by a registered mortgage but retains the goods in his own possession. *A* then sells the goods to *C* who is not aware of the mortgage. *C* acquires a good title to the goods, for the law does not require the registration of mortgages of moveables and there was no duty cast upon him to search the register: *Backer Khorasanee* v. *Ahmed Ismail* (1927) 5 Rang. 633, 634, 106 I.C. 355, ('28) A.R. 28.

(27) Time from which registration operates as notice.—If the instrument has been registered in the same registration sub-district as that in which the property is situate, it operates as notice from the date of registration. This is because any person seeking to acquire an interest in the property would inspect the register of that sub-district when investigating title. If, however, the property is situate in several sub-districts, or if registration has been effected under sec. 30 (2) of the Registration Act in another district, the registered deed will not operate as notice until memorandum of such registration has been received and filed by the Sub-Registrar of the sub-district in which the property is situate under sec. 66 of the Registration Act. The reason for this distinction is obvious, for the purchaser could not be expected to search the registers of other sub-districts. In *Alliance Bank of Simla* v. *Bhai Kahan* (*p*) a mortgage-deed affecting properties in more than one sub-district was registered at Lahore, and the Chief Court held that a purchaser of one of the properties in a different district had notice. The court said—"As to the registration of the deed being effected in Lahore the force of the argument is weakened when it is remembered that, when a deed affecting properties in more than one district is registered in Lahore, a copy is sent for record to each district in which any part of the property is." The point as to the time from which the registration operated as notice did not arise in this case but this is now settled by the amendment made in Explanation I by Act 5 of 1930. See note *supra* "Amendments."

(28) Registration is notice of registered instrument.—If an instrument is registered in the manner prescribed by the Registration Act, a party cannot be heard to say that he searched the register without finding it, for he must take the consequences of his want of diligence (*q*). Notice of a deed is notice of all material facts affecting the property which appear on the face of the deed, or can be reasonably inferred from its contents (*r*). It is also notice of all documents recited in the deed and which an examination of the deed would have disclosed, provided the deed forms part of the chain of title and so necessarily affects the property (*s*). When a mortgage is mentioned in a conveyance the purchaser has constructive notice of other incumbrances referred to in the mortgage. The report of a very old case—*Bisco* v. *Earl of Banbury* (*t*) —contains the following passage:—"But my Lord Chancellor declared; that there was sufficient notice in Law, or an implied notice, for the mortgage to Hewet was excepted in the Defendant's Conveyance, and therefore they could not be ignorant of the

(*o*) *Coggan* v. *Pogose* (1884) 11 Cal. 158, 160; *Gokul Dass* v. *Eastern Mortgage & Agency Co.* (1906) 33 Cal. 410, 422; *Stewart* v. *Bank of Upper India* (1916) P.R. 31, 34 I.C. 987.

(*p*) (1915) P.R. 4, p. 39, 42, 25 I.C. 856.

(*q*) *Srimatty Akhoy Kumari* v. *Kanai Lal* (1912) 17 Cal. W.N. 224, 16 I.C. 618; *Renukabai* v. *Bheosan* (1939) 185 I.C. 33 (1939) A.N. 192.

(*r*) *Rajaram* v. *Krishnasami* (1893) 16 Mad. 301.

(*s*) *Patman* v. *Harland* (1881) 17 Ch. D. 353; *Bepin Krishna* v. *Priya Brata* (1921) 26 C.W.N. 36, 66 I.C. 345, ('21) A.C. 730.

(*t*) (1676) 1 Cas. in Ch. 287, 291.

S. 3

Mortgage, and ought to have seen that, and that would have led them to the other *Deeds* in which, pursued from one to another, the whole Case must have been discovered to them."

Illustration.

A and his half brother *B* effected a partition of the family property, and the deed of partition contained a mutual covenant that if either brother agreed to sell his share of the family house, he would give the other a right of pre-emption. *B* sold his half share of the house to *C* by a deed which described the share as acquired under a deed of partition. *C* had constructive notice of the covenant of pre-emption: *Rajaram* v. *Krishnasami* (1893) 16 Mad. 301.

The Bombay High Court had in some cases held that registration did not operate as notice of unregistered instruments referred to in the registered deed (*u*). These cases it is submitted are no longer law.

(29) Provisos.—The provisos to Explanation I call for no comment. The first proviso merely repeats what is enacted in the fifth paragraph of the section that registration must be according to law. The second and third provisos make it clear that a purchaser will not be affected with notice of any fact which has not been correctly entered in the registers and indexes kept by the Sub-Registrar. In *Gordhandas* v. *Mohanlal* (*v*) the Bombay High Court held that the purchaser was not affected with notice of a registered agreement restricting the use of the property purchased because it was not shown that the agreement was indexed in relation to the property sold.

A mere defect of procedure will not invalidate registration (*w*). Cases have occurred in which immoveable property which ought to be registered in Book No. 1 has been registered in the Miscellaneous Register Book No. 4. There is a conflict of decisions as to whether such registration is valid (*x*) or invalid (*y*). However that may be, the second proviso shows that such misplaced entries will not operate as notice (*z*).

Record of rights.—Omission by a purchaser to inspect entries in the record of rights will, as already stated (p. 27), amount to wilful abstention from inquiry under the first part of the definition of notice (*a*).

Possession as notice of title.

(30) Actual possession as notice of title—Explanation II.—Explanation II settles the law that actual possession is notice of such title as the person in actual possession has.

Before the amending Act there had been some uncertainty in the decisions. Before the Transfer of Property Act abolished optional registration of the specific transfers dealt with in the Act, cases arose in which it was held that possession under a prior unregistered deed was notice to the holder of the subsequent registered deed so as to deprive him of

(*u*) *Chunilal* v. *Ramchandra* (1898) 22 Bom. 213; *Sharfudin* v. *Govind* (1903) 27 Bom. 452.

(*v*) (1921) 45 Bom. 170, 59 I.C. 506, ('21) A.B. 161.

(*w*) *Sah Mukhun Lal* v. *Sah Koondun Lall* (1875) 2 I.A. 210, 24 W.R. 75; *Ma Pwa May* v. *S.R.M.M.A. Chettyar Firm* (1929) 7 Rang. 624, 56 I.A. 379, 120 I.C. 645, ('29) A.PC. 279.

(*x*) *Narasamma* v. *Subbaraguḍu* (1895) 18 Mad. 364; *Najibulla* v. *Nusir* (1881) 7 Cal. 196; *Indra Bibi* v. *Jain Sirdar* (1908) 35 Cal. 845.

(*y*) *Parashrampant* v. *Rama* (1910) 34 Bom. 202, 4 I.C. 598; *Subbalakshmi* v. *Narasimiah* (1927) 52 Mad. L.J. 482, 102 I.C. 360, ('27) A.M. 586.

(*z*) *K. V. Galliara* v. *U. That* (1929) 7 Rang. 118, 117 I.C. 580, ('29) A.R. 117; *Pt. Sita Ram* v. *Raj Narayan* (1934) 150 I.C. 145, ('34) A.O. 283.

(*a*) *Harilal* v. *Mulchand* (1928) 52 Bom. 883, 113 I.C. 27, ('28) A.B. 427.

S. 3 priority. The High Courts of Bombay (*b*), Madras (*c*) and Allahabad (*d*) held that possession amounted to notice of such title as the person in actual possession may have, and that if any person took a mortgage or charge, or purchased the property without ascertaining the nature of the claim of the person in possession, he did so at his own risk. The basis of this view was that possession under Hindu and Mahomedan law was essential to the completion of a transfer and under English law was "*prima facie* evidence of a seisin in fee (*e*)." The Calcutta High Court, however, held that possession is not conclusive but only cogent evidence of notice (*f*) so that the subsequent purchaser might show that he believed that the possession was under his vendor. The Explanation adopts the decisions of the other High Courts that the purchaser is deemed to have notice of the title of the person in actual possession.

This principle is also enacted in the third illustration to sec. 27 (b) of the Specific Relief Act, 1877, which is as follows:—

> "*A* contracts to sell land to *B* for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sells it to *C* for Rs. 6,000. *C* makes no inquiry of *B* relating to his interest in the land. *B*'s possession is sufficient to affect *C* with notice of his interest, and he may enforce specific performance of the contract against *C*."

This illustration is based on the case of *Daniels* v. *Davison* (*g*) where Lord Eldon said:—"Upon one point in this cause there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease or an agreement, a person, purchasing part of the estate, must be bound to inquire, on what terms that person is in possession."

Illustration.

A leased a public house and garden to *B* and then agreed to sell the property to *B*. *A* then sold the property to *C*. Lord Eldon said "this tenant being in possession under a lease with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession:" *Daniels* v. *Davison* (1809) 16 Ves. 249 at p. 254.

Again in *Barnhart* v. *Greenshields* (*h*), Lord Kingsdown delivering the judgment of the Board said:—"With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* (*i*), but also to interests under collateral agreements, as in *Daniels* v. *Davison* (*j*) and *Allen* v. *Anthony* (*k*), the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to inquire what

(*b*) *Lakshmandas* v. *Dasrat* (1882) 6 Bom. 168, 187 F.B.; *Sharfudin* v. *Govind* (1903) 27 Bom. 452, 469; *Khondiba* v. *Nana* (1903) 27 Bom. 408; *Waman* v. *Dhondiba* (1880) 4 Bom. 126; *Dundaya* v. *Chenbasappa* (1885) 9 Bom. 427; *Balaram* v. *Appa* (1872) 9 Bom. H.C. 121; *Basapa* v. *Basapa* (1900) 2 Bom. L.R. 410; *Sobhagchand* v. *Bhaichand* (1882) 6 Bom. 193 F.B.

(*c*) *Krishnamma* v. *Suranna* (1893) 16 Mad. 148 F.B.

(*d*) *Bhikhi Rai* v. *Udit Narain* (1903) 25 All. 366, 370; *Ram Autar* v. *Dhanauri* (1886) 8 All. 540.

(*e*) *Jones* v. *Smith* (1841) 1 Hare 43, 60. See also sec. 110 of the Indian Evidence Act, 1872.

(*f*) *Nani Bibee* v. *Hafizullah* (1884) 10 Cal. 1073; *Fazludin* v. *Fakir* (1879) 5 Cal. 336; *Narain Chunder* v. *Dataram Roy* (1882) 8 Cal. 597 F.B. overruling *Dinonath* v. *Auluck* (1881) 7 Cal. 753. But see *Magu* v. *Bholi Das* (1914) 19 Cal. L.J. 352, 20 I.C. 195.

(*g*) (1809) 16 Ves. 249, 254 followed in the *National Bank* v. *Paul Hamilton Joseph* ('20) A.PC. 274.

(*h*) (1853) 9 Moo P.C. 18, 32.

(*i*) (1794) 2 Ves. 437.

(*j*) *Supra.*

(*k*) (1816) 1 Mer. 282.

S. 3

that interest is, or to give effect to it, whatever it may be." A mortgagor contracted to sell the mortgaged property to the mortgagee who was in possession and then sold it to a third person. The purchaser having made no inquiries was held to have had constructive notice of all the equities in favour of the mortgagee (*l*). Similarly in *Be*[illegible] *Bag* v. *Madhav Chandra* (*m*) Sir Lawrence Jenkins, C.J., said "the occupation of property by a tenant ordinarily affects one who would take a transfer of the property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant he cannot claim to be a transferee without notice." A purchaser (*n*), or a permanent lessee (*o*) of a village, is affected with notice of the rights, of cultivating tenants about which he made no inquiry. If a landlord has released the rent of a tenant and then mortgages the property leased, the possession of the tenant is constructive notice of the release and the mortgagee is not entitled to recover rent from the tenants; but a release after the mortgage is not binding on the mortgagee (*p*). The first part of this proposition rests on the principle that the open possession of a tenant is notice, not only of the terms of the tenancy, but of collateral agreements as well, in the absence of all inquiry by the transferee (*q*).

Illustration.

A, the owner of a house, leased it to *B* on a lease from month to month. During the pendency of the lease, *B*, in June 1920, advanced Rs. 7,800 to *A* on a verbal agreement that the money was to be spent on repairs and repaid by *B* giving credit for monthly rents as they became due at the rate of Rs. 200 per mensem, that the rent was to be increased to Rs. 200 and that *B* was to remain in possession until the whole amount was repaid in this way, *i.e.*, until the end of August 1923. In July 1921 *A* mortgaged the house to *C*. *C* obtained a decree for sale on his mortgage, purchased the house at the Court sale, and gave *B* notice to quit in March 1923. *C* was not entitled to evict *B* on that notice. The possession of *B* was constructive notice to *C* not only of *B*'s tenancy but also of the agreement under which he was entitled to remain in possession until the end of August 1923: *Tiloke Chand Surana* v. *J. B. Beattie & Co.* (1926) 29 Cal. W.N. 953, 94 I.C. 538, ('26) A.C. 204.

Possession to operate as notice must be actual.—In order to operate as constructive notice possession must be actual possession (*r*). Constructive possession is not notice, and the possession of a tenant is not notice of the title of the lessor (*s*) unless the purchaser had learnt that the rent was in fact paid to him in a manner inconsistent with the title of the seller (*t*). Thus if *A* contracts to sell land to *B*, and after *B* has put his tenant in possession, *A* sells the land to *C*, then the possession of *B*'s tenant will not be sufficient to affect *C* with notice of *B*'s interest. It matters not that the party in possession under a contract of sale had previously been in possession as tenant of the vendor for the purchaser has no right to assume that the former tenant has not subsequently acquired another title (*u*). On the other hand if a purchaser finds his vendor in possession he is not affected with notice that he is in possession as tenant of a third party (*v*).

(*l*) *Faki Ibrahim* v. *Faki Gulam* (1921) 45 Bom. 910, 60 I.C. 986, ('21) A.B. 459.

(*m*) (1913) 40 Cal. 565, 569, 19 I.C. 9.

(*n*) *Ahmedbhoy* v. *Balkrishna* (1895) 19 Bom. 391; *Vinayakrao* v. *Gyanoba* (1921) 23 Bom. L.R. 1062, 64 I.C. 246, ('23) A.B. 13.

(*o*) *Bisheshar* v. *Muirhead* (1892) 14 All. 362.

(*p*) *Tiloke Chand Surana* v. *J. B. Beattie & Co.* (1926) 29 Cal. W.N. 953, 94 I.C. 538, ('26) A.C. 204; *Ashburton* v. *Norton* (1915) 1 Ch. 274.

(*q*) Per Rankin, J., in *Tiloke Chand Surana* v. *J. B. Beattie & Co.*, *supra*.

(*r*) *Gunamoni* v. *Bussunt* (1890) 16 Cal. 414.

(*s*) *Banhart* v. *Greenshields* (1853) 9 Moo. P.C. 18; *Gunamoni* v. *Bussunt* (1890) 16 Cal. 414, 417.

(*t*) *Hunt* v. *Luck* (1902) 1 Ch. 428; *Gunamoni* v. *Bussunt*. *supra*, p. 417.

(*u*) *Balchand Mahton* v. *Bulaki Singh* (1929) 8 Pat. 316, 117 I.C. 170, ('29) A.P. 284; *Magu* v. *Bholi Das* (1914) 19 Cal. L.J. 352, 20 I.C. 195.

(*v*) *Moreshwar* v. *Dattu* (1888) 12 Bom. 569, 572; *Pindee* v. *U. Hpa* (1928) 6 Rang. 315, 112 I.C. 230, ('28) A.R. 237.

Illustrations.

S. 3 (1) *A* leased his land on the 2nd March, 1901, to *B* for seven years. On the 1st May 1901 *A* entered into an agreement with *B* for the renewal of the lease on the termination of the term. On the 11th July *A* purported to settle the land with *C* for seven years from the 1st May 1908. *C* sued to recover possession on the ground that the lease to *B* had terminated but the Court held that *C* had constructive notice of the agreement as *B* was in possession and that *C* was not entitled to possession: *Baburam Bag* v. *Madhav Chandra* (1913) 40 Cal. 565, 19 I.C. 9; *Kalyani* v. *Krishnan Nambiar* (1932) 55 Mad. 519, 62 M.L.J. 525, 138 I.C. 78, ('32) A.M. 305.

(2) *A* leased his land to *B*, and then in 1875 sold it to him for Rs. 75 by an unregistered deed of sale. *B* who was originally tenant continued in possession as owner. In 1876 *A* sold the land to *C* by a registered sale deed. *C* sued *B* for the rent alleging that *B* was in possession as tenant. Although *C*'s deed being registered would have priority over *B*'s unregistered deed, yet *C* is not entitled to rent because having notice of *B*'s possession he had constructive notice of the title on which *B* held the land: *Kondiba* v. *Nana* (1903) 27 Bom. 408 [Facts simplified].

(3) *A* sells land to *B* but remains in possession as tenant of *B*. The sale deed to *B* is unregistered, and *A* afterwards sells the same land to *C* by a registered deed. *C* is not deprived of the priority by the doctrine of notice, for he had no reason to suppose that *A* was in possession otherwise than as owner: *Moreshwar* v. *Dattu* (1888) 12 Bom. 569.

Rule in Daniels v. *Davison not applicable where matter rests in contract.*—As between a seller and buyer the rule that a tenant's occupation is notice of all the tenant's rights has no application where the matter rests in contract (*w*). Under sec. 55 (1) (a) the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto, and the seller is not entitled to force a defective title on the buyer on the ground that he had constructive notice of the defect. In *Caballero* v. *Henty* (*x*) it was one of the conditions of sale of a public-house that it was in the occupation of a tenant. A brewer, who wished to carry on the business of a publican in that public-house, agreed to buy it. He subsequently learnt that the lease in favour of the tenant had another eight years to run, and he refused to complete the sale. It was argued by the seller that the buyer had constructive notice of the tenant's rights. In that case James, L.J., said:—"There is no pretence for the case made by the plaintiff, that a person who wants to buy such property, and has notice of the occupation of a tenant, is bound to go and inquire of the tenant what is the nature of his tenancy. For this proposition *James* v. *Lichfield* (*y*) was cited as an authority. In that case there certainly are some dicta which nearly go to that extent, and which support the notion that the doctrine of *Daniels* v. *Davison* applies as between vendor and purchaser, and whilst the matter still rests in contract. It is not necessary now to deal with that case, but I am not at present prepared to assent to any such proposition. The doctrine in question seems to me to refer to equities between the purchaser and the tenant *when the legal estate has passed*, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold, and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired you would have found out all about it.' During the argument, I referred to a passage in Sug. V. & P. which seems to show that a purchaser is not bound to go to the tenant to inquire. At all events, the vendor cannot enforce such an agreement as this" (*z*).

(*w*) *Caballero* v. *Henty* (1874) 9 Ch. 447.
(*x*) (1874) 9 Ch. 447.
(*y*) (1869) 9 Eq. 51.
(*z*) *Caballero* v. *Henty* (1874) 9 Ch. 447. See also *Hormusji* v. *Mankuvarbai* (1879) 12 Bom. H.C. 262; *Morgan* v. *Govt. of Haidarabad* (1881) 11 Mad. 419.

Possession only of portion where whole property sold.—The rule depends upon the principle that when another is in exclusive possession of the property, and such possession would be *prima facie* inconsistent with the full rights of ownership of the vendor or mortgagor, and the purchaser does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked (*a*). But the doctrine must not be extended to the case of every person who may be on the premises; and possession of a small part of a house will not put a purchaser on constructive notice of that person's rights as to the whole house (*b*).

State of property may be notice.

(30) (2) State of the property.—A purchaser has been held to have notice of rights of third parties from the state of the property purchased. Thus the mortgagee of a burial ground has notice of the purposes to which it is devoted and is bound by rights of burial, temporary or in perpetuity, granted by his mortgagor, while left in possession (*c*). If there is a shrine or tomb on the land to be sold, the purchaser will be put to an inquiry whether the land is wakf (*d*). Where part of an estate, agreed to be let upon building leases, was sold and the purchaser had notice of the existence of an archway, which on the completion of the buildings was to be the only access to the adjoining land, it was held that the state of the property being such as to put the purchaser upon inquiry, he was fixed with constructive notice of the right of way (*e*). But the mere fact of there being windows in an adjoining house, which overlooks a purchased property, is not constructive notice of an agreement giving a right to the access of light to them, because windows are frequently made in situations where they are liable to be obstructed (*f*).

Notice to agent when notice to principal.

(31) Notice to an agent.—Explanation III amends the law as to notice to an agent. Before the amending Act of 1929 the definition of notice included a provision that a person is said to have notice of a fact "when information of the fact is given or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229." The words "given or obtained" suggested express notice. In a Calcutta case (*g*) Pontifex, J., said "for a purchaser to be affected with constructive notice through his solicitor the latter himself must have actual notice." The words "given or obtained" have been omitted, and the reference to the section of the Indian Contract Act deleted, and the definition widened so as to include a fact of which the agent has notice whether express or constructive. This accords with the principle *qui facit per alium facit per se* (*i.e.*, he who acts through another is deemed to act in person), and that the agent stands in the place of his principal with reference to the business for which he is agent so that his acts and knowledge are the acts and knowledge of his principal (*h*).

The expression "imputed notice" was probably first used by Lord Chelmsford in the following passage from *Espin* v. *Pemberton* (*i*)—"Constructive notice properly so called, is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his

(*a*) *Parthasarathy* v. *Subbaraya* (1923) 45 Mad. L.J. 175, 72 I.C. 558, ('24) A.M. 67.

(*b*) *Manji* v. *Hoorbai* (1910) 35 Bom. 342, 8 I.C. 752; *Parthasarathy* v. *Subbaraya*, *supra*. See also *Hari Charan* v. *Kaula Rai* (1917) 2 Pat. L. J. 513, 40 I.C. 142; *Hunter* v. *Walters* (1871) 7 Ch. 75.

(*c*) *Moreland* v. *Richardson* (1857) 24 Beav. 33.

(*d*) *Motisha* v. *Hirsha* (1877) P.J. 3.

(*e*) *Davies* v. *Sear* (1869) 7 Eq. 427.

(*f*) *Allen* v. *Seckham* (1879) 11 Ch. D. 790.

(*g*) *Greender Chunder* v. *Mackintosh* (1879) 4 Cal. 897, 910.

(*h*) *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 Cal. 539, 30 I.A. 114, 121; *Renukabai* v. *Bheosan* (1939) 185 I.C. 33, (1939) A.N. 132.

(*i*) (1859) 3 De G. & J. 547, 554.

S. 3 wilfully abstaining from inquiry, to avoid notice. I should therefore prefer calling the knowledge which a person has either by himself or through his agent, actual knowledge or if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the latter might be called imputed knowledge." The Privy Council have said that it is a rule of law that imputes the knowledge of the agent to the principal for the agency extends to receiving notice on behalf of the principal of whatever is material (*j*). In *Berwick & Co.* v. *Price* (*k*) the Court said that "if notice to the agent were not notice to the principal, notice would be avoided in every case by employing agents."

(32) **Scope of the rule.**—The rule of imputed notice is subject to certain limitations. Notice should have been received by the agent (1) during the agency, (2) in his capacity as agent, (3) in the course of the agency business, (4) in a matter material to the agency business, and (5) should not have been fraudulently withheld from the principal. The first four conditions are implied by the words 'whilst acting on his behalf in the course of the business to which that fact is material.' The fifth condition is the subject of the proviso and will be considered separately.

During the agency.—It is essential that the knowledge should have been acquired by the agent, as agent and while acting in the agency business. Thus if a canvasser for an insurance company negotiates a policy of insurance for a man who has lost the sight of one eye, against the loss of both eyes, the knowledge obtained by the canvasser, when acting as agent of the company, that the man had already lost one eye, will be imputed to the company (*l*). Knowledge obtained before the commencement of the agency will not be imputed to the principal. A mortgagee is not held to have notice of prior charges because his solicitor had previously acted for the prior encumbrancers (*m*). In *Chabildas* v. *Dayal Mawji* (*n*) a mortgagee sold the property mortgaged under a power of sale and one of the conditions of the sale was a depreciatory condition wholly unwarranted by the state of the mortgagor's title. The purchaser signed the contract the same day, and a few days later employed a solicitor to act for him in the preparation of a conveyance. The High Court set aside the sale on the ground that the solicitor knew enough about the title to see that the condition was unjustifiable. The Privy Council however, said that this view imputed to the principal knowledge of an agent not acquired in the business for which he was agent, and to use it to upset a transaction of date before the agency commenced was an extension of the doctrine of constructive notice in which their Lordships could not concur. It is perhaps unnecessary to add that knowledge acquired by an agent after the agency has terminated cannot be imputed to the principal.

In his capacity as agent.—It is necessary that the transaction should be such as to constitute the relation of principal and agent. It has been held that notice to the town agent of a country solicitor is notice to the person employing the solicitor (*o*). On the other hand if a mortgagee allows a mortgagor solicitor to engross the deed of mortgage, he does not constitute the solicitor his agent and is not affected with knowledge of an incumbrance known to him (*p*). If company *A* lend money to company *B*, and if a director of company *A* is by reason of a personal interest in company *B* aware that the loan is required for an *ultra vires* purpose that knowledge will not be imputed to company *A* for the director is under no duty to disclose how the money borrowed would be applied (*q*). But if a director in his personal capacity has notice of a charge on shares of the company

(*j*) *Rampal Sing* v. *Balbaddar Singh* (1904) 25 All. 1, 29 I.A. 203, 212.

(*k*) (1905) 1 Ch. 632, 639.

(*l*) *Bawden* v. *London, etc. Assurance Co.* (1892) 2 Q.B. 534. But see the criticism of this case in *Newsholme Bros.* v. *Road Transport and General Insurance Co., Ltd.* (1929) 2 K.B. 356.

(*m*) *Re cousins* (1886) 31 Ch. D. 671.

(*n*) (1907) 31 Bom. 566, 34 I.A. 179.

(*o*) *Norris* v. *Le Neve* (1743) 3 Atk. 26, 37.

(*p*) *Espin* v. *Pemberton* (1859) 3 De. G. & J. 547.

(*q*) *In re David Payne & Co.* (1904) 2 Ch. 608; *Re Hampshire Land Co.* (1896) 2 Ch. 743.

that will be notice to the company (*r*). Similarly if a director charges his own shares notice of the charge will be imputed to the company (*s*).

In the course of the agency business.—The employment of a solicitor in one transaction will not make him an agent for receiving notice in a subsequent transaction (*t*). When the purchaser employed the same solicitor as the vendor, and the solicitor had heard of certain restrictions in the course of his previous employment by the vendor, notice of the restrictions was not imputed to the purchaser since *his* solicitor would not have discovered them if he had investigated title in the usual way (*u*). But in *Dixon* v. *Winch* (*v*) a mortgagor joined with the mortgagee, his solicitor, in conveying property mortgaged believing that he was conveying an absolute title. The solicitor had already transferred the mortgage without informing the mortgagor. Nevertheless as the mortgagor had always placed himself entirely in the hands of his solicitor and constituted him his general agent in a series of transactions the latter's knowledge that the mortgage was outstanding was imputed to him. In *Wyllie* v. *Pollen* (*w*) transferees of mortgages were represented by a solicitor who employed a solicitor of one of the mortgagors merely to obtain execution of the deed of transfer by the mortgagors. The second solicitor had, at the date of the transfer, notice of a judgment-debt against the mortgagors subsequent to the securities transferred but did not disclose this to the transferees. The transferees afterwards made a further advance to the mortgagors without actual notice of the judgment-debt. It was held that as the second solicitor was employed to do a merely ministerial act and that such employment did not constitute him solicitor to the transferees so as to impute to them his knowledge of the judgment-debt. His authority was limited to obtaining execution of the deed and it was no part of his duty to inquire as to subsequent advances.

Material to the business.—The knowledge must, of course, be material to the business for which the agent is employed. It can be no part of the duty of an agent to acquire knowledge of a fact which is not material to the business of the agency, nor would it be his duty, if it did acquire such knowledge to communicate it to his principal.

Ratification.—If a principal ratifies an act of an agent, notice to the agent will be imputed to the principal, as the effect of the ratification is to constitute the agent an agent *ab initio* (*x*).

Illustration.

A without the authority of *B* acts as the agent of *B* and purchases an immoveable property with notice of an incumbrance. *B* thereafter ratifies the transaction and pays the price. *A* becomes in law *B*'s agent *ab initio* and *A*'s knowledge is imputed to *B* : *Coote* v. *Mammon* (1724) 5 Bro. P.C. 355. See also secs. 196 and 199 of the Indian Contract Act.

Communication by agent not necessary.—That the knowledge of the agent is knowledge of the principal has been said by the Privy Council to be a rule of law and not an inference of fact (*y*). In the absence of fraud it matters not that there has been no communication by the agent (*z*). In *Kettlewell* v. *Watson* (*a*) Fry, L.J., said :—"The Court, therefore, receives evidence of the agency and it receives evidence of the Act of the principal, but it will not receive evidence whether the agent recollected the fact at the time, or

(*r*) *Rainford* v. *James Keith and Blackman Co., Ltd.* (1905) 2 Ch. 147.

(*s*) *In the matter of the Union Indian Sugar Mills Co., Ltd.* (1933) 55 All. 810, 146 I.C. 801, ('33) A.A. 607.

(*t*) *Saffron, etc., Society* v. *Rayner* (1880) 14 Ch. D. 406, 409. Cf. *Prakash Narain* v. *Raja Binendra* (1931) 7 Luck. 131, 132 I.C. 51, ('31) A.O. 333.

(*u*) *Rowell* v. *Satchell* (1903) 2 Ch. 212, 221.

(*v*) (1900) 1 Ch. 736.

(*w*) (1863) 3 De G. J. & Sm. 596.

(*x*) *Coote* v. *Mammon* (1724) 5 Bro. P.C. 355.

(*y*) *Rampal Singh* v. *Balbaddar Singh* (1904) 25 All. 1, 29 I.A. 203.

(*z*) *Bradley* v. *Riches* (1878) 9 Ch. D. 189; *Berwick & Co.* v. *Price* (1905) 1 Ch. 639; *Rolland* v. *Hart* (1871) 6 Ch. 678.

(*a*) (1882) 21 Ch. D. 685, 706.

S. 3 whether he communicated it to his principal. It deals with those matters by way of irrebuttable presumption when the circumstances are known."

Illustration.

Plaintiff sued for cancellation of an instrument of permanent lease set up by the defendant and for a declaration that the defendant was liable to ejectment on notice to quit. More than three years before suit the defendant had set up the permanent lease in mutation proceedings in which the plaintiff was represented by an agent. Plaintiff, not having been informed by the agent, was not aware that the defendant had relied on the permanent lease before the collector. Nevertheless knowledge of the agent was taken to be knowledge of the principal and the suit was dismissed as time barred under Art. 91 as having been filed more than three years after facts entitling plaintiff to cancellation had come to his knowledge: *Rampal Singh* v. *Balbaddar Singh* (1904) 25 All. 1, 29 I.A. 203.

(33) Proviso: Fraudulent concealment of fact by agent.—Fraud on the part of the agent exempts the principal from the rule of imputed notice. Such conduct raises a necessary presumption that the notice has not been communicated, for the plotter of the fraud will never communicate it to one of his victims. In *Cave* v. *Cave* (*b*) it is pointed out by Fry, J., that this exception has been based on two grounds: (1) that the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal and that it is not to be imputed to the principal as an act done by his agent; and (2) that circumstances raised the inevitable conclusion that the notice had not been communicated. In a case already cited (*c*), Lord Wrenbury (then Buckley, J.), said—"I understand the law to be this: that if a communication be made to an agent which it would be his duty to hand on to his principals, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose and which he did not disclose." This passage was cited with approval by the Judicial Committee in *Texas Co., Ltd.* v. *Bombay Banking Co.* (*d*). In this latter case *V* who was an agent of the bank, had an overdraft in his private banking account which he discharged with money belonging to the Texas Company who were his principals in an oil business. It was contended that as *V* was agent of the bank, knowledge of the ownership of the money should be imputed to the bank. But Lord Buckmaster said—"It would be straining the doctrine of notice beyond all reasonable limits to hold that in such circumstances moneys received in absolute good faith should be earmarked with some independent ownership, because the debtor, who was also a servant of the company committed a fraud in order to discharge his obligations."

If a party has connived with the agent and information has been fraudulently withheld from the principal by the agent, he cannot take advantage of his fraud and impute notice to the principal. A common solicitor of both parties colluding with one does not affect the other with notice, "for it would be an encouragement of fraud to apply the rules of notice which were established for the safety of mankind to a transaction like this; it would be sanctioning a scheme to rob a man by colluding with his solicitor (*e*)."

Illustrations.

(1) A solicitor, *C.C.*, who was trustee of a settlement, purchased with the trust money land in the name of his brother *F.C.* The brother, *F.C.*, mortgaged it to a

(*b*) (1880) 15 Ch. D. 639.
(*c*) *In re David Payne & Co.* (1904) 2 Ch. 608, 611.
(*d*) (1919) 46 I.A. 250, 258, 44 Bom. 139, 54 I.C. 121, ('19) A.PC. 20.
(*e*) *Sharpe* v. *Foy* (1868) 4 Ch. App. 35.

mortgagee who employed *C.C.* as his solicitor. The mortgagee was no party to the fraud and was not affected with the knowledge of the trust which his solicitor possessed: *Cave* v. *Cave* (1880) 15 Ch. D. 639.

(2) A solicitor acts for a husband and wife seeking to mortgage the wife's property, which is in fact caught by a covenant to settle. He also acts for the intending mortgagee. The solicitor, who has notice of the covenant, tells the mortgagors that he will not disclose it to the mortgagee. The mortgagee is not affected with constructive notice of the covenant: *Sharpe* v. *Foy* (1868) 4 Ch. App. 35.

The exception fraud, however, will not altogether exclude the doctrine of imputed notice and if the agent is a fraudulent solicitor, notice will be imputed of anything which an honest solicitor, employed in the place of the fraudulent solicitor, would have discovered in the ordinary course of the business of the agency. In *Kennedy* v. *Green* (*f*), *Mrs. Kennedy* was mortgagee of leasehold property belonging to her solicitor *Bostock*. *Bostock* fraudulently obtained her signature to an assignment of the mortgage to himself. He then raised money on a mortgage of the same property as unencumbered leasehold to another client, *Kirby*. The assignment by *Mrs. Kennedy* to *Bostock* was drawn in an informal and irregular manner, which would have excited the suspicion of a professional man, and no money was paid to her. It was held that though *Kirby* could not be deemed to have notice of the fraud of *Bostock*, yet if an independent solicitor had been employed an examination of the deed signed by *Kennedy* would have at once shown the suspicious character of the transaction. *Kirby* was therefore affected with notice that consideration had not been paid, on the ground that the deed and the indorsed receipt thereon were drawn in a peculiar form. As Lord Brougham, L.C., said:—"For *Bostock*, had he been wholly free from the guilty knowledge, and only employed as a solicitor to act for and advise *Mr. Kirby* must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed". Here the fraud was in the obtaining of the deed. There was no attempt to conceal it from *Kirby*.

Enactments relating to contracts to be taken as part of Contract Act.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908

(1) **Amendment.**—The only amendment made by the Amending Act 20 of 1929 was to substitute the number 1908 for 1877 as the Registration Act is Act 16 of 1908. But even before this amendment the reference to the Indian Registration Act, 1877, was by virtue of the General Clauses Act, 1907, construed as referring to the Act of 1908.

The second paragraph was added by the Amending Act 3 of 1885.

(2) **Contract Act.**—The reference to the Indian Contract Act is explained by the following passage from the report of the Indian Law Commissioners of the 15th November 1879:—

"We would declare that all chapters and sections of the bill which relate to contracts should be taken as part of the Contract Act, 1872. When the body of substantive civil law for India is arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the

(*f*) (1836) 3 My. & K. 699, 720-721.

S. 4

Legislature, the chapters of Sale, Mortgage, Lease and Exchange, contained, in the present bill, will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons."

The Indian Succession Act and the Indian Contract Act had been passed before the Transfer of Property Act, and, as already stated in the notes to the preamble, one of the objects of the Act was to bring the rules which regulate the transmission of property between living persons into harmony with the law of testamentary and intestate succession and to complete the code of contract so far as relates to immoveable property (*g*). The provisions of this Act complete the law of contract, for most transfers of property are executed contracts.

Difference between contract and transfer.—The section says that the chapters and sections of this Act which relate to contracts are to be taken as part of the Contract Act. Thus the word "consideration," wherever it occurs in the Act, is no doubt used in the same sense as in the Contract Act [see sec. 2 (d) of the Act]. Section 137 of this Act must be read as part of the Indian Contract Act (*h*). But it must be observed the section does not say that the provisions of the Contract Act are to be *read into* the Transfer of Property Act. There is a clear distinction between a completed conveyance and an executory contract (*i*). Therefore, a conveyance or completed transfer cannot be rescinded under sec. 39 of the Contract Act, and a mortgagee being a transferee of an interest in property is entitled to enforce his mortgage for the amount he has advanced, although he has failed to advance the whole amount of the mortgage money (*j*). See in this connection the undermentioned case (*k*) and sec. 6 (h).

(3) Indian Registration Act.—The Registration Act makes registration optional in the case of immoveable property of value less than Rs. 100. Thus while under the Registration Act a *sale* or *mortgage* for Rs. 99 need not be registered, yet under this Act such a sale [sec. 54] or mortgage [sec. 59] may be made either by a *registered* instrument or by delivery of the property. Similarly while under the Registration Act a lease of immoveable property other than a lease from year to year or for a term exceeding one year or reserving a yearly rent need not be registered, yet under this Act such a lease [sec. 107] may be made either by a *registered* instrument or by oral agreement accompanied by delivery of possession. Again while under the Registration Act a gift of moveable property need not be registered, yet under this Act such a gift [sec. 123] may either be made by a *registered* instrument or by delivery. This inconsistency between the Registration Act and the Transfer of property Act was noticed by Garth, C.J. (*l*) and the intention of the amending Act of 1885 was to remove this difficulty and to make the provisions of the Transfer of Property Act as to registration absolute (*m*). Thus, although equitable mortgages are recognised in the Punjab yet when sec. 59 (before its amendment in 1929) was applied to an area in the Punjab the requisition for registration became absolute and an equitable mortgage could no longer be accepted in that area if the amount secured was not less than Rs. 100 (*n*).

(*g*) Whitley Stokes Anglo-Indian Codes, Vol. I, p. 726.

(*h*) *Amerchand* v. *Ramdas* (1914) 38 Bom. 255, 21 I.C. 343 on app. *Ramdas Vithaldas* v. *S. Amerchand* (1916) 40 Bom. 630, 43 I.A. 164, 35 I.C. 954; *Mercantile Bank of India* v. *Official Assignee of Madras* (1933) 56 Mad. 177, 64 Mad. L. J. 320, 143 I.C. 641, ('33) A.M. 207.

(*i*) *Tatia* v. *Babaji* (1898) 22 Bom. 176, 183.

(*j*) *Makhan Lal* v. *Hanuman* (1917) 2 Pat. L.J. 168, 38 I.C. 877; *Rashik Lal* v. *Ram Narain* (1912) 34 All. 273, 13 I.C. 573.

(*k*) *Dip Narain Singh* v. *Nageshar* (1930) 52 All. 338, 122 I.C. 872, ('30) A.A. 1 F.B.

(*l*) *Narain Chunder* v. *Dattaram* (1882), 8 Cal. 597.

(*m*) *Makhan Lal* v. *Banku Behari* (1892) 19 Cal. 623 F.B.

(*n*) *Gurdas Mal* v. *Punjab Sindh Bank Ltd.* (1933) 147 I.C. 942, ('33) A.L. 972.

(4) **Supplemental.**—It will be observed that while parts of the Act are to be "taken as part of the Indian Contract Act" and are thus incorporated in it, the provision as to the Indian Registration Act is differently expressed, for the specified sections are to be "read as supplemental to the Indian Registration Act." It had been held that the effect of the provision as to the Indian Registration Act was merely to add to the list of documents which are compulsorily registrable. It did not go to the length of saying that these supplementary documents were deemed to be included in sec. 17 of the Indian Registration Act. The provisions of sec. 49 of the Indian Registration Act, rendering an unregistered document of which registration is compulsory under sec. 17 inadmissible as evidence of any transaction affecting such property, were held not to apply to documents in this supplementary list. This was the view taken by a Full Bench of the Allahabad High Court in *Sohan Lal* v. *Mohan Lal* (o) by Macleod, C.J., in *Dawal* v. *Dharma* (p), and by a majority of judges in a Madras Full Bench decision (q). But this view seems to be over astute and to attribute to the different expressions used in the two paragraphs of the section a meaning which was not intended. The difference of language is probably only due to the difference of subject-matter. Parts of the Transfer of Property Act refer to contracts and these parts might be described as to be "taken as part of the Indian Contract Act:" whereas a similar expression would not have been appropriate to an extraneous subject like the Indian Registration Act. Those decisions, however, have now been superseded by legislation, for Act 21 of 1929 by inserting in sec. 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882," has made it clear that documents in the supplementary list, *i.e.*, documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act fall within the scope of sec. 49 and if not registered are not admissible as evidence of any transaction affecting any property comprised therein and do not affect any such property.

(o) (1928) 50 All. 986, 118 I.C. 177, ('28) A.A. 726 F.B.

(p) (1918) 41 Bom. 550, 41 I.C. 273.

(q) *Rama* v. *Gowra* (1921) 44 Mad. 53, 59 I.C. 350, ('21) A.M. 337 F.B.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A)—*Transfer of Property, whether moveable or immoveable.*

S. 5 **5.** In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, *or to himself* and one or more other living persons; and "to transfer property" is to perform such act.

"Transfer of Property" defined.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

(1) **Amendment.**—The section has been amended by the Act of 1929, by the insertion of the words "or to himself." This section provides for the case where a man makes a settlement of his property in trust, and constitutes himself sole trustee. In this case the beneficial interest is in the beneficiaries of the trust, but the section apparently regards the ownership as transferred to the owner himself in the capacity of trustee. See note below, "Legal and equitable estates."

The second paragraph has been added by the Amending Act of 1929 in order to make it clear that the words "living person" embraced companies and societies, and that the general provisions of this Act as to transfers do not affect the special provisions of the Indian Companies Act. See note below, "Living person."

(2) **Property.**—The Legislature has not attempted to define the word "property," but it is used in this Act in its widest and most generic legal sense (*r*). Sec. 6 says that "property *of any kind* may be transferred," etc. Thus an actionable claim is property (*s*); and so is a right to a reconveyance of land (*t*). But a *power* of appointment is not property (*u*).

The definition in sec. 205, Law of Property Act [English], 1925, is "Property includes anything in action and any interest in real or personal property." The earlier definition in sec. 2 of the Law of Property and Conveyancing Act, 1881, was— "Property, unless a contrary intention appears, includes, real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest."

(*r*) *Matadin* v. *Kasim Husain* (1891) 13 All. 432, 473, per Mahmood J.

(*s*) *Rudra Perkash* v. *Krishna* (1887) 14 Cal. 241, 244; *Muchiram* v. *Ishan Chunder* (1894) 21 Cal. 568 F.B.

(*t*) *Narasingarji* v. *Panaganti* (1921) Mad. W.N. 519, ('21) A.M. 498.

(*u*) *Ex parte Gilchrist, In re Armstrong* (1886) 17 Q.B.D. 521; *In re Mathieson* (1927) 1 Ch. 283, 287. But see the definition of "property" in sec. 2 (e) of the Presidency Towns Insolvency Act, 1909; sec. 2 (d) of the Provincial Insolvency Act, 1920. Mulla's Insolvency Law, para 542.

Property is not only the thing which is the subject-matter of ownership, but includes also *dominium* or the right of ownership or of partial ownership, and as Lord Langdale said it is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have (*v*). It is used in this dual sense of the thing and the right to the thing in sec. 54 which contrasts, " tangible immoveable property " with " a reversion or other intangible thing." This is the distinction expressed in English real property law as a corporeal and an incorporeal hereditament.

(3) Interests in property.—As ownership consists of a bundle of right the various rights and interests may be vested in different persons, *e.g.*, a mortgagor and a mortgagee, a lessor and a lessee, or a tenant for life and a remainderman. Absolute ownership is an aggregate of component rights such as the right of possession, the right of enjoying the usufruct of land and so on (*w*).

These subordinate rights, the aggregate of which make up absolute ownership, are called in this Act interests in property ; and in English law real rights. A transfer of property is either a transfer of absolute ownership or a transfer of one or more of these subordinate rights. In section 58, however, the word interest is not distinguished from absolute ownership. With reference to an English mortgage it is used to express an absolute interest, *i.e.*, ownership which is not the less absolute because it is subject to a covenant to reconvey.

(4) Future interests in property: Reversion and Remainder.—Some interests in property are future and are called in English law reversions and remainders. A reversion is the residue of an original estate which is left after the grantor has granted a smaller estate. Thus the interest of a lessor is a reversion, a future estate pending the termination of a lease. A remainder is an interest granted out of the original estate at the same time as, but in succession to a precedent interest. Thus if an estate is granted to *A* for life and then to *B*, the estate of *B* is the remainder and the estate of *A* is the particular estate which supports it. The terms " reversion " and " remainder " are commonly used in judgments of the Courts in India. The Act uses the word " reversion " in sec. 54 but it occurs nowhere else in the Act, not even in the chapter dealing with leases. The word "remainder" does not occur in the Act but in sec. 13 the phrase " remaining interest " is used instead. A vested remainder is capable of being attached (*x*) and so is a contingent interest (*y*).

(5) Legal and equitable estates.—English law recognizes other interests which are not created by transfer or grant. Thus in a trust of land the legal estate is in the trustee and the interest of the *cestui que* trust or beneficiary is an interest in land called the equitable interest, or equitable estate. Similarly an agreement for the sale of land leaves the legal estate in the seller but creates an equitable estate in the buyer.

These equitable estates were the creation of the court of Chancery. A *cestui que* trust when in possession was protected in his enjoyment of the rents and profits and treated as if he were the owner, and the Court of Chancery continued to treat him as having an estate in land when out of possession (*z*). Again the relation created by contract between a vendor and a purchaser was described as that of trustee and *cestui que* trust (*a*), and the contract was held to give the purchaser an equitable estate in the land.

(*v*) *Jones* v. *Skinner* (1835) 5 L.J. Ch. 87, 90.

(*w*) *Indar Sen* v. *Naubat Sen* (1885) 7 All. 553, 556 F.B.

(*x*) *Umes Chunder* v. *Zahoor Fatima* (1891) 18 Cal. 164, 17 I.A. 201.

(*y*) *Ma Yait* v. *Official Assignee* (1930) 57 I.A. 10, 8 Rang. 8, 121 I.C. 225, ('30) A.PC. 17.

(*z*) *Hopkins* v. *Hopkins* (1739) West, Temp. Hardw. 606, 619.

(*a*) *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321.

S. 5

The law in India recognizes no distinction between legal and equitable estates. The leading case on the subject is *Tagore* v. *Tagore* (b), decided by the Privy Council in 1872. In a later case (c), the Privy Council said—"The law of India, speaking broadly, knows nothing of that distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England." And in a still later case (d), their Lordships said: (By that law) [*i.e.*, the law of India], therefore, there can be but one owner, and where the property is vested in a trustee the owner must, their Lordships think, be the trustee. This is the view embodied in the Indian Trusts Act, 1882, secs. 3, 55, 56, etc." The interest of the beneficiary of a trust is defined in sec. 3 of the Trusts Act not as an interest in the trust property but as a right against the trustee as owner of the trust property.

A contract of sale does not, of itself, create any interest in, or charge on, the property. This is expressly declared in sec. 54 of this Act, while the fiduciary character of the personal obligation created by a contract for sale is recognized in sec. 3 of the Specific Relief Act and in sec. 91 of the Trusts Act.

The personal obligation created by a contract of sale is described in sec. 40 as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein. The section further enacts that the obligation cannot be enforced against a transferee for consideration without notice. Section 63 of the Trusts Act similarly enacts that the right of a beneficiary of a trust cannot be enforced against a transferee in good faith without notice of the trust. Therefore these personal rights resemble the equitable estate or interest of the *cestui que* trust and of the person who has agreed to purchase in English law, in that they are liable to be defeated by a purchaser for value without notice. The rule against perpetuity which applies to equitable estates in English law has sometimes been applied to these personal rights by way of analogy. This it is submitted is a mistake as explained in the notes to sec. 14.

(6) **Transfer.**—The word "transfer" is defined with reference to the word "convey." This word in English law in its narrower and more usual sense refers to the transfer of an estate in land; but it is sometimes used in a much wider sense to include any form of an assurance *inter vivos*. The definition is sec. 205 (1) (ii) of the law of Property Act is —" Conveyance includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of any interest therein by any instrument except a will." This is a special definition adopted for the purposes of the Law of Property Act, 1925, the object of which is explained in Appendix V. The word "conveys" in sec. 5 of the Indian Act is obviously used in the wider sense referred to above.

A "transfer of property" as defined in the present section does not necessarily involve the execution of an instrument of transfer or a conveyance. In the case of moveables and generally in the case of immoveable property of value less than Rs. 100 a transfer may be effected by delivery of possession. Leases other than leases from year to year or for a time exceeding one year or reserving a yearly rent may be made by oral agreement accompanied by delivery of possession. The fundamental rule is that a transfer cannot be affected in any way not prescribed by the Act (e).

(b) (1872) I.A. Supp. 47, 71.

(c) *Webb* v. *MacPherson* (1904) 31 Cal. 57, 30 I.A. 238, 245; *Rani Chhatra Kumari* v. *Mohan Bikram* (1931) 10 Pat. 851, 58 I.A. 279, 133 I.C. 705, ('31) A.P.C. 196; *Imperial Bank of India* v. *Rai Gyaw Thu* (1923) 1 Rang. 637, 50 I.A. 283, 76 I.C. 910, ('23) A.P.C. 211; *Surendra Mohan* v. *Mohendra Nath* (1932) 59 Cal. 781, 140 I.C. 662, ('32) A.C. 589.

(d) *Rani Chhatra Kumari* v. *Mohan Bikram* (1931) 58 I.A. 279, 297, 10 Pat. 851, 133 I.C. 705, ('31) A.P.C. 196.

(e) *Immudipattam Thirugnana* v. *Periya Dorasami* (1901) 24 Mad. 377, 28 I.A. 46, 53; *Palikandy* v. *Krishnan* (1917) 40 Mad. 302, 307, 34 I.C. 381.

The definition of transfer of property in this section does not exclude property situate outside the Provinces. It matters not that the property is situate outside the Provinces or in a province in which the Act does not apply; for if the transfer is effected where the Act is in force the rights of the parties are to be determined by the Court under the Act leaving it to the party affected to prove that by the *lex rei sitae*, *i.e.*, by the law of the land where the property is situate, the transaction is invalid or defective (*f*).

Deed of appointment.—A transfer is not necessarily contractual and includes a deed of appointment (*g*). Section 5 does not require that the "living person" who conveys should necessarily be the same person as he who owns, or owned, the property conveyed. All that is required is that there should be an act of conveyance by some living person; under the section there may be a transfer by a person exercising powers over the property of another. Thus where the donee of a power of appointment having power to appoint a beneficial interest in the property, exercises that power, it would amount to a transfer (*h*).

Partition.—An exchange is a mutual transfer of the ownership of one thing for another—sec. 118. A partition has been said to be a surrender of a portion of a joint right in exchange for a similar right of a co-sharer (*i*). From this analogy it has been concluded in some cases (*j*) that a partition amounts to a transfer of property. In some other cases (*k*), however, it has been held that a partition is not an exchange and is not a transfer of property. See note "Partition" under sec. 53.

Charge.—A charge is not a transfer of property, for in a charge no right *in rem* is transferred but a personal obligation is created—a *jus ad rem* or a right to payment out of the property specified (*l*). In the Insolvency Acts a transfer of property is defined as including a charge (*m*). The definition is wider because any obligation incurred by a debtor affecting his property may be voidable as a fraudulent preference (*n*).

Surrender.—A surrender is not a transfer of property as defined in this section (*o*). It is the falling of a lesser estate into a greater (*p*). See note "Surrender" under sec. 111 (e).

Recitals.—Recitals in deeds of mortgage and in petitions to officials do not amount to a transfer (*q*).

Compromise.—A compromise of doubtful rights is not a transfer but is based on the assumption that there was an antecedent title of some kind in the parties which the agreement acknowledged and defined (*r*).

Creation of easement.—The creation of an easement does not involve a transfer (*s*).

(*f*) *Central Bank of India* v. *Nusserwanji* (1933) 57 Bom. 234, 34 Bom. L.R. 1384, 142 I.C. 130, ('32) A.B. 642; *Varden Seth Sam* v. *Luckpathy* (1862) 9 M.I.A. 303.

(*g*) *Joshua* v. *Alliance Bank* (1895) 22 Cal. 185, 202.

(*h*) *U. Theta* v. *U. Aresena* (1939) 199 I.C. 903, (1939) A.R. 76.

(*i*) *Atrabannessa Bibi* v. *Safatullah Mia* (1916) 43 Cal. 504, 509, 31 I.C. 189.

(*j*) *Rasa Gounden* v. *Arunachala Gounden* (1923) 44 Mad. L.J. 518, 72 I.C. 978, ('23) A.R. 577. *Waman Ram Krishna* v. *Ganpat Mahadeo* (1935) I.L.R. 60 Bom. 34; *Sadhu Ram* v. *Pirthi Singh & Co.* ('36). Lah. 220, 161 I.C. 861.

(*k*) *Gyannessa* v. *Mobarakannessa* (1817) I.L.R. 25 Cal. 219; *Satya Kumar Banerjee* v. *Satya Kripal Banerjee* (1909) 10 C.L.J. 503; *Indoji Jithaji* v. *Kottapath Rama Charchi* (1911) 54 I.C. 146, 10 L.W. 498, *Pokhar Singh* v. *Dulare Kunwar* (1930) I.L.R. 52 Bom. 716 at p. 727; *Suhashini Poddar* v. *Sreenath Chakravarty* (1945) 49 C.W.N. 769; *Khirode Sundari Dasya* v. *Chunilal Chaudhuri* (1945) 49 C.W.N. 779.

(*l*) *Gobinda* v. *Dwarkanath* (1908) 35 Cal. 837; *Jawahirmal* v. *Indomati* (1914) 36 All. 201, 22 I.C. 973.

(*m*) Presidency Towns Insolvency Act, 1909, s. 2 (1); Provincial Insolvency Act, 1920, s. 2 (f).

(*n*) *Ex parte Lancaster, Re Marsden* (1883) 23 Ch. D. 311; *Butcher* v. *Stead* (1875) L.R. 7, H.L. 839.

(*o*) *Makkan Lal Saha* v. *Nagendranath Adhikari* (1933) 60 Cal. 379, 37 C.W.N. 110, 144 I.C. 312, ('33) A.C. 467.

(*p*) Co. Litt. 337b.

(*q*) *Immudipattam Thirugnana* v. *Periya Dorasami* (1901) 24 Mad. 377, 28 I.A. 46.

(*r*) *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477; *Hiran Bibi* v. *Sohan Bibi* (1914) 18 Cal. W.N. 929, 24 I.C. 309 P.C.; *Basangowda* v. *Irgowdatti* (1923) 47 Bom. 597, 73 I.C. 196, ('23) A.B. 276; *Abbas Bandi Bibi* v. *Saiyid Muhammad Raza* (1929) 4 Luck. 452, 473, 120 I.C. 387, ('29) A.O. 193; *Krishna Tanhaji* v. *Aba* (1910) 34 Bom. 139, 4 I.C. 833.

(*s*) See *Sital Chandra* v. *Delanney* (1916) 20 Cal. W.N. 1156, 34 I.C. 450.

S. 5

Razinama and kabulayet in Collector's books.—The effect of a razinama and kabulayet in the Collector's books has been the subject of conflicting decisions, but the better opinion is that it is not necessarily evidence of an intention to transfer and that its effect depends upon the circumstances of each case (*t*).

Partition Act.—The definition of transfer in this section is not applicable in the Partition Act where it means simply change of ownership (*u*).

(7) Living person.—These words exclude transfers by will, for a will operates from the *death* of the testator. When the beneficiary is not a living person the expression used is the creation of an interest in an unborn person—sec. 13.

Corporation.—The words "living person" include a juristic person such as a corporation. A Court is not a juristic person (*v*). The second paragraph has been added by the Amending Act of 1929 in order to make it clear that the words embrace companies and societies, and that the general provisions of this Act as to transfer do not affect the special provisions of the Indian Companies Act.

An idol.—An idol is a juristic person capable of holding property (*w*), but it is not a *living* person. An idol not being a living person, a dedication of land to an idol does not fall within the terms of sec. 122 and need not be made in writing or by registered instrument under sec. 123 of this Act (*x*). It has also been said that an idol is only the symbol of the deity and that it would be contrary to Hindu religion that a deity should make an acceptance of worldly goods (*y*).

Wakf.—These decisions must be distinguished from the Allahabad case where it was held that a Mahomedan wakf, which is a dedication of property to God, is voidable at the option of creditors, if made with intent to defraud creditors, under sec. 53 of the Act, there being no rule of Mahomedan law inconsistent with the provisions of that section (*z*).

(8) In present or in future.—A transfer of property may take place not only in the present, but also in the future (*a*); but the property must be in existence. The words "in present or in future" qualify the word "conveys" and not the word "property" (*b*). A transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence (*c*). In *Rajah Sahib Perhlad* v. *Budhoo* (*d*), the Privy Council said—"But how can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed

(*t*) *Rachappa* v. *Ningappa* (1925) 49 Bom. 847, 91 I.C. 849, ('26) A.B. 40; *Chandanmal* v. *Bhaskar* (1920) 22 Bom. L.R. 140, 55 I.C. 619. But see *Venkaji* v. *Gopal* (1914) 39 Bom. 55, 27 I.C. 613; *Imam Valad Ibrahim* v. *Bhau Appaji* (1917) 41 Bom. 510, 40 I.C. 68; *Narso* v. *Nagava* (1918) 42 Bom. 359, 45 I.C. 492.

(*u*) *Sohni* v. *Raj Kumar Singh* (1932) 54 All. 840, 141 I.C. 118, ('32) A.A. 678.

(*v*) *Raghubar Singh* v. *Jai Indra Bahadur Singh* (1919) 46 I.A. 228, 42 All. 158, 55 I.C. 550; *Mehdi Ali Khan* v. *Chunni Lal* (1929) 27 All. L.J. 902, 119 I.C. 81 ('29) A.A. 884; *Syam Sundar* v. *Bajpai* (1903) 30 Cal. 1060.

(*w*) *Pramatha Nath* v. *Pradyumna* (1925) 52 Cal. 809, 52 I.A. 245, 250, 67 I.C. 305, ('25) A.P.C. 139; *Prosunno Kumari* v. *Golab Chand* (1875) 14 Beng. L.R. 450. 459, 2 I.A. 145; *Jodhhi Rai* v. *Basdeo Prasad* (1911) 33 All. 735, 11 I.C. 47.

(*x*) *Narasimha* v. *Venkatalingum* (1927) 50 Mad. 687, 103 I.C. 302, ('27) A.M. 636 F.B.; *Harihar Prasad* v. *Siri Gurugranth Saheb* 128 I.C. 791, (1930) A.P. 610, but see *Shaukat Begam* v. *Sri Thakurji* (1930) 131 I.C. 442, ('31) A.O. 14.

(*y*) *Bhupati Nath* v. *Ram Lal* (1910) 37 Cal. 128, 153, 155, 3 I.C. 642; *Ramalinga* v. *Sivachidambara* (1919) 42 Mad. 440, 49 I.C. 742; *Bhopatrao* v. *Shri Ramchandra* (1926) 96 I.C. 1004, ('26) A.N. 469.

(*z*) *Ahmad Husain* v. *Kallu Mian* (1929) 27 All. L.J. 460, 462, 117 I.C. 97, ('29) A.A. 277.

(*a*) *Sumsuddin* v. *Abdul Hussein* (1906) 31 Bom. 165, 172.

(*b*) *In re Mahomed Hashan* (1922) 24 Bom. L.R. 861, 871, 75 I.C. 203, ('23) A.B. 107, 113; *Venkatapathiraja* v. *Subhadrayamma* (1918) 37 I.C. 563.

(*c*) *Rajah Sahib Perhlad* v. *Budhoo* (1869) 12 M.I.A. 275, 2 Beng. L.R. 111 P.C.; *Ranee Bhobosoonduree* v. *Issur Chunder* (1872) 18 W.R. 140 P.C.; *Mohendra* v. *Kali* (1903) 30 Cal. 265, 274; *Baldeo* v. *Miller* (1904) 31 Cal. 667.

(*d*) *Supra* at p. 307.

in future, and upon the happening of a contingency, of which the purchaser may claim a specific performance, if he comes into Court shewing that he has himself done all that he was bound to do." In English law as soon as the property comes into existence and is capable of being identified, equity taking as done that which ought to be done fastens upon the property, and the contract to assign thus becomes a complete equitable assignment (*e*); and so in a recent case (*f*), Viscount Cave said—"When a person executes a document purporting to assign property to be afterwards acquired by him, that property on its acquisition passes in equity to the assignee." The Calcutta High Court has followed the English decisions mentioned under foot-note (*e*) supra and held that a transfer of non-existent or, as it is conveniently called, after acquired property, provided it is not of the nature contemplated in section 6 (a), is perfectly valid and is to be regarded in a Court as a Contract to transfer after the vendor acquires the title and will fasten upon the property as soon as the vendor acquires it (*g*). While it is true that the law of India does not recognise equitable assignment or equitable estate, it is difficult to say that the right of the transferee in such circumstances is a purely personal right which can only be enforced under section 18 (a) of the Specific Relief Act or by a suit for damages, for upon such a transfer or afterwards acquiring the property an obligation undoubtedly attaches to the property under section 40 and the transfer also operates under section 43 on the interest acquired by the transferor. See also notes supra, "Second Paragraph—Contractual Obligation" under section 40 and "Feeding the Estoppel" under section 43. The interest of the transferee however, may not prevail against a *bona fide* transferee for value. In an English case (*h*) it has been held that an assignment by a member of a profession of his future earnings is as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative against his trustee in bankruptcy.

A mortgage of a future crop has been recognized, but such a mortgage will not affect a transferee without notice (*i*).

Transfer of a chance of receiving a gratuitous payment at the discretion of an employer for services being or about to be rendered consists of a possibility and cannot be transferred (*j*).

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force (*pp.* 52-53).

What may be transferred.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred (*pp.* 53-59).

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby (*p.* 59).

(*e*) *Holroyd* v. *Marshall* (1862) 10 H.L.C. 191; *Collyer* v. *Isaacs* (1881) 19 Ch.D. 342; *Tailby* v. *Official Receiver* (1888) 13 A.C. 523; *H. V. Low & Co.* v. *Pulin Leharilal Sinha* (1933) 59 Cal. 1372, 143 I.C. 193, ('33) A.C. 154.

(*f*) *Performing Right Society* v. *London Theatre of Varieties* (1924) A.C. 1, 13; *Ditcham* v. *Miller* (1931) 134 I.C. 324, ('31) P.C. 203.

(*g*) *Khebhari Singh* v. *Ram Prosad Roy* (1907) 7 C. L. J. 337; *Jagdir Singh* v. *Surendra Mohun* (1938) A.C. 606; *Purna Chandra* v. *Barna Kumari* (1939) A.C. 715: *Prem Sukh Gulgulia* v. *Habib Ulla* (1945) A.C. 355, 49 A.N. 371.

(*h*) *In re De Marney* (1943) 1 Ch. 126.

(*i*) *Misri Lal* v. *Mozhar Hossain* (1886) 13 Cal. 262; *Bansidhar* v. *Sant Lal* (1887) 10 All. 133; *Baldeo* v. *Miller* (1904) 31 Cal. 667; *Palaniapa* v. *Lakshmanan* (1892) 16 Mad. 429; *R. N. M. K. Mutu Kumara Pillay* v. *Veerappa* (1931) 131 I.C. 509, ('31) A.R. 160.

(*j*) *Soloman* v. *Official Assignee* (1939) 180 I.C. 399 (1939) A.R. 8.

S. 6(a) (c) An easement cannot be transferred apart from the dominant heritage (*p.* 60).

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him (*pp.* 60-64).

(dd) *A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred* (*pp.* 64-65).

(e) A mere right to sue . . . cannot be transferred (*pp.* 65-66).

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable (*pp.* 66-67).

(g) Stipends allowed to military, *naval*, air force and civil pensioners of the Crown, and political pensions cannot be transferred (*pp.* 67-68).

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee (*pp.* 68-72).

(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee (*pp.* 72-73).

(1) Amendments.—The only amendment made by the Amending Act, 1929 was to add clause (dd) as to a right of future maintenance.

The words "air force" in clause (g) were inserted by the Repealing and Amending Act 1927, (10 of 1927), and the word "naval" by the Amending Act, 1934, (35 of 1934). The words "for compensation for fraud or for harm illegally caused" were omitted after the word "sue" in clause (e) by Act 2 of 1900. The words now appearing in clause (h) (2) were substituted for the words "for an illegal purpose" by Act 2 of 1900. Clause (i) was added by Act 3 of 1885.

(2) Property of any kind.—These words indicate that transferability is the general rule and that the right to property includes the right to transfer the property to another person (*k*). The onus of proof is on the person alleging that any kind of property is not transferable (*l*). To this rule the clauses constitute exceptions. Some of the

(*k*) *Lal Baijnath* v. *Chandrapal* (1925) 47 All. 55, 83 I.C. 204, ('24) A.A. 795; *Katar Singh* v. *Bishambar Sahai* (1929) 27 All. L.J. 1151, 116 I.C. 869, ('29) A.A. 57[illegible]

(*l*) *Mohammad [illegible]* v. *Madarieah* (1927) 1[illegible] I.C. [illegible] ('27) A.O. 297.

exceptions are similar to those made in sec. 60 of the Code of Civil Procedure as to property which cannot be attached, *e.g.*, a service tenure or a right to future maintenance or a public office or a pension; but decisions under the Code are not always a safe guide (*m*); and a private alienation may be made of property the attachment of which is prohibited, *e.g.*, the tools of artisans (*n*).

Property of any kind does not include future property (*o*), for a transfer of future property can only operate as a contract which may be specifically performed when the property comes into existence; see note 8 to sec. 5, "In present or in future."

Exceptions made by this Act.—These are set forth in the clauses to the section.

(3) Exceptions made by any other law.—Restrictions are placed by Hindu law on the transfer of coparcenary property and of property dedicated to religious uses. Mahomedan law imposes restrictions on the transfer of wakf property. Various local Acts as well as local customs restrict the transfer of agricultural tenancies. This is also the case with land held on service tenures, such as watan land in Bombay, karnam land in Madras, and ghatwal land in Bengal. Service tenures also fall under the exception in clause (d) of this section.

Clause (a) : Spes successionis.

(4) Clause (a) : Spes successionis.—The possibilites referred to in this clause are bare or naked possibilities and not possibilities coupled with an interest such as contingent remainders and future interest (*p*): see note 4 to sec. 5, "Future interests in property." Such interests have been transferable by deed in England ever since the Real Property Act, 1845, sec. 6, now replaced by the Law of Property Act, 1925, sec. 4 (2). With reference to a contingent interest the Judicial Committee said—"It is something quite different from mere possibility of a like nature of an heir-apparent succeeding to the estate, or the chance of a relation obtaining a legacy, and also something quite different from a mere right to sue. It is a well ascertained form of property—it certainly has been transferred in this country for generations—in respect of which it is quite possible to raise money and to dispose of it in any way the beneficiary chooses" (*q*).

For instance *A*, a Hindu, owning separate property dies leaving a widow *B* and a brother *C*. *C* has only a bare chance of succession in case he survives *B*, and this *spes successionis* he cannot transfer. But if *A* during his life time makes a settlement of his separate property to his wife for her life and then to his son if he should have one, and in default of a son to *B*, *B* has an interest contingent on *A* having no son, and that interest is transferable.

When the rights of an adopted son are curtailed by an agreement giving the widow of the adoptive father the right to enjoy the property during her lifetime, the interest of the son is not a *spes successionis* but is a vested interest, enjoyment and possession only being postponed (*r*).

(*m*) *Brahmadeo* v. *Harjan* (1898) 25 Cal. 778 overruled on a different point in *Nund Kishore* v. *Kanee Ram* (1902) 29 Cal. 355.

(*n*) *Palikandy* v. *Krishnan* (1917) 40 Mad. 302, 307, 34 I.C. 331.

(*o*) *Rajah Sahib Perhlad* v. *Budhoo* (1869) 12 M.I.A. 275, 2 Beng. L.R. 111 P.C.

(*p*) *Phulwanti Kunwar* v. *Janeshari Das* (1924) 46 All. 575, 83 I.C. 782, ('24) A.A. 625 (contingent interest); *Umesh Chandra* v. *Zahur Fatima* (1891) 18 Cal. 164, 17 I.A. 201 (contingent interest); *Ma Yait* v. *Mahomed Ebrahim* (1926) 5 Rang. 145, 102 I.C. 690, ('27) A.R. 156 (contingent interest); *Shujaul* v. *Muhammad* (1927) 25 All. L.J. 41 (vested remainder); *Lachman* v. *Baldeo* (1918) 21 O.C. 312, 43 I.C. 396 (vested interest).

(*q*) *Ma Yait* v. *Official Assignee* (1930) 8 Rang. 8, 57 I.A. 10, 13, 121 I.C. 225, ('30) A.PC. 17. See *Umes Chunder* v. *Zahoor Fatima* (1891) 18 Cal. 164, 17 I.A. 201; *Kali Prashad* v. *Ram Golavi* (1937) 167 I.C. 339 (1937) P.A. 250.

(*r*) *Balwant Singh* v. *Joti Prasad* (1918) 40 All. 692, 47 I.C. 599; *Basanta Kumar* v. *Lala Ram* (1932) 59 Cal. 859, 55 Cal. L.J. 205, 138 I.C. 882, ('32) A.C. 690.

S. 6 (a) (5) **Transfer by heir-apparent.**—An heir-apparent is a person who would be the heir if he survived the *propositus* and if the *propositus* died intestate. Such a possibility is in English law not an interest or even a contingent title. The law was stated in *Re Parsons* (*s*) as follows—"It is indisputable law that no one can have any estate or interest at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the lifetime of such person no one can have more than a *spes successionis* an expectation or hope of succeeding to his property."

The chance of a Mahomedan heir succeeding is a mere *spes successionis* and cannot be the subject of a transfer or a release (*t*).

Illustrations.

A has a wife *B* and a daughter *C*. *C* in consideration of Rs. 1,000 paid to her by *A* executes a release of her right to share in the inheritance to *A*'s property. *A* dies and *C* claims her one-third share in the inheritance. *B* resists the claim and sets up the release signed by *C*. The release is no defence, for it is a transfer of a *spes successionis*, and *C* is entitled to her one-third share but is bound to bring into account the Rs. 1,000 received from her father: *Samsuddin* v. *Abdul Hoosein* (1906) 31 Bom. 165.

(6) **Transfer by Hindu reversioner.**—By the Hindu law the right of a reversionary heir expectant on the death of a Hindu widow is a *spes successionis* and its transfer is a nullity and has no effect in law (*u*). In *Amrit Narayan* v. *Gaya Singh* (*v*), the Privy Council said—"A Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*." For the same reason a relinquishment by or on behalf of a reversionary heir of the reversionary right to succeed is invalid (*w*). This rule of Hindu law was applied to Hindus independently of the present section by the Privy Council (*x*). Since the amending Act of 1929, the present section applies *directly* to Hindus (*y*).

(*s*) (1890) 45 Ch. D. 51, 55; *In re Mudge* (1914) 1 Ch. 115.

(*t*) *Abdool* v. *Goolam* (1906) 30 Bom. 304; *Samsuddin* v. *Abdul Hoosein* (1906) 31 Bom. 165; *Asa Beevi* v. *Karuppan* (1918) 41 Mad. 365, 46 I.C. 35; *Marangami* v. *Nagur Meera* (1913) 24 Mad. L. J. 258, 18 I.C. 185.

(*u*) *Venkatanarayana* v. *Subbammal* (1915) 38 Mad. 406, 410, 29 I.C. 298, 42 I.A. 125, 128; *Janaki Ammal* v. *Narayanasami* (1916) 39 Mad. 634, 638, 37 I.C. 161, 43 I.A. 207, 209; *Amrit Narayan* v. *Gaya Singh* (1918) 45 Cal. 590, 44 I.C. 408, 45 I.A. 35; *Harnath Kuar* v. *Indar Bahadur* (1923) 45 All. 170, 50 I.A. 69, 71 I.C. 629, ('22) A.PC. 403; *Annada* v. *Gour Mohan* (1923) 50 Cal. 929, 50 I.A. 239, 74 I.C. 499, ('23) A.PC. 189, affirming (1921) 48 Cal. 536, 65 I.C. 27, ('21) A.C. 501; *Jagan Nath* v. *Dibbu* (1909) 31 All. 53, 1 I.C. 818; *Nund Kishore* v. *Kanee Ram* (1902) 29 Cal. 365; *Manickam* v. *Ramalinga* (1906) 29 Mad. 120; *Muthuveeru* v. *Vythilinga* (1909) 32 Mad. 266, 3 I.C. 476; *Pindiprolu* v. *Pindiprolu* (1907) 30 Mad. 486; *Ramchandra* v. *Kallu* (1908) 30 All. 497; *Bhagu* v. *Guman* (1918) 40 All. 384, 44 I.C. 629; *Mt. Bhagwati* v. *Jagdam* (1921) 6 Pat. L.J. 604, 62 I.C. 983, ('21) A.P. 260; *Gurbhaj* v. *Lachhman* (1925) 6 Lah. 87, 88 I.C. 550, ('25) A.L. 341; *Buta Singh* v. *Jhandu* (1921) 3 Lah. L.J. 211, 61 I.C. 375, ('21) A.L. 133; *Anandibai* v. *Rajaram* (1898) 22 Bom. 984; *Bhagwan* v. *Mannu* (1912) 15 O.C. 122, 13 I.C. 495; *Dio Chand* v. *Imam Din* (1917) P.L.R. 135, 41 I.C. 847; *Mahadeo Prasad* v. *Mathura* (1931) 26 All.L.J. 295, 132 I.C. 321, ('31) A.A. 589; *Karasinga* v. *Narsaila* (1938) A.B. 121, (1937) Bom. 895, 39 Bom. L.R. 1287, 174 I.C. 116; *Shah Nawaj* v. *Ghulam Murtaza* (1941) 24 Lah. 161 (where, however, the transaction was upheld on the ground of its being in settlement of disputed claims.)

(*v*) (1918) 45 Cal. 590, 45 I.A. 35, 39, 44 I.C. 408.

(*w*) *Amrit Narayan* v. *Gaya Singh* (1918) 45 Cal. 590, 45 I.A. 35, 44 I.C. 408; *Dhoorjati* v. *Dhoorjati* (1907) 30 Mad. 201; *Narasimham* v. *Madhavarayudu* (1908) 18 Mad. L.J. 323; *Marangami* v. *Nagur Meera Labbai* (1913) 24 Mad. L.J. 258, 18 I.C. 185.

(*x*) See *Harnath Kuar* v. *Indar Bahadur* (1923) 45 All. 170, 50 I.A. 69, 71 I.C. 629, ('22) A.PC. 403; *Annada Mohan* v. *Gour Mohan* (1923) 50 I.A. 239, 50 Cal. 929, 74 I.C. 499, ('23) A.PC. 189.

(*y*) *Sheshagiri* [illegible] v. *Mupidathi* [illegible] (1942) A.M. 720.

Illustrations.

(1) *N*, an Oudh Taluqdar, died leaving two widows and a reversionary heir *I*. The widows set up a will of *N* which empowered them to adpot a son. *I* filed a suit to set aside the will as invalid, and in order to defray the expenses of the litigation transferred his interest to *H* for Rs. 25,000. The Court set aside the will and made a decree declaring that *I* was entitled to succeed as reversionary heir. On the death of the widows *I* took possession of *N*'s villages. *H* sued *I* for possession but his suit was dismissed as *I*, at the time of the transfer, had no more than an expectancy and so had no interest which he was competent to transfer: *Harnath Kuar* v. *Indar Bahadur* (1923) 45 All. 179, 50 I.A. 69, 71 I.C. 69, ('22) A.PC. 403. **S. 6 (a)**

(2) *R* on behalf of his wife and minor son effected a compromise with agnatic male relations releasing the minor's reversionary interest in the property of his maternal grandfather. The minor on attaining majority sued to recover this property. The suit was decreed. The reversionary interest was only a *spes successionis* and was therefore not an interest which could be the subject of a bargain: *Amrit Narayan* v. *Gaya Singh* (1918) 45 Cal. 590, 45 I.A. 35, 44 I.C. 408.

If the reversioner purports to release his interests to the widow, her interest is in no way enlarged and the release cannot take effect as vesting in her the absolute estate in the property left by her husband (*z*). Such a release might amount to an acknowledgment that the widow had an absolute right (*a*), but the acknowledgment would not be binding on any other person who may be the heir when the succession opens out (*b*). But if the widow claims a property as her own, and the reversioner alleges it forms part of her husband's estate, and the dispute is bona fide settled between the parties, the settlement is binding on the whole body of reversioners, though the transaction might appear in one of its aspects as a dealing with a *spes successionis* (*c*). The reversioner "can relinquish his right to say that the properties in dispute form part of the estate to which he is the reversioner" (*c*).

A transfer by a reversioner will not when he succeeds to the property become valid on the principle, recognized in sec. 43, of feeding the grant by estoppel. This principle is that if a man who has no title to property grants it by a conveyance which in form would carry the legal title, and subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. But this principle has no application when the contract of assignment refers to property which has expressly been rendered non-transferable by the Legislature (*d*).

If the reversioner transfers, not his reversionary interest but the estate *in præsenti* as if he was absolutely entitled, the Madras High Court held in one case (*e*) that the transfer is validated by sec. 43 when he succeeds to the property; the distinction drawn being between the transfer of an expectancy and the transfer of an immoveable property with an erroneous representation as to authority. A later Madras case (*f*) dissents on the ground that such a distinction would defeat the provisions of this section. The Allahabad High Court (*g*) has held that section 6 (a) applies to cases where professedly there is a transfer of a mere *spes successionis* or where parties knowing full facts fraudulently clothe

(*z*) *Dayaram* v. *Bechardas* (1922) 24 Bom. L.R. 851, 67 I.C. 936, ('22) A.B. 437.

(*a*) *Chetty* v. *Chetty* (1908) 31 Mad. 474; *Bhana* v. *Guman Singh* (1918) 40 All. 384, 44 I.C. 629.

(*b*) *Bahadur Singh* v. *Mohar Singh* (1901) 24 All. 94, 29 I.A. 1.

(*c*) Per Coutts Trotter, C.J., in *Kamaraju* v. *Venkatalakshmipathi* (1925) 49 Mad. L. J. 296, 297, 88 I. C. 982, ('25) A. M. 1048.

(*d*) *Annada* v. *Gour Mohan* (1921) 48 Cal. 536, 65 I. C. 27, ('21) A. C. 501; *Dwarka Prasad* v. *Nasir Ahmed* (1925) 78 I.C. 850, ('25) A. O. 16.

(*e*) *Alamanaya-Kunigari* v. *Murukuti* (1915) 29 M.L.J. 733, 29 I. C. 439.

(*f*) *The Official Assignee of Madras* v. *Sampath Naidu* (1933) 65 M.L.J. 388, 145 I. C. 965, ('33) A.M. 795.

(*g*) *Shyam Narain* v. *Mangal Prasad* (1934) 57 All. 474.

S. 6 (a) the transaction in the garb of an out and out sale of the property but that where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorised to transfer it and the transferee acts upon such representation then if the transferor happens later, before the contract of transfer has been rescinded, to acquire an interest in that property, section 43 comes into operation. The Bombay High Court (*h*) has also taken the same view.

Agreement by Hindu reversioner to transfer.—An *agreement* by a reversionary heir to transfer or to relinquish his right of succession is also void (*i*). In *Annada* v. *Gour Mohan* (*j*) the Privy Council said that "it is impossible for them to admit the commonsense of maintaining an enactment which would prevent the purpose of the contract, while permitting the contract to stand as a contract." The Bombay High Court has held that the equitable doctrine which regards that done which ought to be done is excluded by the express prohibition in this section and that an agreement by a person not to claim a share of an inheritance when it falls in is void (*k*). In some cases such agreements have (it is submitted erroneously) been held to be valid as agreements to take effect on a contingency (*l*). The Allahabad High Court has in a series of cases (*m*) treated such agreement as valid, but the correctness of these decisions was doubted by Piggott, C.J., in *Chahlu* v. *Parmal* (*n*), and they must be taken as overruled by *Annada* v. *Gour Mohan* (*o*). The case of *Chahlu* v. *Parmal* (*p*) was, however, a peculiar one and called for the application of another doctrine. There were four separated brothers, *A*, *B*, *C* and *D*. *B* died and *A* took his share and remarried his widow. Then *D* died and *A* agreed with *C* not to claim *D*'s share after *D*'s widow should die. But when *D*'s widow died he did claim a share and the dispute was settled by a compromise that *A* should keep *B*'s share and that *C* should keep *D*'s share. This was a valid family settlement, and even if *A*'s agreement not to claim *D*'s share was invalid, yet *A* could not claim that share without bringing *B*'s share into account.

As an agreement to transfer a reversion is void the Court will not allow such an agreement to be embodied in a consent decree (*q*). But if a suit has been filed on an invalid agreement to assign the reversion, it may become the subject of a valid compromise after the reversion has fallen in (*r*).

Although an agreement to transfer a reversion is void, yet an alternative promise may constitute a valid substituted contract under sec. 58 of the Indian Contract Act. In *Mahadeo Prasad* v. *Mathura Chaudhuri* (*s*) there was an agreement between the mortgagor and the mortgagee by which the mortgagee agreed not to recover the balance due on his mortgage during the lifetime of a Hindu widow, and at her death to accept in discharge either a share of the mortgagor's reversion in three villages owned by the widow or a share in another village owned by the mortgagor. This was held to be invalid as to the three villages, but valid as to the other village.

(*h*) *Vithabai Dattu Pattar* v. *Malhar Shankar* 40 Bom. L.R. 147, ('38) A.B. 228.

(*i*) *Annada* v. *Gour Mohan* (1923) 50 Cal. 929, 50 I.A. 239, 74 I.C. 499, ('23) A.PC. 189; *Samsuddin* v. *Abdul Hussein* (1906) 31 Bom. 165; *Jagannada* v. *Prasada Rao* (1916) 39 Mad. 554, 29 I.C. 241; *Dhoorjati* v. *Dhoorjati* (1906) 30 Mad. 201; *Thakur Singh* v. *Mst. Uttam Kaur* (1929) 10 Lah. 613, 118 I.C. 449, ('29) A.L. 295; *Bindeshwari Singh* v. *Har Narain* (1929) 4 Luck. 622, 127 I. C. 20, ('29) A.O. 185; *Jotilal Shah* v. *Beni Madho* (1937) 188 I.C. 512, (1937) A.P. 280.

(*j*) (1923) 50 Cal. 929, 50 I.A. 239, 245, 74 I.C. 499, ('23) A.PC. 189.

(*k*) *Samsuddin* v. *Abdul, supra.*

(*l*) *Bangshirunjun* v. *Pryag Singh* (1881) 8 Cal. 138; *Gitabai* v. *Balaji* (1893) 17 Bom. 232; *Lalita Prasad* v. *Sarnam Singh* (1933) 149 I.C. 491, ('33) A.P. 165.

(*m*) *Nasirul Haq* v. *Faiyaz-ul-Rahman* (1911) 33 All. 457, 9 I. C. 580; *Kanti Chandra* v. *Ali Nabi* (1911) 33 All. 414, 9 I. C. 935; *Mohammad Hashmat Ali* v. *Kanis Fatima* (1915) 13 All. L. J. 110, 27 I. C. 701.

(*n*) (1919) 41 All. 611, 51 I.C. 919.

(*o*) *Supra.*

(*p*) *Supra.*

(*q*) *Ramasami* v. *Ramasami* (1907) 30 Mad. 255; *Bhagwan* v. *Munnu* (1913) 15 O.C. 122, 18 I.C. 495.

(*r*) *Durga Prasad* v. *Narain* (1929) 4 Luck. 181, 115 I.C. 294, ('29) A.O. 63.

(*s*) (1931) 29 All. L.J. 295, 132 I.O. 321, ('31) A.A. 589.

Estoppel of reversioner.—Although both the transfer and the agreement to transfer a reversionary interest are void, yet a reversioner may be estopped from claiming the reversion by his conduct if he has consented to an alienation by a widow or other limited heir (*t*).

Illustrations.

(1) A Hindu widow executed a deed of gift of a part of her husband's property to *D*. *F* who was then the nearest reversioner joined in the deed. On the widow's death *F* claimed the property pleading that the gift was invalid. *F* having consented to the gift is estopped from disputing its validity: *Basappa* v. *Fakirappa* (1922) 46 Bom. 292, 64 I. C. 214, ('22) A.B. 102.

(2) Tayava, a Hindu widow, disposed of the greater part of her husband's property by three deeds executed and registered on the same day. The first was a deed of gift to her brother which was attested by the reversioner Annagowda, the second was a deed of sale to Annagowda, and the third was a deed of sale to her son-in-law. All the deeds formed part of the same transaction and were executed with Annagowda's consent. The Privy Council said—"If some other person than Annagowda had been, at the death of Tayava, the nearest heir to her husband, it might have been open to him to question all or any of the three deeds but Annagowda himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it": *Ramgouda* v. *Bhausaheb* (1927) 52 Bom. 1, 54 I.A. 396, 402, 105 I.C. 708, ('27) A.PC. 227.

This is particularly the case if the reversioner had been a party to a compromise (*u*), or family settlement (*v*), entered into by a widow or other limited heir which involves an alienation of the estate by her and if he has benefited by the transaction. Different considerations prevail, if the renunciation or relinquishment proceeds on a settlement of conflicting claims or *bona fide* disputes (*w*)

Illustrations.

(1) A Hindu died leaving as his heirs two daughters. Nevertheless two separated cousins claimed the inheritance and the dispute was settled by a compromise under which the property was partitioned and a fourth share was allotted to each cousin and daughter, as absolute owner. On the death of one daughter without issue the sons of one of the cousins claimed to succeed to her quarter share as reversionary heir. The court held that as they had taken the place of their father and had, ever since his death, enjoyed possession of the share allotted to him they were estopped from claiming as reversionary heirs: *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204.

(2) A Hindu governed by the Benares school of law dies leaving a widow and three daughters, two of whom have sons. The widow claimed to be absolutely entitled to certain properties which the daughters said belonged to their father. As there was a doubt

---

(*t*) *Bajranji* v. *Manokarnika* (1907) 30 All. 1, 35 I.A. 1; *Ramgouda* v. *Bausaheb* (1927) 52 Bom. 1, 54 I.A. 396, 105 I.C. 708, ('27) A.PC. 227; *Basappa* v. *Fakirappa* (1922) 46 Bom. 292, 64 I.C. 214, ('22) A.B. 102, explaining *Bai Parvati* v. *Dayabhai* (1920) 44 Bom. 488, 58 I. C. 266; *Fateh Singh* v. *Thakur Rukmini* (1923) 45 All. 339, 72 I.C. 8, ('23) A.A. 387 F.B.

(*u*) *Kanhai Lal* v. *Brij Lal* (1918) 40 All. 487, 45 I.A. 118, 47 I.C. 207; *Barati Lal* v. *Salik Ram* (1916) 38 All. 107, 31 I.C. 919; *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204; *Moti Shah* v. *Gandharp Singh* (1926) 48 All. 637, 96 I.C. 595, ('26) A.A. 715; *Raghubir Datt* v. *Narain Datt* (1930) 28 All. L.J. 1541, 126 I.C. 24, ('30) A.A. 498; *Jagdam Sahay* v. *Rupnarain* (1924) 84 I.C. 208, ('24) A.P. 736; *Basangowda* v. *Irgowdatti* (1923) 47 Bom. 594, 73 I.C. 196, ('23) A.B. 276.

(*v*) *Mst. Hardei* v. *Bhagwan Singh* (1919) 24 Cal. W.N. 105, 50 I.C. 812 P.C.; *Pulliah Chetty* v. *Varadarajulu* (1906) 31 Mad. 474; *Kantee Chandra* v. *Ali Nabi* (1911) 33 All. 414, 9 I.C. 985; *Chajlu* v. *Parmal* (1919) 41 All. 611, 51 I.C. 919; *Muthuraman* v. *Ponnusyamy* (1915) 29 Mad. L.J. 214, 29 I.C. 549; *Mangal Singh* v. *Ghasita* (1929) 116 I.C. 812, ('29) A.L. 485.

(*w*) *Shah Nawaz* v. *Ghulam Murtaza* (1942) A.L. 138, 44 P.L.R. 87, 201 I.C. 292, 24 Lah. 161.

S. 6 (a) about their rights, the members of the family agreed and arranged among themselves that the whole property should be divided among the daughters and their sons, the widow surrendering her share. Each daughter accepted the property allotted to her in severality in lieu of the undivided share in the whole estate which would have devolved upon her on the mother's death and abandoned the right of survivorship on the death of either of her sisters. Thirty-eight years later, after the death of the mother and two sisters, the third sister sued as heir of her father to recover a property sold to the defendant by one of the deceased sisters. The Privy Council said that in view of the favour shown by the court to family arrangements and the long period of time which had elapsed since the arrangement was made the plaintiff could not be allowed to repudiate the arrangement and impeach a sale which had been made upon the faith of it: *Mst. Hardei* v. *Bhagwan Singh* (1919) 24 Cal. W.N. 105, 50 I.C. 812 P.C.

Compromises and family arrangements do not operate as transfers of the reversionary interest, but as said by the Judicial Committee in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (*x*) are based on the assumption that there was an antecedant title of some kind in the parties and the agreement acknowledges and defines what that title is. A compromise implies an existing dispute but a family arrangement may be concluded for the avoidance of future disputes (*y*).

(7) Mahomedan law and transfer of spes successionis.—The present section does not apply in terms to mahomedans: see sec. 2 above. But the rule of Mahomedan law is the same. The transfer of an expectancy is invalid under that law (*z*).

(8) Transfer of spes successionis in the Punjab.—The High Court of Lahore has held that the transfer of an expectancy is valid in the Punjab where the Transfer of Property does not apply (*a*) and that a declaratory suit with reference to a *spes successionis* is maintainable (*b*). The law applicable there is in substance the rule of English law stated in the next following paragraph.

(9) English law as to transfer of spes successionis.—An expectancy in English law is not property which can be assigned. But English law differs in this respect that as there is no express prohibition of such an assignment, the assignment, if made for value, operates as a contract to assign if and when the expectancy becomes an interest; and therefore the assignment is effectual as an assignment in equity. In *re Ellenborough* (*c*) Buckley, J., said "if value be given, it is immaterial what is the form of assurance by which the disposition is made, or whether the subject of the disposition is capable of being thereby disposed of or not. An assignment for value binds the conscience of the assignor. A Court of Equity as against him will compel him to do that which *ex hypothesi* he has not yet effectually done. Future property, possibilities and expectancies are all assignable in equity for value: *Tailby* v. *Official Receiver* (*d*). But when the assurance is not for value, a Court of Equity will not assist a volunteer."

(10) Chance of a legacy.—The chance of a relation or friend receiving a legacy is a possibility even more remote than the chance of succession of an heir, and is not transferable (*e*).

(*x*) (1875) 1 I.A. 157, 166, 13 Beng. L.R. 312 P.C.; *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 471 P.C.; *Hiran Bibi* v. *Sohan Bibi* (1914) 18 Cal. W.N. 929, 24 I.C. 309 P.C.

(*y*) *Pokhar Singh* v. *Mst. Dulari Kunwar* (1930) 52 All. 716, 125 I.C. 1, ('30) A.A. 687.

(*z*) *Samsuddin* v. *Abdul Hossain* (1906) 31 Bom. 165; *Asa Beevi* v. *Karuppan* (1918) 41 Mad. 365, 40 I.C. 35; *Abdul Hossain* v. *Golam Hossain* (1905) 30 Bom. 304; *Hossain Ali* v. *Naro* (1889) 11 All. 456; *Muranjani* v. *Karupati* (1912) 24 Mad. L.J. 258, 18 I.C. 185; *Rebati Mohan* v. *Ahmed* (1909) 9 Cal. L.J. 50, 1 I.C. 590.

(*a*) *Naranjan Singh* v. *Dharm Singh* (1930) 129 I.C. 29, ('30) A.L. 928; *Gobind* v. *Chanan Singh* (1933) 147 I.C. 847, ('33) A.L. 378.

(*b*) *Karim Bakah* v. *Mt. Rahiman* (1933) 144 I.C. 408, ('33) A.L. 555.

(*c*) (1903) 1 Ch. 697, 700.

(*d*) (1888) 13 A.C. 523, 543.

(*e*) *Cf. Prag Dai* v. *Chote Singh* (1906) 9 O.C. 55.

(11) Other possibilities of a like nature.—The usual illustration of a possibility is the next cast of a fisherman's net. There is no certainty that any fish will be caught and the fisherman has no interest in the fish until they are caught. An agreement for the sale of karnam lands after they should be enfranchised in the name of the transferor is an agreement for the transfer of a possibility and is therefore void (*f*). There is a conflict of decisions as to whether a right to receive future offerings at a temple can be assigned. Some cases take the view that the chance that future worshippers will give offerings is a mere possibility which cannot be transferred (*g*), while others hold that the right to receive offerings is not so uncertain, variable and limited as to pass out of the conception of the law (*h*). Offerings that have actually been made may, of course, be transferred; and the Bombay High Court has held that the priest's share of the *utpat* or net balance of the offerings to an idol may be attached (*i*). Future wages of a servant before they are earned are a mere expectancy which cannot be attached or sold (*j*). Before the completion of a sale a vendor's interest in the purchase money is only a possibility which cannot be transferred (*k*). But when land which had been acquired under the Land Acquisition Act, was restored by Government to one of the owners on his undertaking to transfer their respective shares to the co-owners, the latter had a beneficial interest in the land and not a mere possibility (*l*). As to the words "of a like nature" it has been held that they indicate possibilities of the same kind as the chance of a legacy (*m*), or a chance of being paid a gratuity (*n*). But a contract for the sale of a property which is not the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, is not bad in law (*o*).

Clause (b)—Right of re-entry.

(12) Clause (b)—Transfer of right of re-entry.—This is the right referred to in sec. 111 (g) which the lessor has against the lessee for breach of an express condition which provides that on its breach the lessor may re-enter. Such a condition is a condition subsequent defined in sec. 31 which divests an estate which has already vested. A right of re-entry implies an estate of reversion and cannot be transferred apart from the estate to which it belongs. The transfer of the reversion, *i.e.*, of the lessor's interest, carries with it the right of re-entry. This is the law under sec. 109 of this Act (*p*), and also under sec. 141 (1) Law of Property Act [English], 1925. It was also the law under the Statute 32 Hen. 8, c. 34, which was applied in a Calcutta case (*q*) to a lease before the Act.

The expression "mere right of re-entry" means a right of re-entry apart from any interest in the property. If not accompanied by an interest in property it is a personal licence and not transferable. This is illustrated by the case of *In re Davis & Co., ex-parte Rawlings* (*r*). Goods were delivered under a hire purchase agreement which gave the bailor a right to enter the premises where the goods were kept and take possession

(*f*) *Suryaprabhakara* v. *Gummudu* (1925) 48 Mad. L.J. 598, 88 I.C. 557, ('25) A.M. 885.

(*g*) *Shotlejanund* v. *Peary Charan* (1902) 29 Cal. 470; *Puncha Thakur* v. *Bindeswari* (1916) 43 Cal. 28, I.C. 675; *Paragi* v. *Gauri Shunker* (1919) 51 I.C. 86; *Nityagopal* v. *Nani Lal* (1920) 47 Cal. 990, 56 I.C. 19.

(*h*) *Ahmaduddin* v. *Ilahi Baksh* (1912) 34 All. 465. 14 I.C. 587; *Sukh Lal* v. *Bishambhar* (1917) 39 All. 196, 37 I.C. 661; *Balmukund* v. *Tular Ram* (1928) 50 All. 394, 113 I.C. 242, ('28) A.A. 21; *Nand Kumar* v. *Ganesh Das* (1936) A.A. 131, 58 All. 457; (1936) A.L.J. 609, 159 I.C. 812; *Zaharia Mal* v. *Parmeshri Das* (1942) A.L. 284, 44 P.L.R. 403, 203 I.C. 348; *Sukh Ram* v. *Ram Kishan* (1943) A.L. 265, 45 P.L.R. 284, 210 I.C. 262.

(*i*) *Digambar* v. *Hari* (1927) 29 Bom. L.R. 102, 100 I.C. 1008, ('27) A.B. 143.

(*j*) *Devi Prasad* v. *Lewis* (1909) 31 All. 304, 1 I.C. 186.

(*k*) *Ahmaduddin* v. *Majlis* (1906) 3 All. 12.

(*l*) *Lakshman* v. *Babani* (1932) 34 Bom. L.R. 366, 139 I.C. 642, ('32) A.B. 244.

(*m*) *Pashupati Venkatapathi* v. *Venkata Subhadryamma* (1918) 47 I.C. 563.

(*n*) *Solomon* v. *Official Assignee* (1939) 180 I.C. 399, (1939) A.R. 8.

(*o*) *Premsukh* v. *Habib Ullah* (1945) A.C. 355.

(*p*) *Vishveshwar* v. *Mahableshwar* (1919) 43 Bom. 28, 47 I.C. 193; *Vaguran* v. *Rangayyangar* (1892) 15 Mad. 125.

(*q*) *Kristo Nath* v. *Brown* (1887) 14 Cal. 176.

(*r*) (1889) 22 Q.B.D. 193.

S. 6(c)(d) in default of payment of any instalment. The bailor assigned his rights under the agreement by way of security to his creditor; but it was held that the creditor could not enforce the right of re-entry as it was only a personal licence which was not assignable.

Clause (c)—Transfer of easement.

(13) Clause (c)—Transfer of easement.—An easement is defined in sec. 4 of the Easements Act 5 of 1882 as "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own." An easement includes a profit *a prendre*, *i.e.*, a right to enjoy a profit out of the land of another; see Easements Act, sec. 4, ill. (d) (*s*). An easement cannot be detached from the dominant heritage but passes with it as a legal incident of the property transferred. This is enacted in sec. 8 of this Act and in sec. 19 of the Easements Act. The present section in effect enacts that there cannot be an easement in gross (*t*). A thing *in gross* exists in its own right, and not as an appendage to another thing. An easement cannot be in gross, for it must be a right over one piece of land for the benefit of another piece of land and therefore cannot be transferred without the land that has the benefit of it. Rights of way which may be enjoyed irrespective of a dominant heritage are sometimes called easements in gross, but this is an incorrect use of the word(*u*).

In India there are various rights which resemble easements, but are really not easements. They are customary rights saved by sec. 2 (b) of the Easements Act (*v*), such as a *Kamaki* right to collect leaves for manure and to pasture cattle (*w*); a right to use land of another person for a holi festival (*x*), or for a bathing ghat (*y*), or for a burial ground (*z*), or for the celebration of the mohurrum (*a*), or of the *Ram Lila* (*b*). Such rights are independent of any dominant heritage. See Easements Act, sec. 18 and illustrations.

The section refers to the transfer of an existing easement and not to the grant of an easement. The grant of an easement is not a transfer of property (*c*); and the provisions of the Transfer of Property Act have no application to the creation of easements (*d*). An easement may be released in favour of the owner of the servient tenement but such a release effects not a transfer, but an extinction of the easement (*e*). The imposition, acquisition and transfer of easements, is governed by the provisions of Chapter II of the Easements Act (secs. 8-18).

Clause (d)—Restricted interests.

(14) Clause (d)—Restricted interests.—An interest restricted in enjoyment to the owner personally is by its very nature not transferable, unless the restriction is void under sec. 10. A transfer of such property would defeat the object of the restriction. For instance the object of a right of pre-emption is to prevent the introduction of strangers

(*s*) *Chundee Churn* v. *Shib Chunder* (1888) 5 Cal. 945; *Sundrabai* v. *Jayawant* (1899) 23 Bom. 397.

(*t*) *Sital Chand* v. *Delanney* (1916) 20 Cal. W.N. 1158, 34 I.C. 450.

(*u*) *Municipal Board of Benares* v. *Behari Lal* (1926) 48 All. 560, 564, 95 I.C. 1030, ('26) A.A. 538; *Rangeley* v. *Midland Rly. Co.* (1868) 3 Ch. App. 306.

(*v*) *Municipal Board of Cawnpore* v. *Lallu* (1898) 20 All. 200.

(*w*) *Matilda Fernandez* v. *Pinto* (1912) 15 I.C. 278.

(*x*) *Ashraf* v. *Jagannath* (1884) 6 All. 497.

(*y*) *Shah Mahammad* v. *Kashi* (1885) 7 All. 199.

(*z*) *Mohidin* v. *Shivlingappa* (1899) 23 Bom. 666; *Ramrao* v. *Rustumkhan* (1902) 26 Bom. 198; *Ram Singh* v. *Ali Baksh* (1926) 95 I.C. 458.

(*a*) *Kuar Sen* v. *Mamman* (1895) 17 All. 87.

(*b*) *Ramdas* v. *Damodhar* (1928) 72 I.C. 218, ('23) A.P. 346; *Channu Datta* v. *Swami Gyannandji* (1926) 90 I.C. 976, ('26) A.A. 130.

(*c*) *Bhagwan Sahai* v. *Narsingh Sahai* (1909) 31 All. 612, 3 I.C. 615; *Konadayya* v. *Veeranna* (1926) 92 I.C. 672, ('26) A.M. 543; *Satyanarayana* v. *Lakshmayya* (1929) 57 Mad. L.J. 46, 115 I.C. 145, ('29) A.M. 79.

(*d*) *Sital Chand* v. *Delanney*, *supra*.

(*e*) *Kristodhone* v. *Nandarani* (1908) 35 Cal. 889.

as co-sharers, and the sale of such a right to an outsider would defeat that object. A grant for parwarish is restricted in enjoyment to the grantee and cannot be alienated (*f*). In the case of a religious office Macpherson, J., said—"Such a sale would practically destroy the endowment, or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up; for the purchaser whoever he might be—even if a Mohamedan or a Christian—would have the right of performing the worship of this Hindu idol" (*g*). Again with reference to the sale by Urallers or trustees of a Hindu temple, the Privy Council said that where the founder of a religious endowment may be supposed to have established a corporation with the distinct object of securing the due performance of the worship, and the due administration of the property, by the instrumentality and at the discretion of its members, they have no power to transfer their right (*h*). For this reason a religious office is not a transferable property (*i*). The office of shebait of a temple (*j*), or mohunt of a mutt (*k*), or mutwalli of a wakf (*l*), cannot be transferred. A vritti is not saleable property (*m*); nor the right of a village joshi to perform religious ceremonies at the house of his yajman (*n*); nor the birt maha brahmani or right to officiate at funeral ceremonies (*o*).

A pala or turn of worship, and the pujari's right to receive offerings are *res extra commercium* and cannot be alienated (*p*), though by custom they may be transferable to another Brahman (*q*). The sale of yajman vahis or pilgrim visitor's books is not invalid but the sale carries with it no right to act as guide to the pilgrims (*r*).

(15) Custom.—It has been held in several cases that the inalienable character of a religious office may be affected by custom, and alienation to members of the founder's family or of the priestly family has sometimes been permitted (*s*). Rankin, C.J., in *Panchanan* v. *Surendra Nath* (*t*) said that some of the cases on this point (*u*) ought not to be followed; and pointed out that the Privy Council in *Raja Vurmah* v. *Ravi Vurmah* (*v*) said that a custom sanctioning the *sale* of a trusteeship for the *pecuniary advantage* of the trustees would be bad in law.

The cases cited in this paragraph refer to Hindu religious offices and were decided before the Amending Act of 1929. Now that this chapter of the Act supersedes the Hindu Law it is open to question whether a customary right of transfer can be recognized, if it

---

(*f*) *Mahomed Shabbar* v. *Harnath* (1927) 105 I.C. 196, ('27) A.O. 436; *Lachhmeshwar* v. *Moti Rani* (1939) A.P.C. 157.

(*g*) *Juggurnath* v. *Kishen* (1867) 7 W.R. 266.

(*h*) *Rajah Vurmah* v. *Ravi Vurmah* (1878) 1 Mad. 235, 4 I.A. 76.

(*i*) *Narasimma* v. *Anantha* (1881) 4 Mad. 391; *Kuppa* v. *Dorasami* (1883) 6 Mad. 76; *Keyake-Ilata* v. *Yadattil* (1868) 3 Mad. H.C. 380; *Subbarayudu* v. *Kotayya* (1892) 15 Mad. 389; *Durga Bibi* v. *Chanchal* (1882) 4 All. 81; *Rama Varma* v. *Raman Nayar* (1882) 5 Mad. 89; *Rup Narain* v. *Junko* (1879) 3 Cal. L.R. 112; *Srimati Mallika* v. *Ratanmani* (1897) 1 Cal. W. N. 493; *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I.A. 69; *Rajaram* v. *Ganesh* (1899) 23 Bom. 131.

(*j*) *Juggurnath* v. *Kishen* (1867) 7 W.R. 266; *Dubo Misser* v. *Srinabas* (1870) 14 W.R. 409; *Gobinda* v. *Debendra* (1907) 12 Cal. W.N. 98; *Nagendra* v. *Rabindra* (1926) 53 Cal. 132, 94 I.C. 212, ('26) A.C. 490.

(*k*) *Prayad Das* v. *Mohunth Kriparam* (1906) 8 Cal. L.J. 499.

(*l*) *Wahid Ali* v. *Ashruff* (1882) 8 Cal. 732; *Sarkum* v. *Rahaman* (1897) 24 Cal. 83; *Munshi Sahed Baksh* v. *Golam Nabi* (1918) 22 Cal. W.N. 996, 47 I.C. 117; *Haji Ali Muhammad* v. *Anjuman-i-Islamia* (1931) 12 Lah. 590, 135 I.C. 56, ('31) A.L. 379.

(*m*) *Manjunath* v. *Shankar* (1914) 39 Bom. 26, 28 I.C. 130; *Govind* v. *Ramkrishna* (1888) 12 Bom. 366; *Ganesh* v. *Shankar* (1886) 10 Bom. 395.

(*n*) *Waman* v. *Balaji* (1890) 14 Bom. 167.

(*o*) *Durga Prasad* v. *Shambhu* (1919) 41 All. 656, 51 I.C. 539; *Jhummun* v. *Dinoonath* (1870) 16 W.R. 171, *contra*; *Sukh Lal* v. *Bushambar* (1917) 39 All. 196, 37 I.C. 661.

(*p*) *Puncha Thakur* v. *Bindeshri* (1916) 43 Cal. 28, 28 I.C. 675; *Nitya Gopal* v. *Nani Lal* (1920) 47 Cal. 990, 56 I.C. 19.

(*q*) *Mahamaya Debi* v. *Haridas Haldar* (1915) 42 Cal. 455, 27 I.C. 400; *Jagdeo Singh* v. *Ram Saran Pande* (1927) 6 Pat. 245, 97 I.C. 332, ('27) A.P. 7.

(*r*) *Gopinath* v. *Jandhu* (1907) 4 All. L.J. 712.

(*s*) *Sitarambhat* v. *Sitaram* (1870) 6 Bom. H.C. 250; *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298; *Rangasami* v. *Ranga* (1893) 16 Mad. 146; *Baroda Charan Duff* v. *Hemlata* (1908) 13 Cal. W.N. 242, 3 I.C. 560; *Khetter Chunder* v. *Hari Das* (1890) 17 Cal. 557; *Mahamaya Debi* v. *Haridas* (1915) 42 Cal. 455, 27 I.C. 400; *Raghunath* v. *Purnanand* (1923) 47 Bom. 529, 72 I.C. 812, ('23) A.B. 268.

(*t*) (1930) 50 Cal. L.J. 332, 126 I.C. 26, ('30) A.C. 180.

(*u*) *Mancharam* v. *Pranshankar*, *supra*; *Narayana* v. *Ranga* (1891) 15 Mad. 183.

(*v*) (1878) 1 Mad. 235, 4 I.A. 76, see *Ramasawmy* v. *Venkata* (1860) 9 M.I.A. 343.

S. 6 (d) conflicts with sec. 6 (d). Possibly where the interest in the enjoyment of the office is by custom restricted not to the incumbent personally but to the members of his family, a transfer to a member of the family may not be in contravention of this sub-section.

(16) **Service tenures.**—In service tenures the interest in the land is the remuneration for the personal service to be rendered. It is therefore a necessary incident of such tenures that they should be incapable of alienation. Thus ghatwal tenures in Bengal, created to provide a local military and police force are inalienable (*w*), and cannot be sold in execution of a decree against the ghatwal (*x*), but if the preformance of military service is abolished, as in the case of palyan land in Madras, the alienations would be valid (*y*). A chowkidar in Bengal who holds chakran lands cannot alienate them beyond the term of his office (*z*). A watandar in Bombay cannot alienate watan land beyond his lifetime to a person who is not a member of the watan family (*a*). The prohibition against alienation in the Watan Act is not absolute, for sec. 5 allows alienation with the sanction of the Collector and a watandar may be estopped from impeaching his alienation (*b*). Karnam lands in Madras cannot be alienated by the holder of the office to the prejudice of his successor (*c*). Inam lands or the performance of swastivachakam service in a temple cannot be alienated (*d*). But a right to money charged upon land with the object that religious ceremonies should be performed may be transferred, for if the performance of ceremonies is not a condition precedent to payment it does not constitute a religious office (*e*). Muafi lands, *i.e.*, lands granted with a remission of revenue to certain brahmins and their descendants on condition that they should give their blessings to the Maharaja of Nepal are transferable (*f*).

Land held on service tenure may lose its character of inalienability. In *Radha Bai* v. *Anantrav* (*g*) West, J., said—"When an estate is freed from its connection with a public office, the reason arising from that connection for the preservation of the estate intact and unencumbered necessarily fails." Again in *Bhagwat Baksh Ray* v. *Sheo Prosad Sahu* (*h*), it was said that "on principle, it may well be maintained that when service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated." Accordingly a ghatwal tenure loses its character of inalienability when the services have been commuted by a money payment (*i*), or the tenure on military service has been abolished (*j*).

Resumption of service tenure.—A service tenure may be (1) a grant of an office for which the land is the remuneration, or (2) a grant of land burdened with a condition of service. In case (1) the land is *prima facie* resumable, but in case (2) the land is not resumable unless a condition of resumption is expressed in the terms of the grant or

(*w*) *Hurlal Singh* v. *Jorawun Singh* (1837) 6 S.D.A. (Cal.) 169; *Bally Dobey* v. *Gensi Deo* (1882) 9 Cal. 388; *Narain* v. *Badi Roy* (1902) 29 Cal. 227; *Narayan Singh* v. *Niranjan Chakravarti* (1924) 3 Pat. 183, 51 I.A. 37, 79 I.C. 825, ('24) A.PC. 5; *Purna Chandra* v. *Soudamini* (1918) 28 Cal. L.J. 283, 48 I.C. 385.

(*x*) *Nilmoni Singh* v. *Bakranath Singh* (1883) 9 Cal. 187, 9 I.A. 104; *Joykishen Mookerjee* v. *Collector of East Burdwan* (1863-66) 10 M.I.A. 16, 1 W.R. 26 P.C.; *Udoy Kumari* v. *Hari Ram* (1901) 28 Cal. 483, 485.

(*y*) *Appayasami* v. *Midnapore Zamindari Co.* (1921) 48 I.A. 100, 44 Mad. 575, 60 I.C. 953, ('22) A.PC. 154.

(*z*) *Ram Kumar* v. *Ram Newaj* (1904) 31 Cal. 1021.

(*a*) *Jagjivandas* v. *Imad Ali* (1882) 6 Bom. 211; *Radhabai* v. *Anantrao* (1885) 9 Bom. 198 F.B.

(*b*) *Narayan* v. *Kalgaunda* (1890) 14 Bom. 404. *Jayram* v. *Narayan* (1903) 5 Bom. L.R. 652 (mortgage of Khoti land).

(*c*) *Papaya* v. *Ramana* (1884) 7 Mad. 85; *Venkatarayadu* v. *Venkataramayya* (1892) 15 Mad. 284; *Seshaiya* v. *Gaouramma* (1870) 4 Mad. H.C. 335.

(*d*) *Anjaneyalu* v. *Shri Venugopala* (1922) 45 Mad. 620, 70 I.C. 466, ('22) A.M. 197.

(*e*) *Savitri* v. *Holebasappa* (1932) 34 Bom. L.R. 198, 137 I.C. 600, ('32) A.B. 257.

(*f*) *Pt. Harikishan* v. *Ratan Singh* (1934) 151 I.C. 562, ('34) A.A. 973.

(*g*) (1885) 9 Bom. 198, 213, F.B.

(*h*) (1913) 18 Cal. W.N. 297, 309, 21 I.C. 481

(*i*) *Bansidhar Sharaff* v. *Thakur Ashutosh Deo* (1925) 4 Pat. 272, 86 I.C. 193, ('25) A.P. 346.

(*j*) *Appasami Naicker* v. *Midnapore Zamindari Co.* (1921) 44 Mad. 575, 48 I.A. 100, 60 I.C. 953, ('22) A.PC. 154.

implied from the circumstances under which it was made (*k*). The onus is on the grantor to prove such a condition (*k*).

But once the tenure has been established it is not terminated by obsolescence and desuetude but it is "necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender and regrant of the lands on new terms, or, at any rate, of a release of the right to appoint the ghatwal and call for the performance of the services" (*l*).

(17) Right of pre-emption not transferable.—The right of pre-emption, has been defined as "a right in the event of a sale to purchase the property upon agreed terms" (*m*). It can only be exercised as to immoveable property. It is a purely personal right which cannot be transferred to a stranger. The object of the right is to prevent the introduction of strangers as co-sharers and the right is enforced on the assumption that the introduction of strangers causes inconvenience to the pre-emptive co-sharers. It is a transient right in its very inception and nature, and being a personal privilege of the pre-emptor cannot be transferred to anyone except the owner of the property affected thereby (*n*). Where a pre-emptor in anticipation of his success in a pre-emption suit transfers the "pre-emptional" property, he is not entitled to enforce his right of pre-emption (*o*). But a plaintiff who has obtained a decree for pre-emption may mortgage his rights under the decree in order to put himself in funds to pay the purchase money for the pre-empted property (*p*). The right of pre-emption is a Mahomedan law right and that is the only system of law which provides substantive rules for its enforcement (*q*). This law is applied as between Mahomedans as a matter of "justice, equity and good conscience" by all the Courts in India except in the Madras Presidency where the Courts have declined to apply it on the ground that it places a restriction on liberty of transfer (*r*). The right of pre-emption has received statutory recognition in the Punjab by the Punjab Laws Act, 1872, and in Oudh by the Oudh Laws Act, 1876. The right also exists by custom among Hindus in Behar (*s*) and certain parts of Gujerat. See Mulla's "Principles of Mahomedan Law," 10th ed., sec. 180.

The right of pre-emption is sometimes given by contract or covenant. When a purchaser gave a right of pre-emption to one of his vendors if he could raise the price before a certain day without the help of others, the right was held to be incapable of assignment (*t*).

(17A) Contract.—The benefit of a contract can be assigned as an actionable claim. This is however subject to two exceptions in the case of an executory contract, (1) when the contract is one which had been induced by personal qualifications or considerations as to the parties to it, and (2) when the benefit is coupled with an obligation which the assignor is bound to discharge (*u*). Thus when *R* agreed with *M* to grow indigo for him taking the seeds from *M*'s factory and cultivating according to *M*'s instructions, it was held that the contract was entered into with reference to the personal position and qualifications of *M*, and that he could not assign it (*v*). In such a case the enjoyment

(*k*) *Forbes* v. *Meer Mahomed Tuquee* (1870) 13 M.I.A. 438, 14 W.R. 28 P.C.; *Lakhamgouda* v. *Baswantrao* (1931) 33 Bom. L.R. 974, 132 I.C. 736, ('31) A.PC. 157.

(*l*) *Narayan Singh* v. *Niranjan Chakravarti* (1923) 3 Pat. 183, 51 I.A. 37, 68, 79 I.C. 825, ('24) A.PC. 5; *Rani Sonabati Kumar* v. *Raja Kalyanand* (1935) 14 Pat. 70, 157 I.C. 433, ('35) A.P. 306.

(*m*) *Jasudin* v. *Sakharam* (1912) 36 Bom. 139, 143, 12 I.C. 693.

(*n*) *Jasudin* v. *Sakharam*, *supra*; *Ram Sahai* v. *Gaya* (1885) 7 All. 107, 111.

(*o*) *Rajjo* v. *Lalman* (1883) 5 All. 180, 183.

(*p*) *Bela Bibi* v. *Akbar Ali* (1902) 24 All. 119: *Ram Sahai* v. *Gaya*, *supra*.

(*q*) *Zamir* v. *Daulat Ram* (1883) 5 All. 110, 113.

(*r*) *Ibrahim* v. *Muni Mir* (1870) 6 Mad. H.C. 26.

(*s*) *Fakir* v. *Emambuksh* (1863) Beng. L.R. Sup. Vol. 35. *Judu Lal* v. *Janki Koer* (1908) 35 Cal. 575 on app. 39 Cal. 915, 39 I.A. 101.

(*t*) *Uthandi* v. *Ragwachari* (1906) 29 Mad. 307.

(*u*) *Jaffer Meher Ali* v. *Budge-Budge Jute Mills Co.* (1900) 33 Cal. 702 on app. 34 Cal. 289; *Nathu* v. *Hansraj* (1907) 9 Bom. L.R. 114.

(*v*) *Toomey* v. *Rama Sahai* (1890) 17 Cal. 115, 121.

S. 6(dd) of the benefit of the contract is restricted to the party personally and cannot be transferred. In a similar case (w), *A* agreed to manufacture salt for *B*, and the terms of the contract allowed *B* credit for payment, and a discretion as to the quantity of salt to be demanded, and it was held that *B* could not assign the contract. See in this connection note "*Assignment of Contracts*" under sec. 130.

Clause (dd) Maintenance.

(18) Clause (dd)—Transfer of right to maintenance.—This clause is new and was added by the amending Act of 1929. Before the amendment there was a con flict of opinion whether a right of future maintenance when it was fixed by a decree was transferable, it being held in Madras that it was (x), and in Calcutta that it was not (y). The amendment supersedes the Madras decisions. Section 60 of the Code of Civil Procedure exempts a right of future maintenance from attachment (z).

The effect of this clause is that the assignment of a decree for maintenance would be valid as to maintenance already accrued due but not as to future maintenance.

The words " in whatsoever manner arising, secured or determined" are very comprehensive; and it is submitted they overrule cases in which when the right has been created by a deed of transfer it was held that the question whether or not the right was alienable depends upon the intention of the parties as expressed in the deed (a).

The right of a Hindu widow to maintenance is a personal right and from its nature incapable of assignment (b); but arrears of maintenance can be attached and sold like any other debt (c). The interest of a Hindu widow in land which has been allotted to her for her maintenance is not property which can be attached (d). But if land is assigned to a Hindu widow in lieu of maintenance, the transfer of such land is not a transfer of a right of maintenance and is valid during the widow's lifetime (e). When villages were allotted to a person, under a compromise, for his maintenance and without power of transfer during his brother's lifetime, the Privy Council held that his interest was a right of future maintenance and could not be attached (f), but allowed a receiver to be appointed to realise the rents and pay thereout what was sufficient for the maintenance of the judgment-debtor and the balance to his creditors.

A hereditary grant of an allowance of paddy out of the melwaram of land is not a right to future maintenance (g). Grants out of the revenue of an impartible estate for the maintenance of cadets of the family are alienable with a reversion to the grantor on the death of the last male heir (h).

(w) *Namasivaya Gurukkul* v. *Kadir Ammal* (1894) 17 Mad. 168.

(x) *Ranee Annapurni* v. *Swaminatha* (1911) 34 Mad. 7, 6 I.C. 439; *Thimmanayanim* v. *Venkatappa* (1928) 109 I.C. 872, ('28) A.M. 713.

(y) *Asad Ali* v. *Haidar Ali* (1910) 38 Cal. 13, 6 I.C. 826.

(z) *Haridas* v. *Baroda Kishore* (1900) 27 Cal. 38; *Asad Ali* v. *Haidar Ali*, *supra*; *Pakikkandy* v. *Krishnan* (1917) 40 Mad. 302, 34 I.C. 381.

(a) *Subraya* v. *Krishna* (1923) 46 Mad. 659, 78 I.C. 584, ('24) A.M. 22; *Altaf Begam* v. *Brij Narain* (1929) 51 All. 612, 116. I.C. 855, ('29) A.A. 281; *Tara Sundari* v. *Saroda Charan* (1910) 12 Cal. L.J. 146, 7 I.C. 80; *Bal Krishna* v. *Paij Singh* (1930) 52 All. 705, 125 I.C. 468, ('30) A.A. 593.

(b) *Narbadabai* v. *Mahadeo* (1880) 5 Bom. 99, 104; *Nanak Chand* v. *Kishan Chand* (1900) P. L. R. 209; *Tara Sundari* v. *Saroda Charan*, *supra*; *Palikandi* v. *Krishna*, *supra*; *Ashfaq Mahomed Khan* v. *Nazir Banu* (1942) O.W.N. 359, 20 I.C. 100, (1942) A.O. 410.

(c) *Kasheeshuree* v. *Greesh Chunder* (1866) 6 W.R. Misc. 64.

(d) *Diwali* v. *Apaji* (1886) 10 Bom. 342; see also *Bansidhar* v. *Gulab Kuar* (1894) 16 All. 443 and *Gulab Kuar* v. *Bansidhar* (1893) 15 All. 371; on app. (1894) 16 All. 443 (where the question was left open).

(e) *Dhup Nath* v. *Ram Charitra* (1932) 54 All. 366, 143 I.C. 65, ('32) A.A. 602; *Kamala Chunder* v. *Sushila Bala Dasee* (1938) A.C. 405.

(f) *Rajindra* v. *Sundara Bibi* (1925) 47 All. 385, 52 I.A. 262, 87 I.C. 295, ('25) A.P.C. 176 on app. from *Sundar Bibi* v. *Raj Indar* (1921) 43 All. 617, 63 I.C. 181, ('21) A.A. 120.

(g) *Vaidyanatha* v. *Eggia* (1907) 30 Mad. 279.

(h) *Durgadut* v. *Rameswar* (1909) 36 Cal. 943, 36 I.A. 176, 4 I.C. 2; *Rameswar* v. *Jibender* (1902) 32 Cal. 683; *Rama Chandra* v. *Mudeshwar* (1903) 33 Cal. 1158, 1161.

S. 6 (e)

An annuity granted by will is not a right to future maintenance and may be attached or sold (*i*). There is, however, a difference between a maintenance allowance and an annuity (*j*). A vested life interest under a will in a definite fund or income of a property is transferable (*k*). An annuity granted by way of maintenance by deed which creates a charge on land, has been held to be alienable (*l*); but in view of the words 'in whatsoever manner arising secured or determined' it is doubtful if this decision is still good law. Thus in *Bibi Haliman* v. *Bibi Umadatunnissa* (*m*) the Patna High Court came to the conclusion that a right of this nature though made a charge on immoveable property could not be transferred. When a settlor creates a trust of his property and reserves an allowance for himself, the allowance is not maintenance within this clause (*n*).

Clause (e)—Mere right to sue.

(19) Clause (e)—Transfer of a mere right to sue.—Before the amending Act 2 of 1900 this clause was—"a mere right to sue *for compensation for a fraud or for harm illegally caused cannot be transferred.*" The amending Act of 1900 widened the clause by omitting the words italicized, and at the same time restricted the definition of actionable claim (which formerly embraced all claims which a civil Court recognised as affording grounds for relief) to debts and beneficial interests in moveable property not in possession. The effect of this amendment was to make clear the distinction between property and a right to sue. For before the amendment a right to sue for damages for breach of contract would have been an actionable claim although such right was not property nor attachable as such. Again the former definition was inadequate, for it was limited to rights of suit for damages for tort. Such rights are undoubtedly not assignable; but there are other rights to sue arising out of contract which also cannot be assigned (*o*).

Courts of Equity recognized as a general rule that choses in action or actionable claims were assignable, but on this general rule engrafted an exception as to naked rights of action on the analogy of the common law against champerty and maintenance (*p*). This exception, it is sometimes said, is enacted in clause (e) of this section (*q*). But the specific rules of English law against champerty and maintenance have not been adopted in India (see note 23 below), and English decisions on what is a naked right of action are not always a safe guide in determining cases arising under sec. 6 (e).

A right to sue is personal to the party aggrieved and there can be no assignment of a right to sue for damages for tort or for breach of contract (*r*). For the same reason a mere right to sue is not an interest which vests in the receiver in Insolvency (*s*) or which can be attached; see Code of Civil Procedure, sec. 60 (1) (e).

(*i*) *Gopal Lal Seal* v. *F. J. Marsden* (1905) 10 Cal. W.N. 1102; *Shari Ahmad* v. *H. Hunter* (1937) 167 I.C. 52, (1937) A.O. 420.

(*j*) *Annirudha* v. *Official Receiver* (1942) A.C. 241, (1942) 1 Cal. 427, 74 C.L.J. 528, 201 I.C. 568.

(*k*) *Khemchand* v. *Hemandas* (1937) 167 I.C. 40, (1937) A.S. 306.

(*l*) *Rajat Kamini* v. *Satyaniranjan* (1919) 23 Cal. W.N. 824, 53 I. C. 587.

(*m*) (1939) 181 I.C. 39, (1939) A.P. 506.

(*n*) *Raja of Ramnand* v. *Subramaniam Chettiar* (1928) 52 Mad. 465, 116 I.C. 827, ('28) A.M. 1201.

(*o*) *Abu Muhammad* v. *S. C. Chunder* (1909) 36 Cal. 345, 1 I.C. 827; *Khetra Mohan Das* v. *Biswa Nath Bera* (1924) 51 Cal. 972, 82 I.C. 411, ('24) A.C. 1047.

(*p*) *Prosser* v. *Edmonds* (1835) 1 Y. & C. 481; *Hill* v. *Boyle* (1867) 4 Eq. 260. Cases bearing on this extension of the doctrine of champerty are collected in the judgment of McCardie, J., in *County Hotel & Wine Co.* v. *London & North Western Railway* (1918) 2 K.B. 251, 258.

(*q*) *Jai Narayan* v. *Kishun Dutta* (1924) 3 Pat. 575, 78 I.C. 105, ('24) A.P. 551.

(*r*) *Abu Muhammad* v. *S. C. Chunder* (1909) 36 Cal. 345, 1 I.C. 827; *Hirachand* v. *Nemchand* (1923) 47 Bom. 719, 73 I.C. 465, ('23) A.B. 403; *Varahaswami* v. *Ramachandra* (1915) 38 Mad. 133, 18 I.C. 520; *Jewan Ram* v. *Ratanchand* (1922) 26 Cal. W.N. 285, 70 I.C. 498, ('21) A.C. 795; *Nasir Hassan* v. *Matinuzzaman* (1925) 11 O.L.J. 672, ('25) A.C. 299; *Punjaram* v. *Harisao* (1934) 153 I.C. 447, ('34) A.N. 268; *Mohan Lal* v. *Mati Lal* (1935) 157 I.C. 587, ('35) A.N. 135; *Manmohan* v. *Bidhu Bhusan* (1939) A.C. 460, 69 C.L.J. 188, 43 C.W.N. 295, 185 I.C. 5; *Rajamanickam Chetty* v. *Abdul Hakim* (1941) A.M. 389, (1941) I.M.L.J. 22, 53 M.L.W. 64, (1941) M.W.N. 37.

(*s*) *Miller* v. *Budh Singh* (1891) 18 Cal. 43; *Chandmall* v. *Ranee Soondery* (1895) 22 Cal. 259; *Liladhar* v. *Nago* (1933) 141 I.C. 479, ('33) A.N. 6.

Illustrations.

S. 6 (e) (1) *B* publishes a libel of *A*. *A* assigns his right to sue *B* for damages to *C*. The assignment is invalid as an assignment of a mere right to sue, and *C* has no right to recover damages from *B*.

(2) *A* contracts to buy goods from *B*. On due date *A* fails to take delivery and *B* sells the goods in the open market at a loss of Rs. 13,000. *B* sells the right to recover these damages to *C*. The assignment is invalid as an assignment of a mere right to sue, and *C* cannot recover the damages from *A*: *Hirachand* v. *Nemchand* (1923) 47 Bom. 719, 18 I.C. 465, ('23) A.B. 403.

(3) *A* purchases from *B* his inam land with all rights appertaining thereto, such as the right to recover rents. *A* then sues *B*'s land agent for negligently omitting to recover rents. The claim is either in tort or for breach of contract and the assignment of such a claim is the assignment of a mere right to sue and is invalid: *Varahaswami* v. *Ramachandra* (1915) 38 Mad. 138, 18 I.C. 520.

(4) *A* maliciously procures the attachment of *B*'s property. *B* has the right to sue *A* for damages for wrongful attachment and assigns his right to damages to *C*. The assignment is of a mere right to sue and is invalid: *Pragi Lal* v. *Fateh Chand* (1883) 5 All. 207.

A claim for compensation for use and occupation against a tenant holding over has been held to be one sounding in damages and therefore not transferable (*t*).

(20) **Transfer of mesne profits, rents, etc.**—On the other hand a person may have a right to sue in virtue of ownership of property transferred to him. In *Glegg* v. *Bromley* (*u*) Parker, J., said—"It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery or was a bare right to bring an action either at law or in equity." Thus in *Ellis* v. *Torrington* (*v*) the respondent purchased property leased, with a right to recover damages previously accrued for breach by the tenant of the covenant to repair; and Scrutton, L.J., said—"So in this case when the respondent, who has brought the freehold took also an assignment of the right to recover damages for dilapidations against the first lessee, he was not buying in order merely to get a cause of action; he was buying property and a cause of action as incidental thereto." On the same principle a bare right to sue for mesne profits cannot be assigned, as mesne profits are unliquidated damages and not a debt (*w*). So also an attachment of profits which had not become due was held to be an attachment of a mere right to sue which could not be the subject-matter of sale (*x*), but if a sale of land is accompanied with an assignment of mesne profits already accrued due, the assignment is valid (*y*). This distinction was not noticed in a Madras case (*z*), but it was pointed out in clear terms in a later case (*a*). So also a transfer of land

(*t*) *Govindaswami* v. *Ramasami* (1916) 30 Mad. L.J. 492, 34 I.C. 6.

(*u*) (1912) 3 K.B. 474, 490; *Dickinson* v. *Burrell* (1866) L.R. 1 Eq. 337; *Khudiram Bhakat* v. *Shomnath Banerji* (1933) 37 C.W.N. 706, 143 I.C. 575 ('33) A.C. 454.

(*v*) (1920) 1 K.B. 399, 412.

(*w*) *Durga Chunder* v. *Koilas Chunder* (1897) 2 Cal. W.N. 43; *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India* (1882) 9 Cal. 695; *Chendrasekaralingam* v. *Naghabhushanam* (1927) 53 Mad. L.J. 342, 104 I.C. 409, ('27) A.M. 817.

(*x*) *Jagannath* v. *Jamnaballabh* (1940) Nag. 37, 181 I.C. 533, (1939) A.N. 97.

(*y*) *Monmatha Nath* v. *Matilal Mitra* (1929) 33 Cal. W.N. 614, 122 I.C. 220, ('29) A.C. 719; *Ganga Din* v. *Piyare* (1929) 113 I.C. 767, ('29) A.A. 63; *Shankarappa* v. *Khatumbi* (1932) 56 Bom. 403, 34 Bom. L.R. 991, 141 I.C. 488, ('32) A.B. 478; *Susai Lazar Villanarayya* v. *Ramaswami Naidu* (1933) 145 I.C. 225, ('33) A.M. 710.

(*z*) *Seetamma* v. *Venkataramanayya* (1915) 39 Mad. 308, 21 I.C. 337.

(*a*) *Venkataramma* v. *Ramaswami* (1920) 44 Mad. 539, 62 I.C. 305, ('21) A.M. 56.

with rents already accrued due is valid (*b*). The Patna High Court has held that a transferee of land and of mesne profits already accrued due cannot maintain a suit for the mesne profits as such profits are damages and not a debt (*c*). It is submitted that this is erroneous and ignores the effect of the word "mere" which limits the prohibition to transfers which purport to transfer nothing but the right to sue (*d*). The Chief Court of Oudh has held that the transferee of a debt may sue to recover the debt but not for interest before the assignment claimed by way of damages under sec. 73 of the Contract Act (*e*); see sec. 8, para 5, below.

Illustrations.

(1) *A* is the owner of a tank which subsides owing to the removal of pillars in a coal mine underneath owned by *B*. *A* has a right of suit against *B* for damages for infringement of his easement of support. *A* transfers the tank and his right of suit to *C*. *C* can sue *B* for damages as his right of suit is incidental to the transfer of the tank: *Jagannath Marwari* v. *Kalidas* (1929) 8 Pat. 776, 120 I.C. 626, ('29) A.P. 245.

(2) *A* is the owner of land of which *B* is wrongfully in possession. *A* has a right to sue *B* for mesne profits. If *A* transferred that right to *C*, the transfer would be invalid as a transfer of a mere right to sue: see *Shankarappa* v. *Khatumbi* (1932) 56 Bom. 403, 141 I.C. 488, ('32) A.B. 478. But if *A* sold the land to *B* and assigned to *B* his right to sue for past mesne profits the assignment would be valid as incidental to the transfer of the land: *Manmath Nath Mullic* v. *Shaikh Hedait Ali* (1932) 59 I.A. 41, 11 Pat. 266, 36 C.W.N. 281, 55 C.L.J. 152, 62 M.L.J. 287, 1932 A.L.J. 341, 34 B.L.R. 489, 135 I.C. 635, ('32) A. PC. 32.

If a guardian sells the property of a minor in fraud of the rights of the minor, the minor may on attaining majority sue to set aside the sale. But until the sale is set aside the property does not belong to the minor and if he sells it the sale is a transfer of a mere right of suit and invalid (*f*). On the other hand if a manager of a joint Hindu family sells joint family property without necessity it has been held that a coparcener has still an interest in the property which he can sell without sueing to set aside the manager's sale and that the coparcener's sale is a transfer of property with an incidental right of suit (*g*).

(21) **Mere right to sue distinguished from actionable claim.**—An actionable claim is property and the assignee has a right to sue to enforce the claim (*h*). *B* cannot sue for a debt due to *A*, nor can *A* assign to *B* the bare right to sue for the debt due to *A*. But if *A* assigns the debt to *B*, then *B* may sue to recover it as a debt due to himself. A right of contribution is not a mere right to sue but is an actionable claim which may be assigned (*i*). The assignment of differences on cross contracts has been held to be valid as an assignment of a debt or actionable claim and not of a mere right to sue (*j*).

But a debt or actionable claim must be distinguished from a right to sue for damages. After breach of a contract for the sale of goods nothing is left but a right to sue for damages

(*b*) *Suryanarayana* v. *Venkayya* (1922) M.W.N. 322, 70 I.C. 38, ('23) A.M. 177.

(*c*) *Jai Narayan* v. *Kishun Dutta* (1924) 3 Pat. 575, [illegible] I.C. 705, ('24) A.P. 551.

(*d*) *Jagannath Marwari* v. *Kalidas* (1929) 8 Pat. 776, 781, 120 I.C. 626, ('29) A.P. 245.

(*e*) [illegible] v. *Raghubir Singh* (1930) 5 Luck. 547, [illegible] I.C. 174, ('30) A.O. 36; *Baijnath* v. [illegible] *Dayal* (1934) 10 Luck. 26, [illegible], ('35) A.O. 240.

(*f*) [illegible] v. [illegible] (1932) 34 Bom. L.R. [illegible] I.C. [illegible], ('33) A.B. 42. *Nathe* v. [illegible] (1939) O.W.N. 241, 180 I.C. 329 (1939) A.O. 122; *Manmohan* v. *Bidhu Bhusan* (1939) A.C. 460, 69 C.L.J. 188, 43 C.W.N. 295, 185 I.C. 5.

(*g*) *Hanmantappa* v. *Dundappa* (1934) 36 Bom. L.R. 474, 151 I.C. 1042, ('34) A.B. 234.

(*h*) *Rudra Perkash* v. *Krishna Mohun* (1887) 14 Cal. 241.

(*i*) *Ramaswami Aiyar* v. *Doraiswami* (1922) 43 Mad. L.J. 129, 66 I.C. 967, ('22) A.M. 307.

(*j*) *Nagappa* v. *Badridas* (1930) 32 Bom. L.R. 694, 127 I.C. 410, ('30) A.B. 409.

S. 6(e) which cannot be transferred (*k*). But before breach the benefit of an executory contract for the sale of goods may generally be transferred and the buyer has the right to sue for the goods (*l*). A right to mesne profits is a mere right to sue which cannot be transferred (see note 20 above), but the right to the profits of a village actually accrued due at the date of the transfer is a debt which may be assigned (*m*). If a certain sum of money is due from a person that sum of money is recoverable on assignment even though a calculation may be necessary to determine the exact amount (*n*), and the right to recover a definite amount in the hands of an agent may be assigned (*o*). As to whether the right to recover such money as may be found due on taking an account from an agent can be assigned the cases are conflicting. In some cases it has been held that such an assignment is not of a mere right to sue but of money belonging to the principal which is in the agent's hands and that it is a debt although the amount remains to be ascertained (*p*). In others it has been held that the assignment is of a mere right to sue the agent for failure to pay (*q*). The distinction between a transfer of a mere right to sue and a transfer of an actionable claim is well illustrated by the Privy Council case quoted in illustration (1) below.

Illustrations.

(1) *A*'s lessee had covenanted to pay the Government assessment or in default to be liable to *A* in damages. *A* sold the reversion to *B* and also assigned to *B* his right to recover from the lessee certain instalments of assessment which he had paid owing to the lessee's default. The High Court held the assignment to be void as an assignment of a mere right to sue. But the Privy Council held that the lessee's failure to pay did not give rise to a claim for damages within the meaning of the clause in the lease, but a claim for reimbursement of the *precise sum A* had paid to meet the obligation. It was therefore valid as an assignment of an *actionable claim: Manmatha Nath* v. *Hedait Ali* (1932) 11 Pat. 266, 59 I.A. 41, 135 I.C. 635, ('32) A. PC. 32.

(2) *A* agrees to sell to *B* a certain quantity of gunny bags deliverable on a future day. There are no circumstances of a personal character in the contract. Before due date *B* assigns his beneficial interest in the contract to *C*. Thereafter *A* commits a breach of the contract. This is not an assignment of a mere right to sue but of an actionable claim and is valid. *C* is entitled to sue for damages for not delivering the gunny bags: *Jaffer Meher Ali* v. *Budge Budge Jute Mills* (1906) 33 Cal. 702. *N.B.*—This illustration should be contrasted with the illustration *Hirachand* v. *Nemchand* (1923) 47 Bom. 719, 73 I.C. 465, ('23) A.B. 403, where the transfer was after breach of the contract.

(3) *A* is the agent of *B* and misappropriates the sum of Rs. 4,000. *A* assigns the debt to *C*. The assignment is valid as the assignment of an actionable claim and *C* may sue to

(*k*) *Janglimal* v. *Pioneer Flour Mills* (1914) P.R. 106, 27 I.C. 115; *Yadavendra* v. *Srinivasa* (1924) 47 Mad. 698, 80 I.C. 5, ('25) A.M. 62; *Gopala* v. *Ramaswami* (1911) 21 Mad. L.J. 158, 6 I.C. 290; *Shahrukh* v. *Sheo Prasad* (1918) 41 I.C. 435; *Nakhela* v. *Kebaya* (1923) 69 I.C. 238, ('23) A.N. 67; *Gerimal* v. *Raghunath* (1921) 66 I.C. 873, ('21) A.S. 59; *Mati Lal* v. *Radhe Lal* (1933) A.L.J. 1009, 55 All. 814, 147 I.C. 529, ('33) A.A. 642; *Mt. Powri* v. *Shiva Paika* (1935) 156 I.C. 487, ('35) A.N. 2. See also cases in footnote (*r*), *supra*.

(*l*) *Jaffer Meher Ali* v. *Budge Budge, Jute Mills* (1906) 33 Cal. 702 on app. (1907) 34 Cal. 289; *Nathu* v. *Hansraj* (1907) 9 Bom. L.R. 114.

(*m*) *Bharat Singh* v. *Bindacharan* (1918) 47 I.C. 634; *Girdhari* v. *Ahmad Mirza Beg* (1919) 60 I.C. 690; *Ram Charan Das* v. *Mt. Naseeran* (1935) All. L. J. 348, 158 I.C. 4, ('35) A.A. 342.

(*n*) *Vatakkathala Thottungal Chakkiu Son Mathu* v. *Achu & others* (1934) 57 Mad. 1074, 67 Mad. L.J. 158, 151 I.C. 353, ('34) A.M. 461.

(*o*) *Venkata Gurunadha* v. *Kesava Ramiah* (1926) 50 Mad. L.J. 54, 92 I.C. 973, ('26) A.M. 417; *Ramaswami* v. *Abdul Kuddus* (1926) 97 I.C. 548, ('26) A. M. 978 (right to recover licensee fees).

(*p*) *Ramiah* v. *Rukmani* (1918) 24 M.L.J. 313, 18 I.C. 138; *Madho Das* v. *Ramji Patak* (1894) 16 All. 286; *Rajeswar Saha* v. *Sheik Yadali* (1933) 57 Cal. L.J. 46, 145 I.C. 123, ('33) A.C. 461; *Mathu* v. *Achu* (1934) 57 Mad. 1074, 67 M.L.J. 158, 151 I.C. 353, ('34) A.M. 461.

(*q*) *Khetra Mohan* v. *Biswa Nath Bose* (1924) 51 Cal. 972, 82 I.C. 411, ('24) A. C. 1047; *Kalusa* v. *Madhorao* (1926) 96 I.C. 289, ('26) A.N. 387. *Ghasilal* v. *Gomtibaimal* (1928) A.C. 877, 52 Cal. 810, 32 C.W.N. 646, 104 I.C. 111.

recover the sum : *Venkata Gurunadha* v. *Kesaba Ramiah* (1926) 50 Mad. L.J. 54, 92 I.C. 973, ('26) A.M. 417.

(4) *A* is the land agent of zemindar *B* and fails to submit accounts, of two villages. *B* assigns his right to recover such sums as might be found due on taking an account to *C*. The assignment is of a mere right to sue and is invalid. *C* cannot sue *A* : *Khetra Mohan* v. *Biswa Nath Bora* (1924) 51 Cal. 972, 82 I.C. 411, ('24) A.C. 1047.

(5) *C* and his two sons effected a partition. *C* then discovered that some outstanding due to a milk business carried on by the family firm had been fraudulently excluded from partition. *C* by deed transferred the right to these outstandings to the plaintiff. The transfer was not invalid as a transfer of a mere right to sue. It was a transfer of an actionable claim with an incidental right of suit either against the original debtors or against the sons as agents : *Ramiah* v. *Rukmani* (1913) 24 Mad. L.J. 313, 18 I.C. 138.

(6) *A* executed a usufructuary mortgage for a certain sum. The mortgage deed specified that out of this sum a portion was left with the mortgagee for payment to *K*. The mortgagor assigned his right to *B*. The assignment was not of a mere right to sue, but of an actionable claim : *Tikam Singh* v. *Bhola Nath* (1937) All. 666, (1937) A.L.J. 518, 170 I.C. 975, (1937) A.A. 470. Other instances of transfer valid as transfers of an actionable claim are the transfer of the benefit of a contract to reconvey land (*r*) ; the transfer by a dispossessed mortgagee of his right to recover his mortgage money (*s*) ; a partner's unascertained interest in a dissolved partnership (*t*) ; a transfer of a right to recover back the price paid on failure of the vendor to deliver possession (*u*). In a case from Bombay (*v*) a partner *A* released his share in the partnership to his partners and then assigned his share to *B*. *A* alleged that the release to his partners had been obtained by fraud. The Court held that what was assigned to *B* was *A*'s right to sue to set aside the release on the ground of fraud and that such a right could not be assigned. A right to the income of property payable to a beneficiary under a settlement may be assigned. It is not a mere right of suit even though further inquiry is necessary to determine the amount (*w*).

(22) **Transfer of decree.**—A decree is neither an actionable claim nor a mere right of suit. When a claim has merged in a judgment and has been decreed, it is no longer a right to sue and is assignable as a decree although the original cause of action was not assignable. Thus a decree for mesne profits may be validly assigned (*x*). As to execution of a decree by a transferee thereof, see Code of Civil Procedure, O. 21, rr. 16, 17.

(23) **Transfer of a mere right to sue and public policy.**—The assignment of a right to sue is as much opposed to public policy as is gambling in litigation. The English law of champerty and maintenance does not apply in India (*y*) and in this country such cases are decided with reference to sec. 23 of the Indian Contract Act. Gambling in litigation is forbidden as opposed to public policy and when such agreements are extortionate or oppressive they are not enforced, though compensation for legitimate

(*r*) *Sakalaguna Nayudu* v. *Chinna Munuswami* (1928) 51 Mad. 533, 55 I. A. 243, 109 I.C. 765, ('28) A.PC. 174 ; *Narasingerji* v. *Panaganti* (1921) Mad. W.N. 519, ('21) A.M. 496 ; *Akhtar Beg* v. *Haq Newaz* (1924) 78 I.C. 87, ('24) A.L. 709 ; *Venkateshwara* v. *Raman* (1916) 33 I.C. 696.

(*s*) *Murat Singh* v. *Pheku Singh* (1928) 7 Pat. 584, 110 I.C. 526, ('28) A.P. 567 ; *Shrinath* v. *Kanhaiyalal* (1924) 75 I.C. 817, ('24) A.N. 145.

(*t*) *Thakurdas* v. *Seth Vishindas* (1925) 79 I.C. 394, ('25) A. S. 72.

(*u*) *Damodar* v. *Allabux* (1948) A.N. 332, (1948) Nag. 762, (1948) N.L.J. 508, 210 I.C. 625.

(*v*) *Dhanaji* v. *Gulabchand* (1925) 27 Bom. L.R. 409, 87 I.C. 812, ('25) A.B. 347.

(*w*) *Ma Yait* v. *Mahomed Ebrahim Moolla* (1927) 5 Rang. 145, 102 I.C. 670, ('27) A.R. 165.

(*x*) *Venkatarama* v. *Ramasami* (1921) 44 Mad. 539, 62 I.C. 305, ('21) A.M. 86 ; *Hari Prasad* v. *Kodo Marya* (1917) 1 Pat. L.J. 437, 37 I. C. 998 ; *Prasanno Kumar* v. *Ashutosh* (1913) 18 Cal. W.N. 450, 20 I.C. 685.

(*y*) *Fischer* v. *Kamala Naicker* (1860) 8 M.I.A. 170 ; *Ram Coomar Coondoo* v. *Chunder Canto Mookerji* (1870) 4 I.A. 23, 2 Cal. 233.

S. 6 (f) expenses may properly be awarded (z). In the undernoted case (a) the Privy Council condemned the practice of the Official Assignee selling land which was in the possession of a person who claimed to have purchased from the insolvent, as being in substance if not in form nothing more than the sale of a right to litigate. On the other hand, if the transaction is made bona fide with the object of assisting a claim believed to be just, a present transfer by a person who is not in possession and who has not yet established title thereto is not invalid (b). Both in England (c), and in India (d), a bona fide transfer of the fruits of an action is not illegal, for such an assignment is an assignment of future property.

Clause (f)—Transfer of public office.

(24) Clause (f)—Transfer of Public Office.—A public office is analogous to the case in clause (d), for a public office is held for qualities personal to the incumbent. A public servant is defined in the Indian Penal Code and a public officer in the Civil Procedure Code, but there is no definition in this Act. In *Henley* v. *Lyme Corporation* (e) it was said that "every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer."

It is opposed to public policy that a public officer should transfer the salary of his office, for the salary is given for the purpose of upholding its dignity and the proper performance of its duties (f). In *Grenfell* v. *The Dean and Canons of Windsor* (g), Lord Langdale, M.R., said—"There are various cases in which public duties are concerned, in which it may be against public policy that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them."

The percentage a khot receives for collecting assessments is not salary (h).

Sales of public offices are forbidden in England by various statutes of which 49 Geo. III, c. 126, sec. 3, is still in force in the presidency towns. Cases in India have arisen generally with reference to religious and village offices (i). An assignment of a gratuity payable to the legal representative of a public officer is not prohibited (j). If there is a doubt as to who is the proper incumbent, a compromise of the dispute is not contrary

(z) *Kunwar Ram Lal* v. *Nil Kanth* (1893) 20 Cal. 843, 20 I.A. 112; *Raja Mokum Singh* v. *Raja Rup Singh* (1893) 15 All. 352; 20 I.A. 127.

(a) *Chockalingam Chetty* v. *Seethal Acha* (1928) 6 Rang. 29, 55 I.A. 7, 107 I.C. 237, ('27) A.PC. 252.

(b) *Achal Ram* v. *Kasim Husain* (1905) 27 All. 271, 32 I.A. 113; *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (1907) 35 Cal. 420, 35 I.A. 48; *Ramanamma* v. *Viranna* (1931) 61 Mad. L. J. 94, 131 I. C. 401, ('31) A.PC. 100.

(c) *Glegg* v. *Bromley* (1912) 3 K.B. 474.

(d) *Vatsavaya* v. *Poosapati* (1924) 52 I.A. 1, 47 Mad. L. J. 93, 80 I. C. 807, ('24) A.PC. 162.

(e) (1828) 5 Bing. 91, 107.

(f) *Liverpool Corporation* v. *Wright* (1859) 28 L. J. (Ch.) 868.

(g) (1840) 2 Beav. 544, 549; *Davis* v. *Duke of Marlborough* (1818) 1 Swan, 74.

(h) *Ravji* v. *Sayajirav* (1889) 13 Bom. 673.

(i) *Archaka* of a temple—*Venkatrayar* v. *Srinivasa* (1872) 7 Mad. H.C. 32. *Paricharaka* of a temple—*Narasimma* v. *Anantha* (1881) 4 Mad. 391. *Dharmakarta* of a temple—*Subbarayudu* v. *Kottaya* (1892) 15 Mad. 389. *Karaima* in a temple—*Keyake* v. *Yaddatil* (1868) 3 Mad. H.C. 380. *Miras* in a temple—*Ramaswami* v. *Ranga* (1893) 16 Mad. 146. *Shebait*—*Nagendra* v. *Rabindra* (1926) 53 Cal. 132, 94 I. C. 212, ('26) A.C. 490; *Girijanand* v. *Sailajanand* (1896) 23 Cal. 645. *Shebati*—*Gobinda* v. *Debendra* (1907) 12 Cal. W. N. 98; *Juggernath* v. *Kishen* (1867) 7 W.R. 266; *Duho Misser* v. *Srinivas* (1870) 14 W. R. 409. *Mutawalli*—*Wahid Ali* v. *Ashruff* (1881) 8 Cal. 732; *Sarkum* v. *Rahaman* (1897) 24 Cal. 83; *Munshi Shahed Baksh* v. *Golam Nabi* (1918) 22 Cal. W.N. 996, 47 I.C. 117; *Haji Ali Mahomed* v. *Anjuman-i-Islamia* (1931) 12 Lah. 590, 135 I. C. 56, ('31) A.L. 379. *Mohant*—*Pryad Das* v. *Mohunt Kriparam* (1908) 8 Cal. L.J. 499. *Vritti*—*Rajaram* v. *Ganesh* (1899) 23 Bom. 131. *Village Joshi* *Waman* v. *Balaji* (1890) 14 Bom. 167. *Ghatwal*—*Narain* v. *Badi Roy* (1902) 29 Cal. 227. *Karnam*—*Kumari Pillai* v. *Orr* (1897) 20 Mad. 145. *Chowkidar*—*Ramkumar* v. *Ram Newaj* (1904) 31 Cal. 1021.

(j) *Arbuthnot* v. *Norton* (1846) 3 M.I.A. 435.

to public policy (*k*). As to the attachment of the salary of public officers, see Code of Civil Procedure, sec. 60 (1) (i). S. 6 (g)

Clause (g)—Transfer of pensions.

(25) Clause (g)—Transfer of pensions.—Civil and military pensions are not transferable and are also exempt from attachment under sec. 60 (g) of the Code of Civil Procedure, 1908. There are similar provisions in the Pensions Act 23 of 1871. In *Secretary of State* v. *Khemchand Jeychand* (*l*) Melvill, J., said that the ordinary and well-known meaning of a pension was "a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past services or particular merits or as compensation to dethroned princes, their families, and dependants." An allowance granted for other considerations is not within the prohibition and can be assigned (*m*). Thus a toda giras hak which is an allowance paid to girassias for police services is not a political pension (*n*).

A pension is a periodical payment of money by Government (*o*) and a bonus or a reward is not a pension (*p*). A grant of land or of land revenue even though in lieu of pension is not a pension and is therefore transferable (*q*); though the Lahore High Court holds that a pension may take the form of an assignment of land revenue (*r*). An allowance made in lieu of a resumed grant of lands is not a pension (*s*). There is no presumption that a jagir is a political pension (*t*).

A pension which the Government of India has by treaty with another sovereign power guaranteed to pay, is a political pension in its strictest sense (*u*); and so is an allowance paid to a political prisoner, although the allowance is collected by the Government of India from a foreign State (*v*). Other instances of political pensions are allowances granted to the "Candyan pensioners" of Ceylon (*w*); to the members of the Mysore family (*x*); and to descendants of the Nawab of the Carnatic (*y*).

A pension retains its character as long as it is unpaid and in the hands of Government but as soon as it is paid to the pensioner or his legal representative or agent it can be attached or transferred (*z*).

The prohibition does not apply to private pensions and pensions granted to railway servants can be attached and sold (*a*).

(*k*) *Girijanund* v. *Sailajanund* (1896) 23 Cal. 645, 669.

(*l*) (1880) 4 Bom. 432, 436.

(*m*) *Subraya* v. *Velayudu* (1907) 30 Mad. 153. *Bhoopal Rai* v. *Shiam Sunder Lal* (1929) 27 All. L.J. 724, 124 I.C. 534, ('29) A.A. 781.

(*n*) *Secretary of State* v. *Khemchand Jeychand*, *supra*.

(*o*) *Lachmi Narain* v. *Makund* (1904) 26 All. 617, 621 *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank* (1931) 29 All. L.J. 495, 58 I.A. 215, 220, 59 Cal. 1, 132 I.C. 727, ('31) A.P.C. 160.

(*p*) *Khasim* v. *Carlier* (1882) 5 Mad. 272.

(*q*) *Lachmi Narain* v. *Mukund*, *supra* (a zamindari grant in reward for past services); *Balkrishna* v. *Govind* (1902) A.W.N. 161 (a grant of a share of revenue in compensation for enhanced assessment); *Amna Bibi* v. *Najm-un-nissa* (1909) 31 All. 382, 2 I.C. 100 (grant of land in lieu of pension); *Balvant* v. *Secretary of State* (1905) 29 Bom. 480 (inam land); *Kumara Tirumalai* v. *Bangaru* (1898) 21 Mad. 310 (inam land); *Ganpat Rao* v. *Anant Rao* (1910) 32 All. 148, 5 I.C. 689 P.C. (grant of the soil); *Subraya Mudali* v. *Velayudu*, *supra* (grant of the soil).

(*r*) *Atma Ram* v. *Kehar Singh* (1930) 31 P.L.R. 812, 132 I.C. 12, ('30) A.L. 904 following *Karar Hasan* v. *Mustafa Hassan* (1914) P.R. 86, 26 I.C. 743; *Bhoopal Rai* v. *Shiam Sundar Lal*, *supra*, per Ashworth, J.

(*s*) *Shah Muhammad Habibul* v. *Abdul* (1926) 24 All. L.J. 680, 95 I.C. 208, ('26) A.A. 521; *Subraya Mudali* v. *Velayudu*, *supra*; *Jiban Krishna* v. *Sripati* (1903) 8 Cal. W.N. 665.

(*t*) *Duni Chand* v. *Gurmukh Singh* (1930) 128 I.C. 487, ('30) A.L. 816.

(*u*) *Bishambhar Nath* v. *Imdad Ali* (1891) 18 Cal. 216, 17 I.A. 181.

(*v*) *Satraji Dongerchand* v. *Madho Singh* (1927) 50 Mad. 711, 103 I.C. 339, ('27) A.M. 604.

(*w*) *Muthusami* v. *Prince Alagia* (1903) 26 Mad. 423.

(*x*) *Mahomed* v. *Mahomed* (1867) 7 W.R. 169.

(*y*) *Mahomed* v. *Commandur* (1869) 4 Mad. H.C. 177.

(*z*) *Valia* v. *Anujani* (1903) 26 Mad. 69; *Lallu* v. *Mahomed* (1877) P.R. 57.

(*a*) *Bhoyrub* v. *Madhub Chunder* (1860) 6 Cal. L.R. 19.

S. 6 (h)

In all probability this clause does not apply to pensions payable by a foreign State when remitted to a pensioner in India (*b*).

Clause (h).

(26) Clause (h).—Previous clauses have defined the kinds of property that cannot be transferred, but the scope of this clause is difficult to define. Sub-clause (1) seems to state the self-evident proposition that what cannot be transferred is not transferable. Sub-clause (3) states the equally self-evident proposition that there cannot be a transfer without a transferee. Sub-clause (2) states that "no transfer can be made for an unlawful object or consideration within the meaning of sec. 23 of the Indian Contract Act." These words mean that the law does not recognise such a transfer. In other words, when such a transfer is made the Courts will give no assistance either to the transferor to revoke it, or to the transferee to enforce it.

(27) Sub-clause (1)—Opposed to the nature of the interest.—*Res communes* which belongs to nobody, such as light, air and water of rivers or the sea would be things which, from their very nature, cannot be transferred. Things dedicated to public or religious uses are classed as *res extra commercium* which cannot be bought or sold (*c*). Regalia, heirlooms, and debutter property (*d*) are therefore inalienable. A transfer of a service inam has been held to be void as opposed to the nature of the interest affected and also as opposed to public policy (*e*). Most of the cases referred to under clauses (d) and (dd) would fall under this sub-clause.

(28) Sub-clause (2)—Unlawful object or consideration.—These are the words used in sec. 23 of the Indian Contract Act. They are disjunctive, for object means purpose or design. An assignment for a money consideration to defeat the provisions of the Insolvency Act is for a valid consideration but it is for an unlawful object (*f*). On the other hand a transfer of property to a prostitute for future cohabitation is a transfer for a consideration which is unlawful as it is immoral (*g*). A transfer of property in consideration of past cohabitation, however, has been held to be good (*h*).

Where object or consideration partly lawful and partly unlawful.—The Act contains no provision corresponding to sec. 24 of the Indian Contract Act, with reference to a transfer which is partly lawful and partly unlawful. A transfer of occupancy land is (except in certain circumstances) void under the Agra Tenancy Act 2 of 1901, but a transfer of lands comprising both zamindari land and inalienable occupancy land has been held to be valid as to the zamindari land (*i*). The Allahabad cases are not consistent, and are collected in the judgment of Mukerji, J., in *Dip Narain Singh* v. *Nageshar* (*j*).

Where possession delivered under an unlawful transfer.—Transfers for an unlawful object or consideration are void, but if possession has been given in pursuance of a transfer that is void for this reason, the general rule is *in pari delicto potior est conditio possidentis*,

(*b*) See *Bishambhar Nath* v. *Imdad Ali* (1891) 18 Cal. 216, 17 I.A. 181.

(*c*) *Raja Varma Valia* v. *Kottayath* (1875) 7 Mad. H.C. 210, 219, on app. 1 Mad. 235, 4 I.A. 76.

(*d*) *Konwar Doorganath* v. *Ramchunder* (1877) 2 Cal. 341, 4 I.A. 52; *Narayan* v. *Chintaman* (1881) 5 Bom. 393; *Shama* v. *Abdul* (1898) 3 Cal. W.N. 158.

(*e*) *Anjaneyalu* v. *Sri Venugopala Rice Mills* (1922) 45 Mad. 620, 70 I.C. 466, ('22) A.M. 193.

(*f*) *Jaffer Meher Ali* v. *Budge Budge Jute Mills* (1906) 33 Cal. 702, 709; *Re Kripendra Kumar Bose* (1929) 56 Cal. 1074, 121 I.C. 745, ('30) A.C. 171.

(*g*) *Deivanayaga* v. *Muthu Reddi* (1921) 44 Mad. 329, 59 I.C. 1003, ('21) A.M. 326; *Ghamma* v. *Ramchandra* (1925) 47 All. 619, 88 I.C. 411, ('25) A.A. 437.

(*h*) *Godfrey* v. *Mussammat Parbati Pahari* (1938) 17 Pat. 308, *Belo* v. *Parbati* (1940) All. 371; but see *Sabava* v. *Yamanappa Saba* (1933) A.B. 209, 35 Bom. L.R. 345.

(*i*) *Bajrangi Lal* v. *Ghura Rai* (1916) 38 All. 232, 32 I.C. 918; *Rajendra Prasad* v. *Ram Jatan Rai* (1917) 39 All. 532, 39 I.C. 785; *Dip Narain Singh* v. *Nageshar* (1930) 52 All. 338, 122 I.C. 872, ('30) A.A. 1.

(*j*) *Dip Narain Singh* v. *Nageshar*, *supra*.

and the transferee cannot recover the property he has professed to transfer (*k*). In such a case the Court would not act, but would say 'Let the estate lie where it falls' (*l*). Section 6 (h) does not annul this rule of law but only lays down that the Court will not enforce a transfer which will have the effect of carrying out an unlawful object (*m*). To this general rule that the Court will not interfere there are three exceptions which are enumerated in sec. 84 of the Trusts Act which is as follows:— **S. 6 (h)**

> "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

In the first case there is a *locus paenitentiae* until the fraud is carried out and the transferor may sue to recover his property (*n*). The second case is where the transferor is not as guilty as the transferee. In the analogous case of contract sec. 35 (b) of the Specific Relief Act allows a contract to be rescinded if the defendant is more to blame than the plaintiff. The third case is where permitting the transferee to retain the property would defeat the provisions of any law, *e.g.* a transfer which would have the effect of withdrawing the property from the transferor's creditors and so defeating the law of insolvency (*o*). An exhaustive examination of the case law on this point by Tekchand, J., will be found in a Lahore case (*p*) where a possessory mortgage which contravened the provisions of the Punjab Land Alienation Act, 1900, because the mortgagee was a non-agriculturist, was executed benami in favour of an agriculturist. The benamidar sued to recover possession but his suit was dismissed, and the Court held that the mortgagors were entitled to show the real nature of the transaction, and differed from a dictum of Sir Lawrence Jenkins that "a deed cannot be avoided on the ground of fraud by a party to the fraud (*q*)."

Where transfer is ultra vires.—Contracts which are *ultra vires* are not necessarily illegal (*r*). A contract which is *ultra vires* of a company is void not because it is illegal, but because the company has no power to enter into it (*s*). A company may be entitled to recover money lent notwithstanding that the loan was *ultra vires*. In *Turner* v. *Bank of Bombay* (*t*) the Bank was held to be entitled to recover on an equitable mortgage in spite of the prohibition in sec. 37 of the Presidency Banks Act, and in *Ahmed Sait* v. *Bank of Mysore* (*u*) a Bank was held entitled to enforce a mortgage although its memorandum of association prohibited loans on mortgage.

(29) Section 23 of Contract Act.—Under sec. 23 of the Indian Contract Act a consideration or object is unlawful if (1) it is forbidden by law, or (2) is of such a nature that it defeats the provisions of any law, or (3) is fraudulent, or (4) involves or implies

(*k*) *Ayerst* v. *Jenkins* (1873) 16 Eq. 275; *Goberdhan* v. *Ritu Roy* (1896) 23 Cal. 962; *Banka Behari* v. *Rajkumar* (1900) 27 Cal. 231; *Govinda Kuar* v. *Lala Kishen Prasad* (1901) 28 Cal. 370; *Sidlingappa* v. *Hirasa* (1906) 31 Bom. 405; *Raghupati* v. *Nrishingha* (1922) 36 Cal. L.J. 491, 71 I. C. 1, ('23) A. C. 90; *Vilayat Husain* v. *Misran* (1923) 45 All. 396, 72 I. C. 92, ('23) A. A. 504; *Sabava* v. *Yamanappa* (1933) 35 B. L. R. 345, 149 I.C. 464, ('33) A. B. 209.

(*l*) *Muckleston* v. *Brown* (1801) 6 Ves. 52, 69; *Gascoigne* v. *Gascoigne* (1918) 1 K. B. 223.

(*m*) *Dolnamayya* v. *Muthu Reddi* (1921) 44 Mad. 329, 59 I. C. 1003, ('21) A. M. 325; *Vilayat Husain* v. *Misran* (1923) 45 All. 396, 72 I.C. 92, ('23) A.A. 504.

(*n*) *Shama Lall Mitra* v. *Amarendra Nath* (1896) 23 Cal. 460; *Govinda Kuar* v. *Lala Kishen Prasad*, *supra*; *Jadu Nath* v. *Rup Lal* (1906) 33 Cal. 967; *Munisami* v. *Subbaraya* (1908) 31 Mad. 97; *Raghupati* v. *Nrishingha*, *supra*; *Bai Devmani* v. *Ravishankar* (1929) 53 Bom. 321, 116 I.C. 236, ('29) A.B. 147.

(*o*) *Jaffer Meher Ali* v. *Budge Budge Jute Mills* (1904) 33 Cal. 702.

(*p*) *Qadir Bukhsh* v. *Hakam* (1932) 139 I.C. 17, ('32) A.L. 503 [F.B.].

(*q*) *Sidlingappa* v. *Hirasa* (1907) 31 Bom. 405, 411.

(*r*) *In re Coltman, Coltman* v. *Coltman* (1881) 19 Ch. D. 64.

(*s*) *Ashbury Rly. Carriage and Iron Co.* v. *Riche* (1875) 7 H. L. 653.

(*t*) (1901) 25 Bom. 52.

(*u*) (1930) 53 Mad. 771, 124 I. C. 872, ('30) A.M. 512.

S. 6 (h) injury to the person or property of another, or the Courts regard it as (5) immoral or (6) opposed to public policy. The following are instances of transfers invalid under these heads:

(1) *Forbidden by law.*—A sub-lease of a farm for the retail sale of opium is void, as the sale of opium without a licence by the Collector is forbidden by the Opium Act (*v*). Transfers of occupancy land have been held to be void as being forbidden by sec. 9 of the North-Western Provinces Rent Act, 1878, (*w*) or by sec. 20 of the Agra Tenancy Act 2 of 1901 (*x*).

Forbidden by law does not refer to prohibition by agreement or decree of Court (*y*).

(2) *Defeat the provisions of any law.*—The following are such transfers: A collusive assignment to a relation in expectation of insolvency to defeat the provisions of the Insolvency Act (*z*); a lease granted by a mortgage under a mortgage forbidden by the Agra Tenancy Act, as the recognition of the lease would defeat the provisions of the Act (*a*); a lease granted with the object of defeating the provisions of the Calcutta Rent Act (*b*); a transfer by an insolvent to a creditor on condition of his not opposing his final discharge (*c*); a sale deed by an accused person to his pleader by way of indemnity for a bail bond executed by the pleader, for the indemnity renders the bail illusory (*d*).

Illustration.

A owes money to *B* and executes a hathchitta in favour of *B* promising to repay the debt. *B* in expectation of being adjudged insolvent assigns the hathchitta to his relation *C* in order to prevent the debt vesting in the Official Assignee. *B* is adjudged insolvent but the adjudication is subsequently annulled. Nevertheless as the assignment was made for an illegal purpose it is void and *C* cannot recover the debt: *Chimni Ram* v. *Shibendra* (1912) 16 Cal. L.J. 162, 14 I.C. 519.

(3) *Fraudulent.*—A transfer to an agent in consideration of the agent granting a lease of land without the knowledge of his principal would be a fraud on the principal and void. See illustration (g) to sec. 23, Indian Contract Act.

(4) *Injury to person or property.*—A payment to a Hindu father in consideration of his giving his son in adoption is void, for the adoption is liable to be set aside and the son would lose his status in both families (*e*).

(5) *Immoral.*—A lease of a house for use as a brothel is void as the purpose is immoral (*f*), but not if the lessor was not aware of the intended use (*g*). A transfer of immoveable property to a woman in consideration of future illicit intercourse is void (*h*),

(*v*) *Raghunath* v. *Nathu* (1895) 19 Bom. 626.

(*w*) *Durga* v. *Jhinguri* (1885) 7 All. 511; *Jinguri* v. *Durga* (1885) 7 All. 678 F. B.

(*x*) *Har Prasad* v. *Sheo Gobind* (1922) 44 All. 486, 67 I.C. 793, ('22) A.A. 184; *Dayaram* v. *Thakuri* (1924) 46 All. 622, 83 I. C. 21, ('24) A. A. 669. But see the criticism of these cases in *Dip Narain Singh* v. *Nageshar* (1930) 52 All. 338, 122 I.C. 872, ('30) A.A. 1 F. B.

(*y*) *Wazir Mahomed* v. *Har Prasad* (1912) 15 O. C. 67, 13 I. C. 613.

(*z*) *Jaffer Meher Ali* v. *Budge Budge Jute Mills* (1906) 33 Cal. 702, on app. (1907) 34 Cal. 289.

(*a*) *Ram Sarup* v. *Kishen Lal* (1907) 29 All. 327.

(*b*) *Elijah Abraham* v. *Manekji* (1923) 50 Cal. 491, 75 I.C. 521, ('24) A. C. 57.

(*c*) *Naoroji* v. *Kasi Sidick Mirza* (1896) 20 Bom. 636.

(*d*) *Laxmanlal* v. *Mulshankar* (1908) 32 Bom. 449.

(*e*) *Narayan* v. *Gopalrao* (1922) 46 Bom. 808, 67 I.C. 850, ('22) A. B. 382; *Eshan Kishor* v. *Haris Chandra* (1874) 13 Beng. L. R. App. 42.

(*f*) *Gaureenath* v. *Madhomanee* (1872) 18 W.R. 445; *Choga Lal* v. *Pujari* (1909) 31 All. 86, 1 I.C. 52.

(*g*) *Sultan* v. *Nanu* (1877) P. R. 22; *Putimal* v. *Bhagan* (1898) P. R. 2.

(*h*) *Muthukannu* v. *Shanmugavelu* (1905) 28 Mad. 413; *Ghumna* v. *Ramchandra* (1925) 47 All. 619, 81 I. C. 411, ('25) A.A. 437; *Brahmaya Lingam* v. *Kanakamma* (1924) 47 Mad. L. J. 652, 82 I.C. 14, ('24) A.M. 849; *Sabava* v. *Yamanappa* (1933) 35 B.L.R. 345, 149 I.C. 464, ('33) A.B. 209.

but if the immoral purpose has been carried out the transfer cannot be set aside (*i*). On the same principle a bequest in a will conditional on the continuance of immoral relations is void (*j*). A consideration, which is immoral at the time, does not become innocent by being past, and therefore past cohabitation is not good consideration for a transfer (*k*); but the contrary view was taken in cases (*l*).

(6) *Public policy.*—A corrupt payment such as a bribe paid to an official is an instance of a transfer void as opposed to public policy (*m*). It is contrary to public policy to stifle a prosecution (*n*). In a Calcutta case (*o*), the relations of a prisoner executed a mortgage in favour of the prisoner's employer for a large part of the employer's money which the prisoner had misappropriated, in consideration of the employer agreeing not to object to the prosecution being withdrawn by the Commissioner of Police. The Court held that the mortgage was valid, but it is clear from the judgment that the mortgage would have been invalid, if the consideration had been that the employer should himself withdraw the prosecution. The Lahore High Court has held that the purchase by a putwara of land within his circle would create an interest in conflict with his duty and would be void as contrary to public policy (*p*). The judgments of the Allahabad High Court on the same point have been conflicting (*q*). A transfer of land granted revenue free on condition that the grantees and their descendants should give blessings to the Maharaja of Nepal is not contrary to public policy (*r*). Payments to a father or guardian in consideration of a daughter or ward being given in marriage have been held to be opposed to public policy (*s*). It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No Court can invent a new head of public policy (*t*); it has even been said in the House of Lords that "public policy is always an unsafe and treacherous ground for legal decision" (*u*).

(30) Sub-clause (3)—Disqualified to be a transferee.—A transfer is defined in sec. 5 as an act by which one person transfers property to another. It is therefore necessary that the transferor should be competent to transfer as enacted in sec. 7; and that the transferee should be competent to be a transferee as enacted in this section. Any living person is competent to be a transferee provided he is not subject to a legal disqualification. Such a disqualification is enacted in section 136 which forbids a Judge, legal practitioner or officer connected with a Court from purchasing an actionable claim. Similarly O. 21, r. 73, of the Code of Civil Procedure, 1908, forbids any officer or person having any duty to perform in connection with any sale from acquiring an interest in the property sold.

(*i*) *Lachmi* v. *Wilayati* (1880) 2 All. 433, on app. *Ramsarup* v. *Bela* (1884) 6 All. 313, 11 I.A. 44; *Devlanayaga* v. *Muthu Reddi* (1921) 44 Mad. 329, 59 I.C. 1003, ('21) A.M. 326; *Sabava* v. *Yamanappa* (1933) 35 B.L.R. 345, 149 I.C. 464, ('33) A.B. 209.

(*j*) *Tayaramma* v. *Sitaramasami Naidu* (1900) 23 Mad. 613.

(*k*) *Kisondas* v. *Dhondu* (1920) 44 Bom. 452, 57 I.C. 472; *Husseinali* v. *Dinbai* (1923) 25 B.L.R. 252, 86 I.C. 240, ('24) A.B. 135; *Sabava* v. *Yamanappa* (1933) 35 B.L.R. 345, 149 I.C. 464, ('33) A.B. 209.

(*l*) *Dhiraj* v. *Bikramjit* (1881) 3 All. 787; *Mankuar* v. *Jasoda* (1875) 1 All. 478; *Mt. Balo* v. *Mt. Parbati* (1940) A.A. 385, (1940) All. 371, 190 I.C. 578; *Godfrey* v. *Parbati* (1938) 17 Pat. 308.

(*m*) *Protina* v. *Dookhia* (1872) 18 W. R. 450; *Gogun* v. *Janokee* (1873) 20 W.R. 235.

(*n*) Section 23, Indian Contract Act, Illustration (b).

(*o*) *Dwijendra Nath* v. *Gopiram* (1926) 53 Cal. 51, 89 I.C. 200, ('26) A.C. 59.

(*p*) *Abdul Rahaman* v. *Ghulam Mahommad* (1927) 7 Lah. 463, 95 I.C. 673, ('27) A.L. 13.

(*q*) *Shiam Lal* v. *Chhaki* (1900) 22 All. 220[illegible]; *Sheo Narain* v. *Mata Prasad* (1904) 27 All. 73 overruled by *Bhagwan Dei* v. *Murari Lal* (1917) 39 All. 51, 36 I.C. 259 F.B.; *Kamala Devi* v. *Gur Dyal* (1917) 39 All. 58, 36 I.C. 319.

(*r*) *Pt. Harikishan* v. *Ratan Singh* (1934) 151 I.C. 562, ('34) A.A. 973.

(*s*) *Dholidas* v. *Fulchand* (1898) 22 Bom. 658; *Dulari* v. *Vallabhdas* (1889) 13 Bom. 126; *Venkata* v. *Lakshmi* (1909) 32 Mad. 185, 3 I.C. 554; *Baldeo* v. *Jumna* (1901) 23 All. 495. But see *Bakshi Das* v. *Nadu Das* (1905) 1 Cal. L. J. 261; *Jogeshwar* v. *Punch Kauri* (1870) 14 W. R. 154; *Ranee Lallun Monee* v. *Nobin Mohan* (1875) 25 W.R. 32.

(*t*) *Janson* v. *Driefontein Consolidated Mines Ld.* [1902] A.C. [illegible], 491, per Lord Halsbury.

(*u*) *Janson* v. *Driefontein Consolidated Mines Ld.* (1902) A.C. 484, 500, per Lord Davey.

S. 6 (h), (i)

Minor as transferee.—A minor is in English law disqualified to be a transferee of a legal estate in land but not of an equitable interest in land or other property (*v*), but in India although a minor's contract is void (*w*), yet a minor is not disqualified to be a transferee (*x*), and a minor may be a purchaser (*y*) or a mortgagee (*z*). But neither the guardian of a minor nor his manager is competent to bind the minor or his estate by a *contract* for the purchase of immoveable property (*a*) but a lease to a minor is void, as a lease imports a covenant by the minor to pay rent and other reciprocal obligations (*b*). This was so decided before the Amending Act 20 of 1929 and the present section 107 makes it clear that a lease to a minor must be void because it must be executed both by the lessor and the lessee.

Executive instructions requiring an official certificate of approval to a transfer do not render a person, who does not hold such certificate, legally disqualified to be a transferee (*c*). A Buddhist monk is not disqualified to be a transferee (*d*).

(31) Clause (i)—Untransferable right of occupancy.—This clause was added by the Amending Act 3 of 1885, and is identical with the proviso to sec. 108 (j) exempting certain holdings from the general rule that leaseholds are transferable. In this section it is also an exception to the general rule that property is transferable.

Some occupancy rights are inalienable either by custom or by local laws such as the North-Western Provinces Rent Act, 1878, or the Agra Tenancy Act, 1901 (*e*). In *Motichand* v. *Ikram Ullah* (*f*) the Privy Council said that the policy of the Tenancy Act, was to preserve proprietary rights from being transferred otherwise than by gift or by exchange between co-sharers and that the Act was not to be defeated by ingenious devices or arrangements such as an arrangement to relinquish. Under that Act and under the Oudh Rent Act, 1886, a proprietor, whose proprietary rights are transferred to an outsider, is entitled to retain possession of his Sir or home farm lands at a reduced statutory rent as an exproprietary tenant. In the undernoted case (*g*) a proprietor was held to be entitled to this exproprietary tenancy although the rents of the Sir lands had been assigned for payment of a maintenance allowance, and although the effect of the exproprietary tenancy was to reduce the amount of that allowance. The rents paid by the cultivators was received by the expropriietary tenant and the person entitled to the maintenance allowance received only the reduced statutory rent from the expropriietary tenant. A mortgage of an occupancy holding is void under sec. 20 of the Agra Tenancy Act and the mortgagee is not entitled even to sue for a money decree on the basis of a personal covenant in the mortgage (*h*).

(*v*) Section 19, Law of Property Act, 1925.

(*w*) [illegible] *Bibi* v. *Dharmodas Ghose* (1903) [illegible] 539, 30 I.A. 114.

(*x*) [illegible] *Kunwar* v. *Madan Gopal* (1916) [illegible] All. 62, 31 I.C. 792; *Raghava* v. *Srinivasa* (1917) 40 Mad. 308, 36 I.C. 931 F.B. overruling *Novakotti* v. *Logalinga* [illegible] Mad. 512, 4 I.C. 383.

(*y*) [illegible] v. *Gauri Shanker* (1911) [illegible] All. 657, [illegible] I.C. 30; *Narain Das* v. *Mt. Dhania* (19[illegible]) 38 All. [illegible], [illegible] I.C. 23; *Munni Kunwar* v. *Madan Gopal*, *supra*; *Munia* v. *Perumal* (1915) 37 Mad. 390, 26 I.C. 1[illegible], *Subba Reddy* v. *Gurava Reddy* (1930) 120 I.C. 77, ('30) A. M. 425.

(*z*) *Raghava Chariar* v. *Srinivasa* (1917) 40 Mad. 308, 36 I.C. 931; *Madhab Koeri* v. *Baikuntha* (1919) 4 Pat. L. J. 682, 52 I.C. 338; *Thakar Das* v. *Mst. Pulti* (1924) 5 Lah. 317, 82 I. C. [illegible], ('24) A. L. 611; [illegible] *Ahsan* v. *Zubaida Khatun* (1929) 27 A[illegible] J. 1114, 121 I.C. 398, ('29) A.A. 604.

(*a*) *Mir Sarwarjan* v. *Fakhruddin Mahomed* (1911) 39 I.A. 1, 39 Cal. 232, 13 I.C. 331.

(*b*) *Pramila Bala Dasi* v. *Jogeshar* (1918) 3 Pat. L. J. 518, 46 I. C. 670.

(*c*) *Maung Ye* v. *M. A. S. Firm* (1928) 6 Rang. 423, 111 I.C. 105, ('28) A. R. 136.

(*d*) *U. Pyinnya* v. *Maung Law* (1929) 7 Rang. 677, 121 I.C. 705, ('29) A. R. 354 F. B. overruling *U. Tala* v. *M. Ma Gwye* (1927) 5 Rang. 626, 106 I.C. 201, ('28) A.R. 3.

(*e*) *Banmali* v. *Bisheshari* (1907) 29 All. 129; *Kedar Nath* v. *Naipal* (1912) 34 All. 155, 12 I. C. 922 (mandadari tenure).

(*f*) (1916) 39 All. 173, 44 I.A. 54, 39 I. C. 454.

(*g*) *Akbar Husain* v. *Mt. Husain Jahan Begum* (1935) 155 I.C. 40, ('35) A.O. 309.

(*h*) *Har Prasad* v. *Sheo Gobind* (1922) 44 All. 486, 67 I.C. 793, ('22) A.A. 134; *Mukund Lal* v. *Sunita* (1931) 132 I. C. 422, ('31) A.A. 461; *Mohammad Muzaffar* v. *Madad Ali* (1931) 132 I.C. 548, ('31) A.O. 309.

Under the law as it stood before the Transfer of Property Act tenancies whether of homestead lands or of agricultural lands in Bengal were not transferable in the absence of a custom to the contrary, or of an express contract to that effect (*i*). Section 11 of the Bengal Tenancy Act (Bengal Act 8 of 1885) enacts that every permanent tenure is (subject to the provisions of the Act) capable of being transferred. Tenures created after the Transfer of Property Act and before the passing of the Bengal Tenancy Act are transferable (*j*). Non-permanent tenures created before the passing of the Transfer of Property Act are not transferable (*k*). By sec. 26B of the Bengal Tenancy Act as amended by Bengal Act 4 of 1928 the holding of an occupancy ryot in Bengal is, subject to the provisions of the Act, capable of being transferred like other immoveable property. The landlord is entitled to evict as a trespasser a mortgagee of a holding that is not transferable, if the tenant has abandoned his holding (*l*). Under sec. 87 of the Bengal Tenancy Act a landlord is entitled to re-enter when a ryot abandons his holding. If a tenant of a non-transferable holding executes a usufructuary mortgage of his holding and leaves the village, the holding is abandoned and the landlord is entitled to treat the mortgagee as a trespasser (*l*). If a co-sharer landlord purchases a non-transferable holding and takes possession the transaction is an abandonment of the holding and the purchasing landlord is a trespasser as to the shares of the other landlords (*m*). This is also the case when the purchase is made by a stranger who afterwards acquires a share in the landlord right (*n*). A tenant with a right of occupancy under sec. 36 of the Oudh Rent Act, 1886, or a statutory tenant under sec. 5 of the said Act has a non-transferable right of occupancy which he can relinquish by the procedure of sec. 50 of the Act. (*o*)

Persons competent to transfer.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Competent to transfer.—Under sec. 6 (h) (3) any person is competent to be a transferee unless legally disqualified. This section deals with competency to be a transferor. The transfer must be—

(1) competent to contract, and

(2) have title to the property, or authority to transfer it if not his own.

(*i*) *Hanuman Prasad* v. *Deo Charan* (1908) 7 Cal. L. J. 309; *Ananda Mohan Sah* v. *Gobinda Chandra Ray* (1916) 20 Cal. W. N. 322, 38 I.C. 565; *Sulin Mohan Banerjee* v. *Rajkrishna Ghosh* (1921) 25 Cal. W.N. 420, 60 I.C. 826, ('21) A.C. 582 *Sarada Kanta* v. *Nabin Chandra* (1927) 54 Cal. 333, 97 I.C. 817, ('27) A.C. 39 dissenting from *Beni Madhab* v. *Jai Krishna* (1870) 12 W.R. 495, 7 Beng. L. R. 152; *Safar Ali* v. *Abdul Rashid* (1924) 39 Cal. L.J. 585, 84 I.C. 28, ('24) A.C. 1012; *Madhu Sudan* v. *Kamini* (1905) 32 Cal. 1023; *Nabu Mondal* v. *Chalim Mullik* (1898) 25 Cal. 896; *Sm. Kamal Mayee Dasi* v. *Nibaran Chandra Pramanik* (1932) 36 Cal. W.N. 149, 133 I.C. 72, ('32) A.C. 431.

(*j*) *Bhagban Das* v. *Biswaswar* (1927) 44 Cal. L.J. 434, 100 I.C. 802, ('27) A.C. [illegible].

(*k*) *Hiramoti Dassya* v. *Annoda Prasad* ([illegible]) 7 Cal. L.J. 553; *Kailash Chandra Pal* v. *Hari Mohan Das* (1909) 13 Cal. W.N. 541, 1 I.C. 362.

(*l*) *Rasik Lal* v. *Bidumukhi* ([illegible]) [illegible] Cal. 1094.

(*m*) *Bhairavendra Narain* v. *Rajendra Narain Roy* (1924) 50 Cal. 457, 74 I.C. 193, ('24) A.C. 45.

(*n*) *Sarat Chandra Saha* v. *Bepin Behary Chakerbutty* (1933) 37 Cal. W.N. 256, 149 I.C. 1014, ('33) A.C. 687.

(*o*) *Amarnath Singh* v. *Har Prasad Singh* (1932) 7 Luck. 425, 135 I.C. 335, ('32) [illegible]; *Jang Bahadur* v. *Rai Raja* ([illegible]) [illegible] 235.

S. 7

Competent to contract.—This is the same condition as is enacted by section 7 of the Trusts Act for the creation of a trust. Section 11 of the Contract Act defines capacity to contract as follows :—

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

The power to transfer must depend upon the power to contract, for without an antecedent contract to give and take there can be no transfer at all.

Minor as transferor.—The transferor must have attained the age of majority according to the law to which he is subject. The Privy Council have held that a contract by a minor is void (*p*). A transfer by a minor, therefore, is also void (*q*). Before the decision of the Privy Council it was generally assumed that a minor's contract was voidable and could be ratified. These decisions are now obsolete, and as the contract is void there can be no question of ratification. There are many conflicting decisions as to whether a minor can be estopped by a false representation that he is of age. Before the Privy Council decision that a minor is incapable of contracting Ameer Ali, J., said that the rule of estoppel was not applicable, as it would have the effect of enlarging the minor's power to contract (*r*). This is supported by a dictum of the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh* (*s*), that the doctrine of estoppel is only applicable to persons who are *sui juris* and by the English cases of *Leslie Ltd.* v. *Sheill* (*t*) and *Levine* v. *Brougham* (*u*). A full Bench of the Lahore High Court has after a review of the case law come to the same conclusion (*v*). In *Sadiq Ali Khan* v. *Jai Kishore* (*w*) the Privy Council observed that a deed executed by a minor was a nullity and incapable of founding a plea of estoppel and following this decision a Full Bench of the Bombay High Court has overruled its previous decisions to the contrary (*x*). The principle underlying the decision of the Privy Council is that there can be no estoppel against a statute.

Although a minor is not competent to be a transferor, yet a transfer to a minor is valid. See note "Disqualified to be a transferee" under sec. 6 (h).

Lunatic as transferor.—Under sec. 12 of the Contract Act a person is of sound mind for the purpose of making a contract if he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A contract made by a lunatic is void under sec. 11 of the Contract Act, and so also a transfer by him of his property (*y*). A lunatic is competent to contract during a lucid interval and a transfer by a lunatic during a lucid interval would be valid here as in England (*z*). But a person who has been adjudged a lunatic would be incapable of making a transfer even during a lucid interval (*a*). As to transfers of the property of a person who has been adjudged a lunatic, see the Indian Lunacy Act 4 of 1912, ss. 47-51, and s. 53.

Disqualified to contract.—A statutory disqualification to contract imports as in the case of a minor inability to transfer. Such a disqualification ensues when the

---

(*p*) *Mohori Bibi* v. *Dharmodas Ghose* (1903) 30 Cal. 539, 30 I.A. 114.

(*q*) *Raja Balwant Singh* v. *Rao Maharaj Singh* (1912) 34 All. 296, 39 I.A. 109, 14 I.C. 629 (a mortgage); *Govinda Kurup* v. *Chowakkram* (1931) 59 Mad. L.J. 941, 129 I.C. 449, ('31) A.M. 147 (a lease); *Indian Cotton Co.* v. *Raghunath* (1931) 33 Bom. L.R. 111, 130 I.C. 598, ('31) A.B. 178 (a lease).

(*r*) *Brohmo* v. *Dharmo* (1898) 26 Cal. 381.

(*s*) (1916) 43 I. A. 256, 19 Bom. L.R. 157, 39 I.C. 401, ('16) A.PC. 242.

(*t*) (1914) 3 K. B. 607.

(*u*) (1909) 25 T. L. R. 265, 53 Sol. J. 243.

(*v*) *Khan Gul* v. *Lakha Singh* (1928) 9 Lah. 701, 111 I.C. 175, ('28) A.L. 609 F.B.

(*w*) (1928) 30 Bom. L.R. 1346, 109 I.C. 387, ('28) A.PC. 152; *Balangowda* v. *Bhimangowda* (1929) 31 Bom. L.R. 340, 118 I.C. 698, ('29) A.B. 201.

(*x*) *Gadigeppa* v. *Balangowda* (1931) 55 Bom. 741, 135 I.C. 161, ('31) A.B. 561 F.B.

(*y*) *Amina Bibi* v. *Saiyid Yusuf* (1922) 44 All. 748, 70 I.C. 968, ('22) A.A. 449 [lease].

(*z*) *Selby* v. *Jackson* (1843) 6 Beav. 192.

(*a*) *In re Walker* (1905) 1 Ch. 160; *In re Marshall, Marshall* v. *Whately* (1920) 1 Ch. 284.

owner's property is under management of the Court of Wards (b), or of an officer appointed under an Encumbered Estates Act (c). A judgment debtor whose property is being sold in execution by the Collector is also incompetent to alienate (d).

Authority to dispose of property.—If the transferor has not title to the property, he must have authority to transfer it (e). As instances of authority to transfer the property of another the following may be cited—an agent acting under a power of attorney; the donee of a power of appointment; the guardian of a minor duly authorized by the Court in that behalf; the manager of a Hindu family in case of necessity or for the benefit of the family; the committee or manager of a lunatic (see note above, "Lunatic as transferor"); a receiver when empowered by the Court; an executor or administrator having authority to dispose of the property of the deceased regulated by sec. 307 of the Indian Succession Act, 1925. In all these cases the authority is defined and limited by personal and statutory laws which are outside the scope of this Act. The extent of the power of transfer depends upon the interest of the transferor or the limitations upon his authority. But whether the power of transfer is limited or absolute, all transfers are subject to the general rules enacted in this chapter.

Operation of transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof (*pp.* 79-83).

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth (*pp.* 83-85);

and, where the property is machinery attached to the earth, the moveable parts thereof (*p.* 85)

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith (*p.* 85)

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer (*pp.* 86-88);

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect (*p.* 88).

(b) *Jiwan Lal* v. *Gokul Das* (1904) 1[illegible] C.P.L.R. 13.

(c) *Radha Bai* v. *Kamod Singh* (1908) 30 All. 38; *Gregson* v. *Udoy Aditya Deb* (1889) 17 Cal. 223 P.C.

(d) Civil Procedure Code, 1882, s. [illegible]; Civil Procedure Code, 1908, Sch. [illegible], para 11; *Gaurishankar* v. *Chinnumiya* (1918) 46 Cal. 183, 48 I.C. 312, 45 I.A. 219 overruling *Magniram* v. *Bakubai* (1912) 36 Bom. 510, 16 I.C 570; *Surja Prasad* v. *Ramsaran* (1931) 29 All. L.J. 496, 132 I.C. 569, ('31) A.A. [illegible].

(e) *Chitu* v. *Charan Singh* (1923) [illegible] 7[illegible], ('23) A.A. 963.

S. 8 **(1) Transfer passes all interest of transferor.**—The first clause corresponds closely with section 63 of the English Conveyancing and Law of Property Act, 1881 (*f*), on which it was no doubt modelled. The object of that section was to simplify the forms of English conveyances. Before 1882 it was the practice in England in conveying land to insert "general words" and "an all estate clause" giving minute details of the property conveyed. The section in the Conveyancing Act implied these and rendered their express statement unnecessary. But even after 1882 it was necessary in England in a conveyance by deed to use words of limitation showing the extent of the estate conveyed. Thus to pass a legal estate in fee simple it was necessary to convey it "to *A* and his heirs," or to "*A* in fee simple;" for a conveyance "to *A*" would give *A* only a *life estate*, and the same rule applied to equitable interests, except in the case of an executory trust, *i.e.*, where the transferor merely indicates the interests which he intends to be created by appropriate words (*g*). This complication has been removed by sec. 60 (1) of the Law of Porperty Act, 1925, which enacts that "a conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance." A similar provision had long ago been made as to wills in England by s. 25 of the Wills Act, 1837, the drafting of which section may well have been followed by the draftsman of the Indian Act as well as of the English Act of 1925. Conveyancing in India has never been obscured by the technicalities of English law, and the rule that a conveyance is presumed to be a transfer of all the interest that the transferor is capable of passing, though not fully established in England till 1926, was recognized in India even before the passing of the Transfer of Property Act. In a case to which the act was not applicable, the Privy Council said that the rule before the Act was that words of grant were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument in order to gather the intention (*h*). Again in *Syed Ashgar* v. *Syed Mahomed* (*i*) Lord Lindley said with reference to the construction of a conveyance: "The deed of 1883 contains no words of exception or reservation, and is ample in point of language to pass all Syed Haidar Reza's interest in the Zemindary, including the land on which the bazar was situate. His interest in the houses on that land and in the profit rents derived from them would pass by the deed in the absence of words shewing an intention to retain them."

The section is a rule of construction which avoids speculation as to the particular interest which was in the mind of the transferor. If he holds under two titles, *e.g.*, by purchase and by inheritance or as part owner and as executor, it will be presumed that both interests have passed; see note 2 below. If the grantor has used unqualified words of conveyance he cannot afterwards claim to have reserved any rights in the property (*j*). A zamindar mortgaged a taluk in some villages of which he had a sarabarakari interest subordinate to his zemindari right. The deed made no reference to the subordinate interest and in the absence of an express reservation the mortgage was held to include the sarabarakari interest also (*k*). This section is not intended to lay down any rule as to what words are necessary to affect a transfer of any particular kind of property. What property is actually conveyed by a particular kind of deed depends on its own terms (*l*).

(*f*) 44 & 45 Vict. c. 41, s. 63 now replaced by s. 63 of the Law of Property Act, 1925.

(*g*) *In re Irwin, Irwin* v. *Parkes* (1904) 2 Ch. 752, 764; *In re Bostocks Settlement* (1921) 2 Ch. 469.

(*h*) *Kalidas Mullick* v. *Kanhayalal* (1884) 11 Cal. 121, 131, 11 I.A. 218, 228.

(*i*) (1903) 30 I.A. 71, 75, 30 Cal. 556; *Leon Sun Kyu* v. *Maung Gyi* (1933) 142 I.C. 12, ('33) A.R. 24; *Sheoraj* v. *Ganga Prasad Rai* (1941) A.O. 395.

(*j*) *Tarachand* v. *Lakshman* (1876) 1 Bom. 91, 94.

(*k*) *Raja Gour Chandra* v. *Raja Mukunda* (1904) 9 Cal. W.N. 710.

(*l*) *Jyoti Prasad Singh* v. *Samuel Henry Seddon* (1940) 19 Pat. 432, 192 I.C. 87, (1940) A.P. 516; *Bisheshwar Singh* v. *Ashadhar Das* (1941) A.O. 507. But see *Umrao Singh* v. *Kachian Singh* (1929) A.A. 415.

(2) Where transferor is both part owner and executor.—An executor has the right to sell the property of the testator in due course of administration. If an executor is also one of the beneficiaries, and he sells the property of the testator together with "all the estate, right, title and interest" of the vendor, the deed conveys the whole title vested in the executor, and not merely his beneficial interest, though he does not purport to convey in his capacity as executor (*m*).

(3) Gift to Hindu widow.—The Hindu law is the same, for under that law an absolute estate may be conveyed without the words of limitation formerly used in English law to convey an estate of inheritance; and whether the gift passes an absolute or a limited estate, depends upon the terms of the grant (*n*). But if the donee is a female relation who takes a limited estate in property inherited, the Privy Council in *Mohamed Shumsool* v. *Shewakaram* (*o*), held that the Court is entitled to assume, where the property given is immoveable, that the donor intended her to take a limited estate only, and in such cases it has been said that the principle of sec. 8 is not of much practical utility (*p*). But of course an absolute estate may be conferred upon a woman by express words indicating full proprietary rights (*q*). The use of the word 'malik' imports an absolute heritable and alienable estate (*r*), unless the context indicates a different meaning (*s*). It was supposed at one time by some of the Courts in India that, under the Hindu law, in case of immoveable property given or devised by a husband to his wife, the wife had no power to alienate, unless the power of alienation was conferred upon her in express terms. But it has been held by the decisions of the Privy Council that the proposition was not sound, and that if words of sufficient amplitude were used conferring the absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended (*t*).

Sale to Hindu wife.—In the case of a transfer for consideration to a wife by a Hindu the Privy Council applied sec. 8 even before the amendment of sec. 2 and held that the donee took an absolute estate (*u*).

(4) Court sales.—The section does not apply to Court sales, for such sales effect a transfer by operation of law (*v*) [s. 2(d)]. The principle of the section was, however, applied in a Madras case (*w*) where a debt for unpaid purchase money on a sale of land was attached and sold and the auction purchaser was held entitled to the charge which the vendor had under sec. 55 (4) (b) on the property in the hands of the buyer. The

(*m*) *Bijroj Napani* v. *Parasundari* (1915) 42 Cal. 56, 41 I.A. 189, 24 I.C. 296; *Gangabai* v. *Sonabai* (1916) 40 Bom. 69, 28 I.C. 544; *Mithibai* v. *Meherbai* (1922) 46 Bom. 162, 64 I.C. 397, ('22) A.B. 179 (a will); *Fazal Ahmad* v. *Har Prasad* (1929) 27 All. L. J. 620, 116 I.C. 1, ('29) A.A. 465.

(*n*) *Ram Narain* v. *Peary* (1883) 9 Cal. 830.

(*o*) (1874) 2 I.A. 7, 14 Beng. L.R. 226.

(*p*) *Mt. Sheoraji* v. *Ram Sawari Devi* (1934) All. L.J. 1018, 152 I.C. 387, ('35) A.A. 43.

(*q*) *Hitendra Singh* v. *Maharaja of Darbhanga* (1928) 7 Pat. 500, 55 I.A. 197, 109 I.C. 858, ('28) A.PC. 112 (to hold the property from generation to generation); *Wazir Devi* v. *Ram Chand* (1920) 1 Lah. 415, 58 I.C. 988 (kulikhtiyar wa milkiat); *Thakur Jagmohan* v. *Mat. Sheoraj* (1928) 3 Luck 19, 106 I.C. 593, ('28) A.O. 49 F.B. (owner with power of transfer).

(*r*) *Lalit Mohan* v. *Chukkun Lal* (1897) 24 Cal. 834, 24 I.A. 76, 88; *Surajmani* v. *Rabina* (1908) 30 All. 84, 35 I.A. 17; *Naulaki* v. *Jai Kishan* (1918) 40 All. 575, 46 I.C. 905; *Bhaidas* v. *Bai Gulab* (1922) 46 Bom. 153, 49 I.A. 1, 65 I.C. 974, ('22) A.PC. 193; *Jagmohan* v. *Sri Nath* (1930) 57 I.A. 291, 128 I.C. 270, ('30) A.PC. 258; *Saraju Bala* v. *Jyotirmoyee* (1931) 35 Cal. W.N. 903, 58 I.A. 270, 134 I.C. 648, ('31) A.PC. 179.

(*s*) *Mahomed Shamsool* v. *Shewukram* (1875) 14 Beng. L.R. 226, 2 I.A. 7; *Motilal* v. *Advocate General of Bombay* (1911) 35 Bom. 279, 11 I.C. 547; *Mithibai* v. *Meherbai* (1922) 46 Bom. 162, 64 I.C. 397, ('22) A.B. 179; *Ashurfi Singh* v. *Bissewar* (1922) 1 Pat. 295, 65 I. C. 977, ('22) A. P. 362.

(*t*) *Shalig Ram* v. *Charanjit* (1930) 57 I.A. 282, 11 Lah. 645, 128 I.C. 265, ('30) A.PC. 239; *Jagmohan Singh* v. *Srinath* (1930) 57 I.A. 291, 128 I.C. 270, ('30) A.PC. 258.

(*u*) *Hitendra Singh* v. *Maharaja of Darbhanga*, *supra*.

(*v*) See *Penumatsa Subbaraju* v. *Vegesena Seetharamaraju* (1916) 39 Mad. 268, 28 I.C. 232; *Nandlal* v. *Sunder Lal* (1944) A.A. 17.

(*w*) *Sambasiva* v. *Venkatarama* (1926) 51 Mad. L. J. 95, 98, 95 I. C. 447, ('26) A.M. 903.

S. 8

Court, after observing that the present section did not apply to Court sales, said: "The effect of applying sec. 8 is to strengthen the sale certificate by transferring the lien along with it." It is difficult to follow this line of reasoning, and these dicta have been treated as obiter in a later Madras case (*x*) where Madhavan Nair, J., said that sec. 8 could not override the provisions of the Registration Act. It is submitted that sec. 8 cannot apply to Court sales. What is sold at a Court sale is the right, title and interest of the judgment debtor and the extent of that interest is a mixed question of fact and law to be decided according to the circumstances of each particular case and depends upon what the Court intended to sell and the purchaser to buy (*y*). Thus a Court sale of a judgment debtor's interest in property which has been leased passes rents accrued due at the time of the sale, not because rents are incident to the land but because the rents were part of the judgment debtor's interest (*z*). Again an execution sale of a zemindari estate will pass buildings in the zemindari area which are appurtenant to the estate (*a*) and were therefore included in the sale but not indigo factories which though in the estate are not appurtenant thereto (*b*).

Revenue sales under the Bengal Land Revenue Sales Act, Bengal Act 11 of 1859 stand on a different footing, for the interest of the defaulting proprietor in the land is forfeited or determined and what is sold is the interest of the Crown subject to the payment of assessment (*c*). Accordingly if he has erected a building on the land, the right to the building would not pass, and he would be entitled to remove the materials, unless the purchaser elected to pay compensation for the building (*d*). This is in accordance with the general rule laid down in the case of *Thakoor Chunder Paramanic* v. *Ram Dhone Bhattacharjee* (*e*). *See* note (10) under sec. 3, "English and Indian law of fixtures."

(5) **Different intention.**—The general presumption is in favour of a transfer of all the interest of the transferor. *A* mortgages a mango tree standing on his land to *B*. *A* then sells the land to *C*, and the sale deed makes no mention of the mortgage. It cannot be inferred that *A*'s interest in the tree did not pass with the sale to *C*: *Pandurang* v. *Bhimrav* (1898) 22 Bom. 610.

The presumption of a transfer of all the interest can be rebutted by express words or by necessary implication. The words "lease" and "mortgage" of themselves express an intention of transferring an interest less than the transferor is capable of passing. The words "mokarari lease with all rights" express the intention to pass all rights which can be passed by way of lease but short of an absolute title and the lessee would take permanent lease, but not with subsoil rights in the minerals for the essential characteristic of a lease is that the corpus does not disappear and minerals must be expressly denominated so as thus to permit of the idea of partial consumption of the subject leased (*f*).

Again the circumstances of the case may be such as to disclose an intention to restrict the transfer to an interest under one title only. Thus in *Har Prasad* v. *Fazal Ahmad* (*g*)

(*x*) *Ranganatha* v. *Rajagopala* (1933) 142 I.C. 730, ('33) A.M. 181 affirmed in *Rajagopala* v. *Ranganatha* (1934) 152 I.C. 375, ('34) A.M. 615.

(*y*) *Abdul Aziz* v. *Appayasami* (1904) 27 Mad. 131, 31 I.A. 1.

(*z*) *Ma Hawa Bi* v. *Sein Ko* (1927) 5 Rang. 803, 109 I.C. 151, ('28) A.R. 67.

(*a*) *Abu Hasan* v. *Ramzan Ali* (1882) 4 All. 381; *Deokinandan Prosad* v. *Aghorenath Banerji* (1945) A.P. 400.

(*b*) *Durga Singh* v. *Bisheshar Dayal* (1902) 24 All. 218.

(*c*) *Maharaja Surjiya Kanta Acharjya* v. *Sarat Chandra Roy* (1914) 18 Cal. W. N. 1281, 25 I.C. 309 P.C.

(*d*) *Jatindra Nath Roy Chowdhury* v. *Narayan Das Khettry* (1925) 52 Cal. 862, 90 I. C. 901, ('26) A.C. 97.

(*e*) (1868) 6 W.R. 228, Beng. L.R. Sup. Vol. 595.

(*f*) *Giridhari Singh* v. *Megh Lal Pandey* (1918 45 Cal. 87, 44 I.A. 246, 42 I.C. 651.

(*g*) (1933) 60 I.A. 116, 55 All. 83, 37 C.W.N. 490, 64 M.L.J. 514, 1933 A.L.J. 381, 35 B.L.R. 496, 142 I.C. 217, ('33) A.PC. 83.

a Mahomedan sold two villages to his mother and left a substantial part of the purchase money with her to be spent in charity. On his death the mother spent some money in charity and then settled the villages in wakf subject to a charge for the amount actually paid plus the amount spent in charity. The sale was set aside as being merely a cloak for a gift in fraud of the heirs. The wakf fell with the sale, but it was contended that as the mother was entitled to a third share of the villages as heir to her son, the wakf was operative as to that third share. But the Privy Council held that the reservation of a charge for what she had paid and spent, showed that the mother had no intention of settling anything of her own or anything except what she thought had been entrusted to her by her son.

The different intention may also be to transfer an interest greater than the transferor possesses at the time, and if the property is sold free from encumbrances the vendor is bound to discharge encumbrances then existing on the property. An intention to reserve a right may be implied not only from the terms of the deed but also from the object of the grant. Thus a gift of certain talukas "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily and may provide for your own support by having the property under your authority and control" was held to confer a life-estate, the Privy Council observing that "the indefinite words of the gift must be limited by the purpose of the gift" (*h*). In a khorpash gift which is only a grant for life, an intention to reserve mineral rights is implied (*i*).

(6) Legal incidents.—An incident is defined in Wharton's Law Lexicon as "a thing necessarily depending upon, appertaining to, or following another that is more worthy—as rent is incident to a reversion." The provisions as to legal incidents in the second, third, and fourth paragraphs of this section correspond with sec. 6 of the Conveyancing and Law Of Property Act, 1881, (*j*) where a more detailed list is given. The list in this section is not exhaustive as is shown by the use of the word "includes."

The following are legal incidents which pass on the transfer of the property to which they relate: the benefit of a covenant which runs with the land under sec. 55 (2), or sec. 65, or sec. 108 (A) (c); a right under sec. 55 (3) to possession of title deeds (*k*); a right of pre-emption (*l*).

(7) Easements annexed thereto.—An easement is defined in sec. 4 of the Easements Act, 1882—see note 13, "Easements," under sec. 6 (c). Under sec. 19 of the Easements Act an easement existing at the date of the transfer passes with the dominant heritage to the transferee. A purchaser of a house acquires a right of way which the vendor has (*m*). The illustration to sec. 19 of the Easements Act is that if *A* owns land to which a right of way is annexed and leases it to *B* for 20 years, the right of way would vest in *B* and his legal representatives for so long as the lease continues. A purchaser of land irrigated by the water of a tank is entitled to use the water of the tank for irrigation (*n*). The phrase "easements annexed thereto" refers to those easements which at and prior to the transfer were existing easements. It does not refer to an easement which first came into existence as a consequence of transfer.

The words 'locks, keys, bars' refer to fittings and permanent fixtures. The words 'other things provided' do not include a right of access by a staircase, when the ownership

(*h*) *Kali Das Mullick* v. *Kanhya Lal* (1884) 11 Cal. 121, 11 I.A. 218, 228.

(*i*) *Tituram* v. *Cohen* (1906) 33 Cal. 203, 32 I.A. 185.

(*j*) Now replaced by s. 62, Law of Property Act, 1925.

(*k*) *Sri Bawani* v. *Devrao* (1887) 11 Bom. 485.

(*l*) *Bhajan* v. *Mushtaq Ahmed* (1883) 5 All. 324.

(*m*) *Nubeen Chunder* v. *Bhoobun* (1871) 15 W. R. 526.

(*n*) *Venkata* v. *Secretary of State* (1902) 12 Mad. L.J. 482.

S. 8 of the staircase itself is not claimed and the right of way is not an easement of necessity (*o*).

Apart from legal easements other rights called quasi easements are created on the severance of property. As to these, sec. 13 of the Easements Act, enacts that on partition the grant of an easement of necessity or of an apparent continuous easement shall be implied. The word "annexed" is used in the same sense as the word "appurtenant" in English law (*p*), and indicates that the right is the right of the owner for the time being. The right to a ferry franchise is not necessarily annexed to the land (*q*).

(8) Rents and profits.—Rents and Profits accruing *after* the transfer are benefits to arise out of the land and are therefore within the definition of immoveable property. The rents and profits of property mortgaged by an English mortgage form part of the mortgagee's security (*r*). A buyer's right to rents and profits therefore accrues on the date of the transfer. This is made clear by sec. 55 (4) (a) under which the seller is entitled to the rents and profits of the property until ownership passes to the buyer, and also sec. 55 (6) (a) which declares the buyer entitled to rents and profits when the ownership of the property passes to him. At a Court sale the property vests at the date of sale and so the auction purchaser is entitled to crops grown between the date of sale and the date of confirmation of the sale (*s*). See in this connection sec. 36 as to apportionment of rent. If the vendor retains possession after the ownership has passed to the buyer, he may be charged for use and occupation. Rents and profits accruing due *before* the transfer are not legal incidents of the property transferred (*t*). Such arrears of rents are a debt or actionable claim and if they are to be transferred must be assigned separately (*u*).

Illustration.

A's house is let at a monthly rent. *A* sells his house to *B* on the 15th of June when the rent is in arrear from the 1st January. If no mention is made in the deed of rent, *B* is entitled to rent from the 15th June. If it is intended that *B* shall have the rents that are in arrears from 1st January to 15th June, the deed must contain an express assignment of the arrears of rent, and notice of the assignment must be given to the tenant under sec. 130. See also sec. 50.

(9) Attached to the earth.—This phrase is defined in sec. 3—see notes (9) and (10) under that section. What is attached to the earth is immoveable property within the definition of the term in the General Clauses Act. What is attached to the earth is part of the land and passes with it on transfer without express mention (*v*). In the case of a lease, the right to enjoy the trees and shrubs passes to the lessee (*w*). Trees on an occupancy holding, which is inalienable, are attached to the holding, and cannot be transferred by the occupancy holder (*x*). A house, being imbedded in the earth, is

(*o*) *Ahmad Ali* v. *Dhondba Dasrat* (1937) Nag. 204, 171 I.C. 496 (1937) A.N. 179.

(*p*) *Wutzler* v. *Sharpe* (1893) 15 All. 270, 288.

(*q*) *Nityahari* v. *Dunne* (1891) 18 Cal. 652; *Dhanpat* v. *Raja Pasput* (1931) 53 All. 764, 135 I.C. 545, ('31) A.A. 587.

(*r*) *Ma Joo Teen* v. *The Collector of Rangoon* (1934) 12 Rang. 437, 155 I.C. 776, ('34) A.R. 321.

(*s*) *Harihar* v. *Narayana* (1933) 145 I.C. 174, ('33) A.M. 482.

(*t*) *Bhogilal* v. *Jethalal* (1928) 30 Bom. L.R. 1588, 114 I.C. 202, ('29) A.B. 51; *Ganesh* v. *Shamnarain* (1879) 6 Cal. 213; *Muthu* v. *Natravarathi* (1921) 58 I.C. 383; *Chendrasekharalingam* v. *Naghabushanam* (1927) 53 Mad. L.J. 342, 104 I.C. 809, ('27) A. M. 817.

(*u*) *Sheogobind Singh* v. *Gouri Prasad* (1925) 4 Pat. 3, 83 I.C. 81, ('25) A.P. 310.

(*v*) *Faqueer Soonra* v. *Mst. Khuderson* (1870) 2 N.W.P. 251 (sale of house and compound includes trees standing therein); *Fitarat Husain* v. *Liaqat Ali* (1939) A.A. 291 (F.B.).

(*w*) *Badam* v. *Ganga* (1897) 29 All. 484.

(*x*) *Imdad Khatun* v. *Bhagirath* (1888) 10 All. 159; *Kausalia* v. *Gulab* (1899) 21 All. 297; *Janki* v. *Sheodhar* (1901) 23 All. 211; *Nafar Chandra* v. *Ram Lal* (1895) 22 Cal. 742.

immoveable property (*y*), and when the land is transferred buildings erected upon it pass by necessary implication (*z*). But an iron shed resting on the land by its own weight is not attached to the earth and is a mere chattel which does not pass on transfer of the land (*a*). All things which are annexed to the property mortgaged are part of the mortgagee's security, and the mortgage need not make mention of structures and fixtures (*b*). S. 8

(10) Minerals.—Minerals are imbedded in the earth and pass on sale of the land. Whether a lease or a grant of land on permanent tenure passes a right to subsoil minerals depends upon the terms of the grant (*c*). If the grantor is the Crown there is a presumption that minerals are reserved. A permanent lease by a Bengal zemindar does not imply a grant of mineral rights (*d*). In *Ali Quadar* v. *Jogendra* (*e*) Prinsep and Hill, J.J., held that a grant of a patni taluka transfers mineral rights. The Judicial Committee intimated in one case that this decision had not been overruled (*f*), and it has since been followed (*g*). But the point is now settled against the patnidar, for in *Bejoy Singh Dudhoria* v *Surendra Narayan Singh* (*h*) the Judicial Committee have held that even in the case of a patni tenure the onus is on the patnidar to prove the inclusion of subsoil rights in the grant. As between zemindar and jagirdar it is well settled that the zemindar must be regarded as the owner of the minerals (*i*).

Shells.—An agricultural tenant may dig up shells for the purpose of cultivating his land but has not the right to appropriate the shells to his own use (*j*).

(11) Machinery.—The section assumes that the machinery is attached to the earth and is therefore a fixture, and then enacts that the moveable parts of the machine although they are detachable pass with the land and the fixed machine. This is an illustration of the principle stated by *Lord Hardwicke* in *Lawton* v. *Lawton* (*k*) that "you shall not destroy the principal thing, by taking away the accessory to it." As to when machinery is considered to be a fixture, see notes (13) to (18) to sec. 3.

(12) House.—This clause merely repeats in regard to a house what has already been enacted in the first and second clauses as to property generally. If the property transferred is a house the easements annexed to it will also pass not only under this section but also under sec. 19 of the Easements Act. The transferee is also entitled to rents and profits accruing after the transfer. Locks, bars, keys, doors and windows have no separate existence from the house (*l*).

(*y*) *Nattu Miah* v. *Nand Rani* (1872) 8 Beng. L.R. 508; *Dinonath* v. *Adhor* (1899) 4 Cal. W.N. 470.

(*z*) *Asgar* v. *Mahomed Medhi Hossein* (1903) 30 Cal. 566, 30 I.A. 71; *Macleod* v. *Kissan* (1906) 30 Bom. 250; *Balram* v. *Ganga Singh* (1926) 93 I.C. 287, ('26) A.O. 358; *Srimati Krishna Kumari* v. *Bhaya Rajendra* (1927) 2 Luck. 43, 104 I. C. 155, ('27) A.O. 240 (case of a will).

(*a*) *Chatturbhuj* v. *Bennett* (1905) 29 Bom. 323.

(*b*) *Macleod* v. *Kissan, supra*; *Hari Pada* v. *Anath Nath* (1917) 22 Cal. W.N. 758, 44 I.C. 211.

(*c*) *Rowbotham* v. *Wilson* (1860) 8 H.L.C. 348, 360.

(*d*) *Giridhari Singh* v. *Megh Lal Pandey* (1918) 45 Cal. 87, 44 I.A. 246, 42 I.C. 651; *Sashi Bhusan* v. *Jyoti Prasad* (1917) 44 Cal. 585, 594, 44 I.A. 46, 40 I.C. 189; *Jagat Mohan* v. *Pratab Udai Nath* (1931) 10 Pat. 877, 134 I.C. 1073, ('31) A.PC. 302; *Hari Narayan* v. *Sriram* (1910) 37 I.A. 136, 37 Cal. 723, 6 I.C. 785 P.C.; *Titaram* v. *Cohen* (1906) 33 Cal. 203, 32 I. A. 185; *Gobinda Narayan* v. *Sham Lal* (1931) 58 Cal. 1187, 58 I.A. 125, 131 I.C. 753, ('31) A.PC. 89; *Nageshar Bux* v. Bengal Coal Co. (1931) 10 Pat. 407, 58 I.A. 29, 130 I.C. 315, ('31) A. PC. 186; *H. V. Low & Co., Ltd.* v. *Jyotiprasad Singh* (1931) 58 I.A. 292, 59 Cal. 699, 35 Cal. W. N. 1246, 54 Cal. L.J. 360, 33 Bom. L.R. 1544, 61 Mad. L.J. 699, 1931 All. L. J. 1112, 135 I.O. 632, ('31) A.PC. 299.

(*e*) (1912) 16 Cal. L.J. 7, 16 I.C. 441.

(*f*) *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj* (1925) 4 Pat. 244, 52 I.A. 109, 86 I.C. 289, ('25) A.PC. 42.

(*g*) *Rajeswar Prosad* v. *Anil Kumar Roy* (1928) 55 Cal. 85, 106 I.C. 117, ('27) A.C. 956.

(*h*) (1928) 56 Cal. 1, 55 I.A. 320, 111 I.C. 345, ('28) A.PC. 234; *Bhupendra* v. *Rajeshwar* (1931) 58 I.A. 228, 59 Cal. 80, 132 I.C. 610, ('31) A.PC. 162.

(*i*) *Bageshwari Charan* v. *Kumar Kamakya Narain Singh* (1931) 10 Pat. 296, 58 I.A. 9, 131 I.C. 825, ('31) A.PC. 30.

(*j*) *Chaladom* v. *Kakkath Kunhambu* (1902) 25 Mad. 669.

(*k*) (1743) 3 Atk. 13, 15.

(*l*) *Peru Bepari* v. *Romuo* (1884) 11 Cal. 164; *Queen Empress* v. *Sheik Ibrahim* (1890) 13 Mad. 518; *Purshottoma* v. *Municipal Council* (1891) 14 Mad. 467.

S. 8

(13) Debts.—The transfer of a debt or actionable claim raises a presumption that the security for the debt has been transferred. The assignment of the debt will, unless a different intention is expressed or implied, draw the securities after it according to the maxim *omne principale trahit ad se accessorium* (m). A promissory note is sometimes described as security for the debt, but the expression is inaccurate, for a promissory note if not itself the contract of loan, is a conditional payment of the debt. If a mortgagee holds a promissory note for a part of the debt, and retains it after transferring the mortgage, he will be restrained from suing on it pending a suit for redemption (n). But a bona fide endorsee for value of the note without notice of the mortgage will be entitled to recover on it (o). Where what is transferred is not the debt, but the property in the promissory note, the section does not apply (p).

The rule in this section is distinct from the doctrine of subrogation enacted in sec. 92 by which a co-debtor or a surety is subrogated to the creditor he has paid off. But the exception made in the parenthesis is similar to that in the last paragraph of sec. 92. For just as there is no subrogation when a mortgage is partially paid off, so there is no transfer of a security on the payment of a debt when the security covers other debts also.

Mortgage debts.—Before mortgage debts were excluded from the definition of actionable claims the assignment of the mortgage debt carried with it an assignment of the mortgage security (q). But since mortgage debts have been excluded from the definition by Act 2 of 1900 sec. 8 no longer applies, for the word "debt" in this section must be confined to such debts as fall within the general definition of actionable claims (r). A mortgage being immoveable property can only be transferred by registered instrument (s).

In *Perumal* v. *Perumal* (t) Wallis, C.J., said that although a debt secured by a written mortgage could not be assigned without a registered deed yet in the case of a promissory note secured by an equitable mortgage the endorsement of the note operates to carry the security with it. The authorities cited were *Cunniah* v. *Gopala Chettiar* (u) and *Natraja* v. *The South Indian Bank* (v). The authorities do not however support the conclusion. In the first case the note was endorsed merely for collection and in the second case the mortgage debt was attached and sold in execution. Although a mortgage debt is immoveable property under the Transfer of Property Act, yet it is treated in some cases as moveable property under the Code of Civil Procedure; see O. 21, rr. 45 and 54—so that if a mortgage debt is attached and sold the purchaser acquires not only the debt but also the right to realise it by enforcement of the mortgage (w). Nevertheless in principle there is no reason to differentiate between a written mortgage and a mortgage by deposit of title-deeds and the dictum of Wallis, C.J., was dissented from in *Elumalai* v. *Balakrishna* (x) where it was held that the assignment of a debt secured by a deposit of title-deeds does not pass the security in the absence of a registered assignment of the mortgage.

(m) Ghose Law of Mortgage, p.76.
(n) *Walker* v. *Jones* (1866) L. R. 1 P.C. 50.
(o) *Glasscock* v. *Balls* (1890) 24 Q.B.D. 13.
(p) *Raghuvalu* v. *Rajalingam* (1939) A.M. 846.
(q) *Subramaniam* v. *Perumal* (1895) 18 Mad. 454; *Perumal Ammal* v. *Perumal* (1921) 44 Mad. 196, 200, 61 I.C. 461, ('21) A.M. 137; *Sakiuddin* v. *Sonaullah* (1917) 22 Cal. W.N. 641, 644, 45 I.C. 986.
(r) *Arunachellam* v. *Subramania* (1907) 30 Mad. 235.
(s) *Perumal Ammal* v. *Perumal* (1921) 44 Mad. 196, 200, 61 I.C. 461, ('21) A.M. 137; *Bank of Upper India etc.* v. *Fanny Skinner* (1929) 51 All. 494, 119 I.C. 241, ('29) A.A. 161; *Villa* v. *Petley* (1934) 148 I.C. 721, ('34) A.R. 51; *Girdhar* v. *Motilal Champalal* (1941) A.N. 15, (1941) Nag. 615, (1940) N.L.J. 151, 192 I.C. 556.
(t) *Supra*.
(u) (1919) Mad. W.N. 613, 52 I.C. 879.
(v) (1914) 37 Mad. 51, 13 I.C. 91.
(w) *Elumalai* v. *Balakrishna* (1921) 44 Mad. 965, 66 I.C. 168, ('22) A.M. 344, dissenting from *Perumal* v. *Perumal* (1921) 44 Mad. 196, 200, 61 I.C. 461, ('21) A.M. 137.
(x) (1921) 44 Mad. 965, 66 I.C. 168, ('22) A.M. 344.

Illustration.

A borrows Rs. 1,000 from *B* on a promissory note and secures repayment by depositing with *B* title-deeds of his property. *B* endorses the promissory note to *C* for value. *C* is entitled to sue *A* personally on the promissory note for the debt of Rs. 1,000. But *C* has no right to the security, for an assignment of a mortgage can only be made by registered instrument: *Elumalai* v. *Balakrishna* (1921) 44 Mad. 965, 66 I.C. 168, ('22) A.M. 344.

In the case last cited Krishan, J., said at page 969—"In my view, it is only if a mortgage debt is transferred as a secured debt that it will carry the securities with it on the principle embodied in sec. 8, and not otherwise. Even in the case of a mortgage where there is no promissory note it cannot, I think, be said that the law does not allow the mortgagee to transfer the debt as an unsecured or simple debt without a registered instrument if he thinks fit to do so. The security is for his benefit and he can give it up if he likes; and the transferee will then get the right to the debt but not to the security. Thus, as regards transferability in law as an unsecured debt, a mortgage for which a negotiable instrument has been taken does not seem to me to differ fundamentally from one where none such has been taken. In my view, in either case, if the debt is transferred by endorsement or otherwise, without the transferor taking care to transfer the mortgage right by registered instrument, the debt and the security will get dissociated and the security may possibly cease."

In the recent case of *Imperial Bank of India* v. *Bengal National Bank* (y), their Lordships of the Privy Council went farther. The Calcutta High Court had held that a transfer of a mortgage debt failed for want of a registered assignment, but their Lordships held that the transfer might be treated as the transfer of a debt dissociated from the security, and that it was capable of being transferred under sec. 6 of the Act. Their Lordships considered that the debt divorced from the security was not an actionable claim, but a species of property for the transfer of which no specific mode was provided in the Act so that the transferee had to sue in the name of the transferor. This was the procedure in the case of a chose in action in England before the Judicature Act.

The question of the transfer of a mortgage debt was again considered in the case of *Fanny Skinner* v. *Bank of Upper India* (z). Fanny Skinner had borrowed money from the Bank secured by a simple mortgage. The Bank went into liquidation and the Liquidator as part of an arrangement of reconstruction executed an unregistered agreement transferring the mortgage debt to a Trust. The Liquidator then sued to enforce the mortgage. It was held that the agreement had not been completed and that as no transfer had been effected the Liquidator was entitled to sue. In the course of the case an interesting argument was raised and disposed of. It was contended that the agreement being unregistered operated as a transfer of the debt but not of the security, so that the Bank was left without the debt but with the security and that the Bank having lost the debt could not enforce the security. This was said to be the effect of the decision in *Imperial Bank of India* v. *Bengal National Bank* (a). Their Lordships explained that that case did not lead to so extraordinary a result. In that case the mortgage debts were due to the Bengal Bank and had been mortgaged by that Bank to debenture holders. The debenture holders could recover from the Bengal Bank the moneys they had lent to the Bank and for the security of which the Bengal Bank had transferred the mortgage debts due to itself. But it was only if the debenture holders proceeded to realize the mortgage debts due to the Bengal Bank that it was necessary for them to sue in the name of that Bank.

(y) (1931) 59 Cal. 377, 35 C.W.N. 1024, 54 C.L.J. 117, 1931 A.L.J. [illegible], 61 M.L.J. 589, 33 B.L.R. 1336, 58 I.A. 323, 134 I.C. 651, ('31) A.P.C. 245.

(z) (1935) 62 I.A. 115, 57 All. 314, 155 I.C. 748, ('35) A.P.C. 103.

(a) *Supra*.

Ss. 8, 9

Debt secured by a charge.—A debt secured by a charge is not a mortgage debt and may be transferred as an actionable claim by an unregistered instrument. A charge differs from a mortgage in that it does not transfer an interest in property but creates a right to payment out of the property specified (*b*). Nevertheless it falls within sec. 17 of the Registration Act and the assignment of a charge must be by registered instrument (*c*). An unregistered assignment of a debt to which a charge was annexed would pass the debt but not the charge. This is the effect of the decision of the Madras High Court in *Rajagopala* v. *Ranganatha* (*d*). It is true that in that case the assignment had been construed as an express assignment of the charge as well as the debt. But it is submitted that this makes no difference for even if the assignment is not an express assignment of the charge, but merely *operates* as such an assignment it comes within sec. 17 (1) (b) of the Registration Act. In a judgment in an earlier stage of the case last cited Madhavan Nair, J., said that sec. 8 of the Transfer of Property Act cannot override the provisions of the Registration Act (*e*). Another Madras case must be distinguished, for it referred to a sale certificate which does not require registration (*f*). The authority of that judgment is also impaired by an incorrect statement that an assignment of a charge need not be by registered instrument (*g*). A Calcutta case also referred to the assignment of a charge with the debt but the question of registration was not considered (*h*).

Decree.—A decree is not an actionable claim, and a purchaser of a money decree for a secured debt cannot go behind the decree and enforce the security (*i*).

(14) Interest on debt.—The right of the transferee to interest or income accrues from the date of the transfer in the same way as the right to rent and profits referred to in the second clause of the section. A transfer of shares, securities and promissory notes carries with it the right to future dividends and interest. If a debt is transferred, interest accruing after the date of the transfer passes as a legal incident of the property transferred, but not arrears of interest. If the debt is time barred, the Court cannot award interest, for interest is an accessory and when the principal is barred the accessory falls along with it (*j*).

Oral transfer.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.—Writing was not necessary under Hindu law to the validity of any transfer whatsoever (*k*), and in all ancient systems of law transfer of possession was the only requisite to the transfer of title. The present Act makes writing necessary in the case of a sale of tangible immoveable property of the value of Rs. 100 or upwards, or the sale of a reversion or other intangible thing—sec. 54; in the case of a simple mortgage, and in the case of all other mortgages (except a mortgage by deposit of title-deeds) when the principal sum secured is Rs. 100 or upwards—sec. 59; in the case of a lease if it is from year to year, or for any term exceeding one year or reserving a yearly rent—sec. 107;

(*b*) *Gobinda Chandra* v. *Dwarka Nath* (1908) 35 Cal. 837.

(*c*) *Imperial Bank of India* v. *Bengal National Bank* (1931) 58 Cal. 136, 131 I.C. 689, ('31) A.C. 223 reversed on another point in 58 I.A. 323, 59 Cal. 377, 134 I.C. 651, ('31) A.P.C. 245.

(*d*) (1934) 152 I.C. 375, ('34) A.M. 615.

(*e*) *Ranganatha* v. *Rajagopala* (1933) 142 I.C. 730, ('33) A.M. 181.

(*f*) *Sambasiva* v. *Venkatarama* (1926) 51 Mad. L.J. 95, 95 I.C. 447, ('26) A.M. 903.

(*g*) See *Rangampudi* v. *Venkataswarlu* (1934) 152 I.C. 772, ('34) A.M. 713 where the same learned Judge has expressed the opposite opinion.

(*h*) *Sheonandan Lal* v. *Saiyid* (1915) 42 Cal. 849, 29 I.C. 869.

(*i*) *Ganpat* v. *Sarupi* (1878) 1 All. 446.

(*j*) *Dhondiram* v. *Taba* (1903) 27 Bom. 330; *Hollis* v. *Palmer* (1836) 2 Bing. N.C. 713.

(*k*) *Balaram* v. [illegible] (1872) 9 Bom. H.C. 121; *Hurpurshad* v. *Sheo Dyal* (1876) 26 W.R. 55, 3 I.A. 259, 278.

and in the case of all gifts of immoveable property—sec. 123, and of all transfers of actionable claims—sec. 130. Exchanges are subject to the same rule as sales—sec. 118; and the law as to leases is subject to rules which the Local Government are empowered to make—secs. 107 and 117.

Where the Act requires a registered instrument the transfer cannot be effected in any other way. An unregistered deed of gift of immoveable property does not effect a transfer (*l*). A petition to the Collector admitting a transfer, or recitals in another deed or mutation of names or delivery of possession will not effect a transfer, if the Act requires a registered deed (*m*). A transfer of title requires a conveyance and this cannot be effected by a mere agreement (*n*). The Oudh Chief Court has held that a grant by way of "guzara," being only a right to enjoy the usufruct, need not be made in writing (*o*) but the correctness of this decision is doubtful.

Where no writing is required by the Act the transfer may be made orally. Thus a partition of joint family property may be made orally (*p*), and so also a surrender of a lease (*q*). A grant of land for life in discharge of a claim for maintenance is neither a gift nor a sale and may be made orally (*r*). In *Imperial Bank of India* v. *Bengal National Bank* (*s*) Rankin, C.J., said that partition, release and surrender are all forms of transfer but that so far as the Transfer of property Act is concerned they come under no restriction. A right to recover a share of immoveable property may be relinquished orally and without an instrument in writing (*t*). Oral transfers are valid in the Punjab outside the cantonment and municipal limits (*u*).

Part performance.—The doctrine of part performance is an encroachment on the rule that when the Act prescribes the mode of transfer the transfer may not be made in any other way. The doctrine is now enacted in sec. 53A and explained in the notes to that section.

Condition restraining alienation.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

(1) Principle underlying the section.—The principle underlying this section is that a right of transfer is incidental to, and inseparable from, the beneficial ownership

(*l*) *Hiralal* v. *Gavrishankar* (1928) 30 Bom. L. R. 451, 109 I.C. 149, ('28) A.B. 250.

(*m*) *Immudipattan* v. *Periya Dorasami* (1901) 24 Mad. 377 P.C. 28 I.A. 46.

(*n*) *Jadu Nath Poddar* v. *Rup Lal Poddar* (1906) 33 Cal. 967, 968; *Rajeswar Prosad* v. *Anil Kumar* (1928) 55 Cal. 35, 106, I.C. 117, ('27) A.C. 956; *Keshrimal* v. *Sukan Ram* (1933) 12 Pat. 616, ('33) A.P. 264.

(*o*) *Gajraj* v. *Inderpal* (1918) 49 I.C. 406.

(*p*) *Gyanesana* v. *Mobarakunnessa* (1898) 25 Cal. 210; *Satya Kumar* v. [illegible] *Kripal* (1909) 10 Cal. L.J. 503, 3 I.C. [illegible]47; *Ma Sein Nyun* v. *Maung U* (1914) 25 I.C. 498.

(*q*) *Elias Meyer* v. *Manoranjan* (1918) 22 Cal. W. N. 441, 44 I.C. 297; *Brojo Nath* v. *Maheshwar* (1918) 28 Cal. L.J. 220, 46 I.C. 100; *Fowler* v. *Secretary of State* (1921) 61 I.C. 852, ('21) A.M. 363.

(*r*) *Madan Pillai* v. *Badrakali Ammal* (1922) 45 Mad. 612, 68 I.C. 687, ('22) A.M. 311.

(*s*) (1931) 58 Cal. 136, 131 I.C. 689, ('31) A.C. 223.

(*t*) *Lal Singh* v. *Mt. Chatey Bati* (1934) A.L.J. 107, 148 I.C. 502, ('33) A.A. 354.

(*u*) *Shankri* v. *Milkha Singh* (1941) A.L. 407, 43 P.L.R. 656, 197 I.C. 232 (F.B.).

S. 10

of property. An absolute restraint on that power is repugnant to the nature of the estate and an exception to the very essence of the grant (v). In Coke upon Littleton it is said—"Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void (w)." In *In re Parry and Daggs* (x) Fry, L.J., said—"From the earliest times the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership." In *Metcalfe* v. *Metcalfe* (y) Kekewich, J., said— "You cannot limit an estate to a man and his heirs until he shall convey the land to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personality."

Illustrations.

(1) *A*, *B*, *C* and *D* effected a partition of joint family property, and agreed that if any one of them should have no issue, he would have no power to sell his share but should leave it for the other sharers. *A* sold his share and died without issue. *B*, *C* and *D* sued to recover the share. The Court held that the condition was void as repugnant to one of the legal incidents of property: *Venkatrammanna* v. *Brammanna* (1869) 4 Mad. H.C. 345.

(2) The testator deviced an absolute estate to his son provided always that if the son, his heirs or devisees, or any person claiming through or under him or them desired to sell the estate in the lifetime of the testator's wife, she should have the option to purchase the estate for £3,000. The value of the estate was £15,000. The Court held that this was an absolute restraint on alienation in the widow's lifetime and void: *Re Rosher Rosher* v. *Rosher* (1884) 26 Ch.D. 801 followed in *In re Cockerill, Mackaness* v. *Percival* (1929) 2 Ch. 131. But see *Ratanlal* v. *Ramanujadas* (1944) A. N. 187 in which the Nagpur High Court held that the condition was a partial restraint.

(2) Transfer subject to a condition or limitation.—The condition referred to in this section must be a condition subsequent as defined in sec. 31 which divests an estate which has already vested. "Condition" must be distinguished from "limitation." The word "limitation" is a term of English law. It refers to words used in a conveyance to limit or define the nature of the estate created. In the case of *In re Machu* (z) Chitty, J., defined a limitation as "the definition or circumscription in any conveyance of the interest which the grantee is intended to take." Thus in a transfer to "*A* and his heirs and assigns" the heirs and assigns are not transferees, but the words are words of limitation indicating an estate in fee simple or an absolute estate. Words of "limitation" such as "and his heirs," or "from generation to generation" denote an absolute estate. These words are said to denote an "estate of inheritance," by which is meant that the heirs of the grantee take by inheritance from the grantee. The word "purchase" in English law has a highly technical meaning and includes acquiring of land under the will of a deceased person or under a settlement. Thus if property is bequeathed to *A* for life and then to *B*, *B* takes the property under the will, and not by inheritance from *A*. The words in the will "and then to *B*" are words of purchase. The question, whether

(v) *Venkatrammanna* v. *Brammanna* (1869) 4 Mad. H.C. 345; *Anantha* v. *Nagamuthu* (1882) 4 Mad. 200; *Re Rosher, Rosher* v. *Rosher* (1884) 26 Ch. D. 801 (fee simple); *Rockford* v. *Hackman* (1852) 9 Hare 475 (life interest); *Bradley* v. *Peixoto* (1797) 3 Ves. 324; *Harbin* v. *Masterman* (1894) 2 Ch. 184, 196-197.

(w) Co. Litt. Sec. 360.

(x) (1886) 31 [illegible] D. 130, 134.

(y) (1890) 45 [illegible] D. 668, 689.

(z) (1882) 21 Ch. D. 838, 842-843.

the words operate as words of limitation or as words of purchase, *i.e.*, whether they define the estate or described the grantees, was decided in English law by the rule in *Shelley's* case. The statement of the rule is this : "It is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'The heirs' are words of limitation of the estate and not words of purchase" (a). Thus in a grant to *A* for life, then to *B* for life, and then to *A*'s *heirs* the words "*A*'s heirs" are words of limitation and not words of "purchase", *i.e.*, the heirs take by inheritance from *A*, and not under the grant. *A* may dispose of the property, in which case the heirs would get nothing. That rule has been abolished by sec. 131 of the Law of Property Act [English Law], 1925, as the necessity for the rule has been removed by sec. 60 of that Act, under which a conveyance without words of limitation passes the fee simple or whole interest, which the grantor has power to convey. In Indian law the question whether the words are words of limitation or words of purchase is a matter of construction. Thus if the bequest is to "*A* and his heirs" the words "and his heirs" are words of limitation indicating that *A* has an absolute estate, but if the bequest is to "*A* for life and after his death to his heirs" the heirs are direct objects of an independent and distinct gift: see sec. 97 of the Indian Succession Act, 1925. In an Indian will the words "putra - poutradi krama" are words of limitation denoting an estate of inheritance (*b*). In *Madhavrao* v. *Balabhai* (*c*) property was settled in trust for "my daughter *K* during her life . . . and after her death in trust for the male heirs of the said *K*." It was contended that this was an attempt to create an estate tail which was bad under the Hindu law, but the Privy Council held that it was an independent gift to the persons, who answered the description of heirs at the death of *K*, that is, her sons living at her death. Words of limitation which denote an estate of inheritance do not of course imply a restriction on alienation (*d*).

If there is a valid transfer, the condition in restraint of alienation is void and the transfer stands. Thus a bequest of an absolute estate subject to a condition that neither the devisee nor his heirs should alienate the estate except for religious purposes is a valid bequest, but the condition is void for repugnancy (*e*). But limitations may be such as to create an estate not recognized by law, and if that is the case, the transfer fails. This distinction was made by the Privy Council in *Tagore* v. *Tagore* (*f*), where the testator attempted to create an estate in tail male, not recognized by Hindu law, with the result that the donee took an estate for life and the heir at law succeeded to the estate at his death.

(3) Absolute restraint on transfer.—A restraint on alienation may be absolute or partial. An absolute restraint is void, a partial restraint is not. See note (4) below "Partial restraint on transfer."

The section says that a condition which *absolutely* restrains the power of alienation is void. In *In re Macleay* (*g*), Jessel, M. R., said that it was a question of substance not of form whether the condition took away the whole power of alienation *substantially*. Thus in *In re Rosher, Rosher* v. *Rosher* (*h*) the testator devised an absolute estate to his son with a proviso that if he sold during the lifetime of his wife she should have an option of purchasing the estate at a price which was one-fifth of the market value. This was

(*a*) For an elaborate discussion of *Shelley's* case, see *Van Grutten* v. *Foxwell* (1897) A.C. 658, at p. 667, per Lord Macnaghten.

(*b*) *Ramlal Mookerjee* v. *Secretary of State* (1880) 7 Cal. 304, 8 I. A. 46.

(*c*) (1928) 52 Bom. 176, 55 I. A. 74, 107 I.C. 119, ('28) A.PC. 33.

(*d*) *Rajah Nursing* v. *Roy Koylasnath* (1864) 9 M. I. A. 55; *Vinayak Moreshwar* v. *Baba* (1889) 13 Bom. 373.

(*e*) *Saraju Bala* v. *Jyotirmoyee* (1931) 35 Cal. W. N. 903, 58 I. A. 270, 134 I. C. 648, ('31) A. PC. 179; *Lalit Mohan* v. *Chukkan Lal* (1897) 23 Cal. 834, 24 I.A. 76.

(*f*) (1872) 9 Beng. L. R. 377, 1 I.A. Sup. Vol 47; *Saraju Bala* v. *Jyotirmoyee*, *supra*.

(*g*) (1875) 20 Eq. 186, 189.

(*h*) (1884) 26 Ch. D. 801.

S. 10

held to be in effect an absolute restraint and void. A similar case was *In re Elliot, Kelly* v. *Elliot* (*i*) where a tea plantation was devised absolutely, but a condition was annexed that if the devisee should sell the plantation "I will and direct her to pay to my brother the sum of £1,000 out of the proceeds of such sale, also the further sum of £500 out of the proceeds of such sale to [her sister]"—the direction was held to be repugnant and void as a restraint on alienation. A provision in a partition deed prohibiting alienation of the property allotted absolutely to each coparcener without the consent of the other sharers is invalid as an absolute restraint (*j*). When a husband settled property on his wives, but subject to a condition that they could not alienate without his consent the condition was held to be void under this section (*k*). The same rule has been applied in the Punjab where the Act is not in force (*l*).

Restrictions for a particular time.—As to restrictions for a particular time the case of *Rosher* v. *Rosher* (*m*), already referred to, shows that a condition restraining alienation during a lifetime is invalid. Again in *Renaud* v. *Tourangeau* (*n*), a case from Canada, the Privy Council said that a restriction for a period of twenty years was contrary to the general principles of jurisprudence. Jarman says that "it seems now settled that a restraint on alienation is bad even if it is limited in point of time (*o*)."

(4) Partial restraint on transfer.—A condition only partially restraining alienation is valid. Conditions restraining alienation *for a particular time* have already been considered in note (3) above. As to prohibition of alienation *to a particular class* the English cases are not consistent. In *Muschamp* v. *Bluet* (*p*), and in *Attwater* v. *Attwater* (*q*) a condition *not to alienate except to particular persons* was held to be bad. On the other hand a condition *not to sell out of the family* was held good by Lord Ellenborough in *Doe d. Gill* v. *Pearson* (*r*), and by Jessel, M.R., in *Re Macleay* (*s*). Both these decisions were approved by the Privy Council in *Mahomed Raza* v. *Mt. Abbas Bandi* (*t*), where it was held that a condition restraining the transferee from transferring to a stranger, *i.e.*, outside the family, was not an absolute restriction, and was valid. Cases in which a condition against alienation to a stranger have been held to be an absolute restraint (*u*) can no longer be regarded as good law. In the Privy Council case above referred to, their Lordships said that after the passing of the Transfer of Property Act, a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos*, be regarded as repugnant, and that there was no authority to suggest that a different principle was applied by the Courts in India before that Act. A condition in a deed of partition that if any coparcener wished to sell his share in a residential house or if his share were sold in any other way, the other coparcener would be entitled to buy it was held to be valid. An agreement of this sort is proper and is enforceable against the promisor's representatives and is not hit by section 14 (See note 10 under sec. 14) (*v*).

A condition that if the vendee sells, he shall give the vendor the option of buying back is obviously not an absolute restraint. Cases relating to such a condition have arisen with reference to the rule against perpetuity, and are considered in sec. 14 below.

(*i*) (1896) 2 Ch. 353. See also *Re Cockerill, Mackaness* v. *Percival* (1929) 2 Ch. 131.

(*j*) *Mudara* v. *Muthu Hengsu* (1935) 154 I.C. 587, ('35) A. M. 33; *T. V. Sangham Ltd.* v. *Shanmugha Sundaram* (1939) A.M. 769 F.B., (1939) Mad. 954, 2 M.L.J. 345, 50 M.L.W. 254, (1939) M.W.N. 812, 184 I.C. 187.

(*k*) *Gomti Singh* v. *Anari Kuar* (1929) 27 All. L. J. 880, 118 I.C. 152, ('29) A.A. 492.

(*l*) *Partap Das* v. *Nand Singh* (1924) 6 Lah. L. J. 419, 85 I.C. 323, ('24) A.L. 729.

(*m*) (1884) 26 Ch. D. 801.

(*n*) (1867) L. R. 2 PC. 4.

(*o*) Jarman, 7th Ed., p. 537.

(*p*) J. Bridgm., pp. 132, 137.

(*q*) (1853) 18 Beav. 330.

(*r*) (1805) 6 East. 173.

(*s*) (1875) 20 Eq. 186.

(*t*) (1932) 59 I. A. 236, 7 Luck. 257, 36 C.W.N. 774, 55 C.L.J. 510, (1932) A.L.J. 709, 63 M.L.J. 180, 137 I. C. 321, ('32) A. PC. 158.

(*u*) *Faiyaz Hussain* v. *Nilkanth* (1901) 4 O.C. 163; *Gaya Din* v. *Syed Mumtaz Hussain* (1907) 10 O.C. 136; *Teja Singh* v. *Moti Singh* (1924) 80 I.C. 918, ('25) A.O. 125; *Asghari Begum* v. *Maula Baksh* (1929) 27 All. L.J. 515, 116 I.C. 90, ('29) A.A. 381.

(*v*) *Aulad Ali* v. *Ali Athar* (1927) 49 All. 527 F.B.; *Moulvi Ali Hossain Mia* v. *Rajkumar Haldar* (1943) 47 C.W.N. 557, (1943) 2 Cal. 605 F. B.; *Ratanlal* v. *Ramanujdas* (1944) A. N. 187.

A condition in a Khorposh grant made by a zamindar in favour of a junior member that the subject-matter of the grant was not liable to be attached and sold in execution does not amount to an absolute restraint and is not void (*w*).

(5) Agreement in restraint of alienation.—The section refers to a condition restricting the estate transferred. It has no application to an agreement affecting the transferee personally. In an Allahabad case (*x*) the vendee executed a separate agreement that he would not transfer the property purchased to anyone except the vendor and then at the same price. It was held that this agreement was void as it deprived the purchaser of the right of alienation. It is submitted that this is not correct unless, as in a Bombay case (*y*) the agreement was by registered instrument and part of the transaction of sale. The true rule was stated in the later Allahabad case of *Devi Dayal* v. *Ghasita* (*z*). *A* sold a house to *B* and on the date of the sale *B* executed a separate unregistered agreement that if he wished to sell the house he would sell it back to *A* for the same price and would sell it to no one else unless *A* declined to purchase. If this had been a condition of the sale it would have been invalid as a restraint on alienation (*a*) but the Court said that "this was a special personal contract between the parties which was binding on them and could be enforced against a transferee with notice." It is submitted that the effect of this decision is that an invalid condition in restraint of partition may yet operate as a personal covenant binding the covenantor personally and creating an obligation enforcible against a transferee from him with notice under sec. 40. With reference to an award which contained an invalid condition against partition the Privy Council said that it may have bound the parties who agreed among themselves to abide by it (*b*).

(6) Restriction against alienation in compromises.—A compromise is not a transfer to which this section applies. This is on the principle that a compromise is not an alienation but as said by Lord Moulton in *Hiran Bivi* v. *Sohan Bivi* (*c*) it is "a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise admitted by the other parties." A compromise operates therefore not as a transfer but as an admission that the party has no right to alienate. The title so admitted may be a restricted interest which under sec. 6 is not transferable. This is explained in *Basangowda* v. *Irgowdatti* (*d*) where under a compromise between a widow and a reversioner, the widow was held to have a limited interest such as is referred to in sec. 6 (d)—now sec. 6 (dd)—which she could not alienate. Similarly in *Diwali* v. *Apaji* (*e*), a case to which the Act did not apply, there was a compromise of a dispute between a widow and an adopted son under which an allotment of land was made for the maintenance of the widow with a provision in restraint of alienation. It was held that this land could not be attached for her debt as she had no disposing power over it. In *Mata Prasad* v. *Nageshar Sahai* (*f*) there was a dispute as to succession between a widow and a nephew. This was compromised on terms that the widow was to retain possession for life while the title of the nephew was admitted with a provision restraining him from alienating during the widow's lifetime. The Privy Council upheld this as a family settlement prudent and reasonable in the circumstances

(*w*) *Shiba Prosad* v. *Lakhraj* (1945) A.P. 162.

(*x*) *Dal Singh* v. *Khub Chand* (1921) 19 All. L. J. 848, 64 I. C. 406, ('21) A. A. 97.

(*y*) *Alibhai* v. *Dada* (1931) 33 B.L.R. 1296, 136 I.C. 509, ('31) A.B. 578.

(*z*) (1929) 27 A. L. J. 1255, 1256, 119 I.C. 836, ('29) A.A. 607.

(*a*) *Gaguni Ram* v. *Shahabuddin* (1935) All. L.J. 410, 157 I.C. 897, ('35) A.A. 466.

(*b*) *Jafri Begam* v. *Syed Ali Raza* (1901) 23 All. 383, 28 I.A. 111.

(*c*) (1914) 18 C.W.N. 929, 932, 24 I.C. 309 P.C.; *Khunni Lal* v. *Govind Krishna* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 471; *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (1875) 1 I. A. 157, 166.

(*d*) (1923) 47 Bom. 597, 73 I.C. 199, ('23) A. B. 276.

(*e*) (1886) 10 Bom. 342; *Gulab Kuar* v. *Bansidhar* (1893) 15 All. 371 on app.; *Bansidhar* v. *Gulab Kuar* (1894) 16 All. 443; *Munisami Naidu* v. *Ammani Ammal* (1904) 15 Mad. L.J. 7.

(*f*) (1925) 47 All. 883, 52 I.A. 398, 91 I.C. 270, ('25) A.P.C. 272; *Kapura* v. *Madu Sudan Das* (1942) A.L. 168, 44 P.L.R. 183, 209 I.C. 699.

S. 10 of the case. Again in a Calcutta case (*g*) a document settling a dispute between a Hindu widow and two surviving members of the family provided that any lease given of the family property should be void unless signed and consented to by both parties, and these provisions were held to be valid.

In *Chamaru Sahu* v. *Sona Koer* (*h*), Mookerjee, J., had to construe a deed of family settlement between reversionary heirs and two Hindu widows by which the reversioners were restrained from alienating during the lifetime of the widows. He considered that the restraint was void if not under sec. 10 then under sec. 11, but as the object of the restriction was to protect the rights of the widows to receive maintenance from what had been their husbands' property, he held that the alienees of the reversioners who had accepted a mortgage contrary to the provisions of the deed of settlement held the property subject to the rights of maintenance possessed by the widows. It is submitted that the restriction on the reversioners being the result of a family settlement, was valid, as in *Mata Prasad*'s case (*i*).

(7) Restraint against alienation in gift.—Under sec. 126 of the Transfer of Property Act a gift may be made on an agreed condition that it may be revoked on the happening of an event which does not depend upon the will of the donor. But the condition contemplated by sec. 126 which is in a chapter dealing with "gifts" should not be repugnant to the provisions of secs. 10 & 12 which deal with all "transfers of property by act of Parties." Thus where a deed of gift provided that the donee or his successor had no right to transfer the property and if they did transfer, the same would be invalid and the donor or his successor would have a right to revoke the gift, the condition was held to be invalid (*j*). The last paragraph of the section enacts that the condition of revocation does not affect the rights of transferees for consideration without notice. This makes it clear that the condition of revocation operates only as a personal covenant. It does not restrict the interest of the donee and is not repugnant to the gift under sec. 10. It has therefore been held that if *A* makes a gift of his property to *B*, with a condition that *A* should be at liberty to revoke the gift if *B* transferred the property without *A*'s consent, the condition does not contravene the provisions of sec. 10 and is valid (*k*). See note *supra*—'Agreement in restraint of alienation.'

(8) Restraint on partition.—Cases of restraint on partition are dealt with in note (5) under sec. 11.

(9) Restraint on transferor.—The section only refers to restraint on alienation by the *transferee* or those claiming under him. It has no bearing on cases where on a transfer a restraint is put on alienation by the transferor. This may occur where the transfer is of a partial interest as in a mortgage. In such cases it may be a clog on the equity of redemption. See notes under sec. 60.

(10) Exception in the case of lease.—A lease is an exception to the rule against an absolute restraint on alienation. Thus a condition in a lease that the lessee shall not sublet or assign is valid—sec. 108 (j) read with the words "in the absence of a contract to the contrary." And it is immaterial that the lease is a permanent lease (*l*). A condition requiring the lessee to pay a fourth of the purchase money as nazar to the

(*g*) *Kuldip Singh* v. *Khetrani Koer* (1898) 25 Cal. 869.

(*h*) (1911) 14 Cal. L. J. 308, 11 I. C. 301.

(*i*) (1925) 47 All. 883, 52 I.A. 398, 91 I.C. 370, ('25) A. PC. 272.

(*j*) *Brij Devi* v. *Shiv Nanda Prasad* (1939) A.A. 221, 1939 All. 298, (1939) A.L.J. 77.

(*k*) *Ma Yin Hu* v. *Ma Chit May* (1929) 7 Rang. 306, 119 I.C. 737, ('29) A. R. 226; *Makund* v. *Bajrup* (1907) 4 All. L. J. 706.

(*l*) *Kelly Dass Ahiri* v. *Monmohini Dassee* (1897) 24 Cal. 440, 447 approved in *Abhiram* v. *Shyama* (1909) 36 Cal. 1003, 36 I. A. 144, 4 I. C. 449; *Vyankatraya* v. *Shivrambhat* (1883) 7 Bom. 256, 260.

lessor in case he should assign the lease is valid (*m*). A condition in a permanent lease, that should necessity for alienation by the lessor arise the lessee will surrender the lease to the lessor, is valid (*n*). If the condition gives the lessor a right to re-enter (*o*), its breach involves forfeiture of the lease; otherwise the breach only gives the lessor a right to an injunction and damages (*p*) and not a right to determine the lease (*q*). So also a condition even in a perpetual lease that the lessee's right shall be veritable, but not transferable is not void (*r*).

The words in this section "when the condition is for the benefit of the lessor or those claiming under him" seem to be merely explanatory of the reason for the exception. They have been construed to mean that the restriction is *invalid* unless accompanied with a right of re-entry (*s*). This has been dissented from in a Madras case (*t*) on the ground that every such restriction is for the benefit of the lessor; but that case also held that a restriction without a right of re-entry *gives the lessor a right to damages*, but was *invalid as a condition* and had not the effect of rendering the assignment invalid. The amendment made in sec. 111 (g), by Act 20 of 1929, makes it clear that the breach of a condition against alienation will not work a forfeiture unless the condition reserves a right of re-entry. A condition that in case of alienation by the lessee the lease shall be void is not now sufficient to determine the lease, and the case of *Vyankataraya* v. *Shivrambhat* (*u*) is now obsolete.

The restriction on assignment prevents the lessee from assigning without the consent of the lessor. This is frequently expressed in the lease with the added clause that such consent shall not be unreasonably withheld. An express condition to the effect that the lessee if he assigned would pay a fourth of the purchase money to the lessor has been held to be valid (*v*). In England sec.144 of the Law of Property Act, 1925, replacing sec. 3 of the Conveyancing Act, 1892, enacts that in the absence of an express condition to the contrary, a condition that the lessee shall not assign without the consent of the lessors is construed as subject to the proviso that no sum shall be payable for such consent.

A condition in a darpatni lease that if the darpatni is sold for arrears of rent, derivative tenures created by the darpatnidar would be extinguished, is not a restraint on alienation (*w*).

Rent free grants under the Agra Tenancy Acts—U.P. Acts 2 of 1901 and 3 of 1926—do not convey the proprietary title of the grantor landlord. Such grants are like leases exempt from the rule against absolute restraint of alienation embodied in

(*m*) *Saradakripa* v. *Bepin Chandra* (1923) 37 Cal. L. J. 538, 74 I. C. 555, ('23) A.C. 679; *Kumarchandra* v. *Narendranath* (1930) 57 Cal. 953, 127 I.C. 76, ('30) A.C. 357; *Nabjan Sardar* v. *Neburali Molla* (1933) 37 C.W.N. 272, 57 C.L.J. 387, 144 I.C. 764, ('33) A.C. 506.

(*n*) *Rama Rao* v. *Thimmappa* (1925) 48 Mad. L. J. 468, 87 I.C. 433, ('25) A. M. 732; *Chettu Kuth* v. *Kunhunni* (1910) 9 Mad. L. T. 484, 9 I. C. 171.

(*o*) *Kristo Nath* v. *Brown* (1887) 14 Cal. 176.

(*p*) *Tamaya* v. *Timapa* (1883) 7 Bom. 262; *Parameshri* v. *Vittappa* (1903) 26 Mad. 157; *Sital Prasad* v. *Nawab Dildar* (1916) 1 Pat. L. J. 1, 33 I. C. 403; *Basarat Ali* v. *Manirulla* (1909) 36 Cal. 745, 2 I. C. 416; *Promode Ranjan* v. *Aswini* (1914) 18 Cal. W. N. 1138, 26 I. C. 23.

(*q*) *Narayan* v. *Ali Saiba* (1894) 18 Bom. 603; *Madar Saheb* v. *Sannabawa* (1897) 21 Bom. 195; *Netrapal Singh* v. *Kalyan Das* (1906) 28 All. 400; *Udipi Seshagiri* v. *Seshamma* (1920) 43 Mad. 503, 61 I. C. 658; *Jogesh Chandra Roy* v. *Mokbul Ali* (1921) 25 Cal. W. N. 857, 60 I. C. 984, ('21) A. C. 474; *Khetra Nath* v. *Sheikh Baharali* (1929) 49 Cal. L. J. 89, 116 I. C. 153, ('29) A. C. 228; *Ananad* v. *Dasarath* (1918) 40 I. C. 444.

(*r*) *Bhairo Singh* v. *Ambika Baksha* (1942) O.W.N. 225, 199 I.C. 776, (1942) A.O. 374.

(*s*) *Nil Madhab* v. *Narattam Sikdar* (1890) 17 Cal. 826; *Udipi Seshagiri* v. *Seshamma*, *supra*; *Akram Ali* v. *Durga Prasad* (1912) 14 Cal. L. J. 614, 10 I. C. 489; *Mahananda Saratmani* v. *Saratmani* (1912) 14 Cal. L. J. 585, 10 I. C. 374; *Sital Prasad* v. *Nawab Dildar*, *supra*.

(*t*) *Parmeshri* v. *Vitappa*, *supra*.

(*u*) 1883) 7. Bom. 256.

(*v*) *Parbhu Narain Singh* v. *Ramzan* (1919) 41 All. 417, 49 I.C. 865; *Swarna Kumar* v. *Prahlad Chandra* (1921) 26 Cal. W. N. 874, 67 I.C. 719, ('22) A.C. 474; *Saradakripa* v. *Bepin Chandra* (1923) 37 Cal. L. J. 538, 74 I.C. 555, ('23) A.C. 679; *Kumarchandra* v. *Narendranath* (1930) 57 Cal. 953, 127 I.C. 76, ('30) A.C. 357.

(*w*) *Madhusudan* v. *Midnapore Zemindary Co.* (1916) 43 Cal. 940, 46 I.C. 129.

S. 10

this section. A condition in a rent-free grant restraining the grantee from alienating is therefore valid (*x*).

(11) Effect of involuntary alienation on conditions against alienation in leases.—An involuntary alienation does not constitute a breach of a condition against alienation in a lease. An assignment by operation of law, such as a sale in execution, or a sale of the property of a company by an official liquidator (*y*), or a sale by the official assignee (*z*), is not a breach of the condition. In *Golak Nath* v. *Mathura Nath* (*a*) the Calcutta High Court said—" We take it to be clear law in India, as in England, that a *general* restriction on assignment does not apply to an assignment by operation of law taking effect in *invitum* as a sale under an execution." But there may be an express prohibition of alienation in execution, and if so it will be enforced. In a Bombay case (*b*) where the condition was " not to let the land be sold or attached in execution," Sargent, C.J., said that if the lessee allowed the land to be attached and sold by not taking measures to satisfy his judgment creditor, there would be a breach both according to the letter and spirit of the provision in the lease. But a condition in a decree on a compromise that a party shall have no power of alienation is not broken if the property is sold in execution of a decree against the party (*c*).

(12) Hindu and Mahomedan law.—The prohibition of a condition in absolute restraint on alienation enacted in this section conforms to Hindu and Mahomedan law. Under Hindu law such a condition either in a gift *inter vivos* (*d*) or in a will (*e*) is void. Even before the amending Act which makes the section directly applicable to Hindus many cases affecting Hindus were decided with reference to this section. In Mahomedan law also a condition in restraint of alienation attached to a gift is void (*f*). But when a Mahomedan widow was restrained from alienating to a stranger as the result of a compromise the Chief Court of Oudh applied the rule that a compromise is in no sense an alienation and held that the restraint was valid (*g*). This case was confirmed on appeal by the Privy Council (*h*), and their Lordships observed that, apart from the favour with which courts regard family settlements, such a restraint was not inconsistent with Mahomedan law, nor with sec. 10 of this Act, and was permissible under English law which is applicable as the rule of justice, equity and good conscience.

(13) Married woman.—The proviso recognizes as another exception *the restraint on the power of anticipation* in the case of a married woman who is not a Hindu, Mahomedan or Buddhist. This restraint was a clause introduced in marriage settlements whereby property was settled on married women for their separate use without power to sell or charge the corpus of the estate. The English Common law rule that a woman's property became her husband's on marriage was abrogated in respect of marriages *after* the 1st

---

(*x*) *Har Dayal* v. *Lal Nauratan* (1934) 149 I.C. 669, ('34) A.A. 358.

(*y*) *In re West Hopetown Tea Co.* (1890) 12 All. 192; *Tamaya* v. *Timapa* (1883) 7 Bom. 262; *Subbaraya* v. *Krishna* (1883) 6 Mad. 159.

(*z*) *Doe* v. *Bevan* (1815) 3 M. & S. 353, 105 E. R. 644.

(*a*) (1893) 20 Cal. 273, 278; *Nil Madhab* v. *Narattam* (1890) 17 Cal. 826; *Promode Ranjan* v. *Aswini Kumar* (1913) 18 Cal. W. N. 1138, 26 I.C. 23; *Mohendra* v. *Gagan Chandra* (1925) 78 I.C. 802, ('25) A. C. 471.

(*b*) *Vyankataraya* v. *Shivrambhat* (1883) 7 Bom. 256.

(*c*) *Bachumal* v. *Vessimal* (1926) 99 I.C. 972, ('26) A. S. 143.

(*d*) *Anantha* v. *Naga Muthu* (1882) 4 Mad. 200; *Bhairo* v. *Parmeshri* (1885) 7 All. 516; *Muthukumara* v. *Anthony* (1915) 38 Mad. 867, 24 I.C. 120; *Rukhminibai* v. *Laxmibai* (1920) 44 Bom. 304, 56 I.C. 361; *Mahram Das* v. *Ajudhia* (1896) 8 All. 452; *Khiali Ram* v. *Raghunath Prasad* (1906) 3 All. L. J. 621; *Krishna* v. *Shanmuga* (1872) 6 Mad. H. C. 248.

(*e*) *Ashutosh* v. *Doorga* (1880) 5 Cal. 438, 6 I. A. 182; *Gokul Nath* v. *Issur Lochun* (1887) 14 Cal. 222; *Raikishori* v. *Debendarnath* (1888) 15 Cal. 409, 15 I.A. 37; *Chandi Churn* v. *Sidheswari* (1889) 16 Cal. 71, 15 I.A. 149; *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 24 I.A. 76.

(*f*) *Babu Lal* v. *Ghansham Das* (1922) 44 All. 633, 70 I.C. 84, ('22) A.A. 205; *Hussain Khan* v. *Nateri* (1872) 6 Mad. H. C. 356.

(*g*) *Abbas Bandi Bibi* v. *Saiyed Mohammad Raza* (1929) 4 Luck. 452, 120 I.C. 387, ('29) A.O. 193.

(*h*) *Muhammad Raza* v. *Abbas Bandi* (1932) 59 I.A. 236, 137 I.C. 321, ('32) A.P.C. 158.

January 1866 by sec. 4 of the Indian Succession Act, 1865. But in settlements designed to protect married women from themselves this clause was retained and received statutory recognition in this section and in secs. 56 and 58 of the Indian Trusts Act, 1882. The Married Women's Property Act, 3 of 1874, was passed to establish the separate property of married women who were married *before* the 1st January 1866 with reference to their own wages and earnings. Section 7 of that Act says that a married woman may sue or be sued in her own name in respect of her separate property. Section 8 provides that a person entering into a contract with a married woman with reference to her separate property may sue and recover against her to the extent of that property. The High Court of Calcutta held that these provisions enabled a creditor to enforce his claim also against property which a married woman is restrained from alienating (*i*). This decision was followed by Farran, J., in a Bombay case (*j*) with great reluctance. The Madras High Court, however, held that full meaning can be given to sec. 8 of the Married Women's Property Act without imputing to the Legislature an intention to ignore conditions in restraint of alienation distinctly recognized in a later Act (*k*). Statutory effect has now been given to the Madras view by the amended proviso to sec. 8 of the Married Women's Property Act, substituted by sec. 2 of the Transfer of Property (Amendment) Supplementary Act 21 of 1929. This expressly provides that decrees passed against a married woman under sec. 8 cannot be executed by attachment or sale of property she is restrained from alienating during marriage.

Under sec. 169 of the Law of Property Act, 1925, (*l*) the Court may with her consent and if it is for her benefit release the restraint on the property of a married woman. There is no similar provision in Indian law.

Restriction repugnant to interest created.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

(1) Amendment.—The only amendment made in this section by the amending Act 20 of 1929, is the substitution of the second paragraph for the old second paragraph. The old paragraph was as follows:—

"Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner."

This amendment should be read with the amendment in sec. 40. As pointed out in note (7) below no alteration in sec. 11 has been affected by the amendment. The alteration is in sec. 40.

(*i*) *Hippolite* v. *Stuart* (1885) 12 Cal. 522.
(*j*) *Cursetji* v. *Rustomji* (1887) 11 Bom. 348.
(*k*) *In re [illegible]* (1885) 18 Mad. 19; *Goolbee* v. *Venkatesa* (1907) 30 Mad. 378.

(*l*) Re-enacting s. 7 of the Conveyancing Act, 1911, which replaced s. 39 of the Conveyancing Act, 1881.

(2) Principle.—This section refers to a restriction on the *enjoyment* of property, while sec. 10 refers to a restriction on the *transfer* of property. Both sections rest on the same principle that a condition repugnant to the interest created is void. Section 11 refers to absolute interests only. A restraint on transfer is repugnant to any interest in property whether absolute or limited, for the right of transfer is an incident of ownership. A restriction on enjoyment is repugnant to an absolute interest, but may not be repugnant to a limited interest such as a leasehold or a life-estate. See note (4) below, "Absolutely."

Illustrations.

(1) *A* makes an absolute gift of a house to *B* with a direction that *B* shall reside in it. The gift is absolute and the direction is void. *B* may live in the house or not as he pleases.

(2) *A* makes a gift of a house to *B* on condition that the gift will be forfeited if *B* does not reside in it. The condition is valid, for the gift is not an absolute gift but one subject to a condition of defeasance—sec. 28 or 31; or of revocation—sec. 126.

(3) *A* by sale conveys an absolute interest in a farm to *B*. The sale deed contains a direction that *B* shall not cut down the trees. The direction is invalid.

(4) *A* assigns a life interest in a farm to *B* for her maintenance. The deed contains a direction that *B* shall not cut down the trees. The direction is valid.

Absolute interests fall under both sections, and the words "applied" (sec. 11) and "disposed" (sec. 10) show that the sections do to a certain extent overlap. This is well illustrated by the case of *Chamaru Sahu* v. *Soma Koer* (m). In that case a Hindu widow transferred her husband's estate to the reversionary heirs with a condition that they should not alienate it in her lifetime. The case was one under sec. 10, but in view of some observations of Jessel, M. R., in *In re Macleay* (n), Mookerjee, J., doubted if the restraint was absolute within the meaning of sec. 10, and therefore decided the case under this section; see note (6) to sec. 10, last para. Cases restricting the right of partition fall as much under the one section as the other.

(3) Indian Succession Act.—The section corresponds with sec. 138 of the Indian Succession Act, 1925, which replaces sec. 125 of the Indian Succession Act, 1865. The following illustration is annexed to the section in the Indian Succession Act:

"A sum of money is bequeathed towards purchasing a country residence for *A*, or to purchase an annuity for *A*, or to place *A* in any business. *A* chooses to receive the legacy in money. He is entitled to do so."

(4) Absolutely.—The section does not apply unless the transfer creates an absolute interest in the transferee. It does not apply for instance to a lease which is a transfer of a limited interest, and the lessee is bound by the conditions and covenants expressed or implied in the lease restricting his mode of enjoyment. When a deed of gift gave land to the donees as "they are the descendants of the same stock as my family and there remains nothing now for their support" and the gift was expressed to be for their maintenance, a covenant restrictive of alienation was held not to be void for repugnancy, as the gift was not of an absolute interest but of usufruct only (o). So also when land is granted only for use and cultivation (p). But when an absolute estate is conveyed any restriction on its enjoyment is invalid. Thus when a co-sharer of a village sold his share to another sharer who executed at the same time an agreement not to collect rents, or

(m) (1911) 14 Cal. L. J. 303, 11 I.C. 301.

(n) (1875) 20 Eq. 186.

(o) *Judgee Baksh* v. *Jwala Prasad* (1912) 15 O.C. 245, 15 I.C. 244, 246.

(p) *Kateswar Estate* v. *Muhammad Amir* (1918) 5 O.L.J. 149, 46 I.C. 78.

demand partition, or alienate or encumber or else the sale would be avoided, the Court read the two documents together and held the agreement to be repugnant to the proprietary interest conveyed by the sale deed (*q*). A stipulation in a sale deed for the payment of a certain amount to the vendor out of the profits of the property by way of rent was held to be illegal (*r*). See note (2) above, "Principle."

(5) **Partition.**—A right to partition is an incident of joint ownership of property. In *Umrao Singh* v. *Baldeo Singh* (*s*) a testator left his property to his sons jointly with a direction that the property should not be partitioned till all the sons attain majority. The Lahore High Court held that this was an invalid restriction on the right of enjoyment even though it was for a limited time. An agreement not to partition, though it may be binding on the immediate parties, will not bind their successors in interest (*t*). The Bombay High Court has held that such an agreement is inconsistent with the Hindu law and will not bind even the parties themselves (*u*); and the Allahabad High Court has held that even an immediate party is not bound by an agreement not to partition for an indefinite time (*v*).

Illustration.

An arbitrator made an award between two sisters giving each a half share of an estate and appointing the husband of one sister manager, but directed that neither sister would have a right to claim partition. One sister died and her son sued for partition. The Privy Council held that the clause in restraint of partition afforded no defence to the *son's* suit for partition. Their Lordships said: "It may have bound the parties who agreed among themselves to abide by it; but as against the present plaintiff the clause has no effect whatever . . . . [The arbitrator] had no power to make property which was divisible by law indivisible forever": *Jafri Begam* v. *Syed Ali Raza* (1901) 23 All. 383, 28 I.A. 111, 118. See also *Srimohan* v. *MacGregor* (1901) 28 Cal, 769, 786.

On the other hand an estate may be impartible by custom, or by the terms of the grant, for the Crown has power to grant or transfer land and by its grant or transfer, to limit in any way it pleases the descent of such lands (*w*).

(6) **Hindu and Mohamedan Law.**—The invalidity of conditions in restraint of enjoyment of property is recognized both in Hindu and Mohamedan Law. A direction in restraint of partition in a Hindu will (*x*), or in a Hindu gift (*y*) is void. In *Anantha* v. *Naga Muthu* (*z*) it was decided under Hindu law that a condition in a gift to Brahmins restrictive of alienation is invalid as being repugnant to the nature of grant; and the same decision was given in *Rukminibai* v. *Laxmibai* (*a*) under this section. Under Mohamedan law when a gift is made subject to a condition which derogates from its completeness the gift is valid, but the condition is void (*b*).

(*q*) *Mahram Das* v. *Ajudhia* (1886) 8 All. 452; *Official Receiver* v. *Samudravijayan* (1939) A.M. 509, (1939) 1 M.L.J. 575, 49 M.L.W. 591, (1939) M.W.N. 378, 185 I.C. [illegible].

(*r*) *Shio Nath* v. *Lachhmi Narain* (1936) A.O. 17.

(*s*) (1933) 14 Lah. 353, 143 I.C. 615, ('33) A.L. 201.

(*t*) *Anand Chandra* v. *Pran Kisto* (1866) 3 B. L. R. 14 O.C.; *Anath Nath* v. *Mackintosh* (1871) 8 B.L.R. 60; *Rajender* v. *Sham Chand* (1881) 6 Cal. 106; *Rup Singh* v. *Bhabhuti* (1920) 42 All. 30, 56 I.C. 682; *Abu Muhammad* v. *Kaniz Fizza* (1905) 28 All. 185; *Jafri Begam* v. *Syed Ali* (1901) 23 All. 383, 28 I.A. 111, 118 [clause against partition in award].

(*u*) *Ramlinga* v. *Virupakshi* (1883) 7 Bom. 538; *Radhanath* v. *Tarrucknath* (1896) 3 Cal. W. N. 126.

(*v*) *Chandar Shekhar* v. *Kundan Lal* (1909) 31 All. 3, 1 I.C. 554.

(*w*) *Rajindra* v. *Raghubans* (1918) 40 All. 470, 45 I.A. 134, 48 I.C. 213.

(*x*) *Raikishori* v. *Debendranath* (1888) 15 Cal. 409, 15 I.A. 37; *Mokoondo Lall* v. *Gonesh Chunder* (1876) 1 Cal. 104.

(*y*) *Narayanan* v. *Kannan* (1884) 7 Mad. 315.

(*z*) (1882) 4 Mad. 200.

(*a*) (1920) 44 Bom. 304, 56 I.C. 361; *Saraju Bala* v. *Jyotirmoyee* (1931) 35 Cal. W.N. 903, 58 I.A. 270, 134 I.C. [illegible], ('31) A. PC. 179.

(*b*) *Moulvi Muhammad* v. *Fatima Bibi* [illegible] 12 I. A. 159, 8 All. [illegible].

S. 11 **(7) Second paragraph—Restrictions for beneficial enjoyment of one's own land.**—The exception made by the second paragraph is a recognition of the rule in *Tulk* v. *Moxhay* (c), that the transferor may impose conditions restraining the enjoyment of land if such restrictions are for the benefit of his adjoining land. This section relates to the enforcement of the restrictions against the *transferee*, while sec. 40 refers to the enforcement of the restriction against *purchasers from the transferee.*

The words "compel the enjoyment," which appeared in the old section, were no doubt suggested by the phrase "to *use* or abstain from using his land in any manner" occurring in the judgment of Lord Cottenham in *Tulk* v. *Moxhay.* But later English cases and particularly the judgment of Cotton, L.J., in *Haywood* v. *Brunswick Permanent Benefit Building Society* (d) made it clear that only covenants of a *negative* character and imposing no pecuniary obligation can be enforced under the rule in *Tulk* v. *Moxhay* against purchasers from the transferee or covenantor. The distinction between an affirmative and a negative covenant may best be explained by a short statement of the two English cases just mentioned :

(1) The plaintiff owner of a vacant piece of ground in Leicester Square as well as of several houses forming the square sold the ground in 1808 by a deed which contained a covenant that the vendee, his heirs and assignees would keep the square in sufficient and proper repair "uncovered with buildings." The land passed by several intermediate purchases to the defendant who admitted that he had notice of the deed of 1808, but manifested an intention to alter the character of the square and to build on it. The plaintiff sued for an injunction to restrain him. The suit was not on the affirmative covenant to keep the square in repair but on the negative covenant not to build. Lord Cottenham granted the injunction : *Tulk* v. *Moxhay* (1848) 2 Phill. 774.

(2) *A* granted land in fee to *B* in consideration of a rent charge and a covenant to lay out money in building and repairing. *B* assigned the land to *C*. *A*'s assignee sued *C* to enforce the covenant to repair. Cotton, L.J., said : "The covenant to repair can only be enforced by making the owner put his hand in his pocket, and there is nothing which would justify us in going that length" *Haywood* v. *Brunswick Permanent Benefit Building Society* (1881) 8 Q. B. D. 403, 409.

The words "compel the enjoyment," which occurred in the old section, have been omitted in the section as amended. The omission of those words, however, do not effect any change in the law, for though those words have been omitted, the substituted words "to enforce such direction" have the same effect. In other words, the section as amended recognizes as much as did the old section that there may be a covenant which, though *affirmative* in character, may be enforceable *as between the actual parties to the transfer,* that is, the transferor and transferee, as in *Wolverhampton Corporation* v. *Emmons* (e) where a covenant to build was enforced on the special facts of the case against the transferee. All that *Haywood* v. *Brunswick Permanent Benefit Building Society* decides is that the doctrine of *Tulk* v. *Moxhay* as to the enforcement of covenants against *assigns* (*i.e.*, purchasers from the transferee) applies only to covenants which are negative in operation. It has no bearing on the enforceability of covenants as between the covenantor and covenantee.

Let us now turn to sec. 40. That section (para. 1), before its amendment, also contained the words "compel its enjoyment," which recognized that an affirmative covenant may be enforced even against a purchaser from a transferee. But those

(c) (1848) 2 Phill. 774.

(d) (1881) 8 Q. B. D. 403; *Smith* v. *Colbourne* (1914) 2 Ch. 533; *London & S. W. Rly.* v. *Gomm* (1882) 20 Ch. D. 562; *Austerberry* v. *Corporation of Oldham* (1885) 29 Ch. D. 750.

(e) [1901] 1 K. B. 515, 524-525.

words have now been omitted in that section and the Legislature has adopted the view taken in *Haywood* v. *Burnswick Permanent Benefit Building Society*, so that an affirmative covenant cannot now be enforced against a purchaser from a transferee. It is only a negative covenant that may be enforced against him, *e. g.*, a covenant *not* to build. If there is such a covenant, and the purchaser buys with notice of the covenant the Court may restrain him by an injunction from building (see the actual decision in *Tulk* v. *Moxhay* reproduced above). Note that there is no substitution in sec. 40 of the words "enforce such direction" for the words "compel the enjoyment" as in sec. 11.

The result then is that there is no alteration in the law in sec. 11. The alteration is in sec. 40 to the extent mentioned above. In *Nand Gopal* v. *Batuk Prasad* (*f*) a covenant to pull down when required by the vendor, rooms over a passage between the house of the vendor and the house sold was held to fall under the second paragraph of sec. 11 and to be enforcible under sec. 40 against a transferee from the vendee. The case was decided under the law as it was before the amendment of the two sections. Under the amended sections the covenant could have been enforced against the vendee under sec. 11, but being an affirmative covenant it could not have been enforced against a transferee from the vendee.

In determining whether a covenant is negative or positive the Court looks to the substance and not to the form of expression (*g*).

Condition making interest determinable on insolvency or attempted alienation.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

(1) Forfeiture on insolvency.—The object of the section is to protect the creditors of the transferee who would otherwise be prevented from having recourse to the property transferred for the satisfaction of their debts. In spite of a condition of defeasance on insolvency the property would vest in the Official Receiver or the Official Assignee, as the case may be. The words "dipose of" no doubt refer to *settlements*, for it would be a fraud on creditors if a man were permitted to settle his property in trust for himself until he should take advantage of the Act for the relief of insolvent debtors, and after that on a near relation.

Illustration.

A settles property in trust for himself until his death or bankruptcy and then over, on either of these events, on his wife. *A* is adjudged insolvent. *A*'s life interest vests in the Official Receiver or Official Assignee.

(2) Forfeiture on attempted alienation.—In so far as the section invalidates a condition of defeasance on an attempted alienation it rests on the same principles as secs. 10 and 11 as to restrictions repugnant to the interest transferred.

(*f*) (1932) 54 All. 17, 1932 A. L. J. 36, 138 I. C. 541, ('32) A. A. 72.

(*g*) *Wolverhampton & Walsall Rly. Co.* v. *London & N. W. Rly. Co.* (1873) 16 Eq. 433, 440; *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1926) A. C. 108.

S. 12

A rule of a Provident Fund that a member purporting to transfer or assign his share or interest in the Fund should forfeit such share or interest was held to be invalid under this section. The member applied to be declared insolvent. The Calcutta High Court held that though the vesting in the Official Assignee, which was the effect of the application, was a transfer by operation of law, yet the member's application to be declared insolvent was a voluntary transfer under the rule. However as the rule was invalid there was no forfeiture to the Fund but the interest did vest in the Official Assignee for the benefit of the creditors (*h*).

Stock Broker's card.—The section has no application to a rule of a Stock Brokers' Association forfeiting a defaulting member's card of membership (*i*).

(3) **English law.**—An *absolute interest in possession* in property may not be transferred under the English law so as to exempt it from the operation of the law of bankruptcy. In *re Dugdale* (*j*), Kay, J., said—"The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to *A*, were to declare that such estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory device which would cause it to shift to another person." A man cannot settle property on himself to be divested on bankruptcy, for that would be a fraud on the law of bankruptcy (*k*). But property may be given to a man for a limited interest terminable on bankruptcy, *e.g.*, for life or until he shall become bankrupt (*l*). Jarman says: "It seems impossible on any sound principle to deny to a third person the power of shifting the subject of his bounty to another when it can no longer be enjoyed by its intended object (*m*)." Following theEnglish law a condition of defeasance in the event of insolvency annexed to a life estate in a settlement was treated as valid by the Bombay High Court in a case which was not governed by the Act (*n*).

(4) **Indian Succession Act.**—The provision in the Indian Succession Act is in this matter different from that in the Transfer of Property Act, for a bequest may be made subject to a condition of defeasance in the event of insolvency. This is sanctioned in illustration (vii) to sec. 120, Indian Succession Act, 1925, replacing illustration (g) to sec. 107, Indian Succession Act, 1865. The illustration is set out in note (2) to sec. 21 below.

(5) **Lease.**—Leases constitute an exception, for the lessor having the *jus disponendi* may annex any conditions he pleases to his grant provided they be not illegal or unreasonable (*o*). A covenant determining a lease in the event of the insolvency of the lessee is valid (*p*). The condition applies to the insolvency of the person who has the term created by the lease. If the lessee assigns the term and then becomes insolvent the condition does not apply (*q*). The insolvency of the lessee will not involve a forfeiture unless there is a provision in the lease that the lessor may re-enter on the happening of such event. This is expressly enacted in the amendment made in sec. 111 (g) by the

(*h*) *Re Earnest Clarence O'Brien* (1933) 60 Cal. 926, 37 C. W. N. 1050, 147 I. C. 422 ('33) A. C. 701; Cf. *Rochford* v. *Hackman* (1852) 9 Hare 275.

(*i*) *Official Assignee of Bombay* v. *Shroff* (1932) 59 I. A. 318, 56 Bom. 374, 36 C. W. N. 909, 55 C. L. J. 592, 63 M. L. J. 623; 137 I. C. 776, ('32) A. C. 186.

(*j*) (1888) 38 Ch. D. 176, 182; *Re Smith Smith* v. *Smith* (1916) 1 Ch. 369.

(*k*) *Wilson* v. *Greenwood* (1818) 1 Sw. 471.

(*l*) *Brandon* v. *Robinson* (1811) 18 Ves. 429; *Re Sartori's Estate* (1892) 1 Ch. 11.

(*m*) Jarman, 7th Ed., p. 1480.

(*n*) *Hormusji* v. *Dadabhoy* (1896) 20 Bom. 310.

(*o*) *Roe d. Hunter* v. *Galliers* (1787) 2 Term. Rep. 133, 1 R.R. 445.

(*p*) *Ex parte Gould, Re Walker* (1884) 13 Q.B.D. 454; *Vyankatesraya* v. *Shivrambhat* (1883) 7 Bom. 256, 271.

(*q*) *Smith* v. *Gronow* (1891) 2 Q. B. 394.

amending Act 20 of 1929. The new sec. 114A makes provision for relief of forfeiture in such cases, and follows in this respect sec. 146, Law of Property Act [English], 1925.

A Kharposh grant of certain property made by the holder of an impartible property in favour of a junior member for maintenance is not a lease. A condition in such grant that if the said property is sold in auction for the grantee's debts the grant will come to an end is not an absolute restraint on alienation and is not invalid under sec. 10 but is wholly void under sec. 12 (*r*).

(5) **For the benefit of the lessor.**—The amendment of sec. 111 (g) makes it clear that these words refer to a condition giving the lessor a right of re-entry.

Transfer for benefit of unborn person.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.

A transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

(1) **Transfer for benefit of unborn person.**—A transfer cannot be made directly to an unborn person, for the definition of transfer in sec. 5 is limited to living persons. Such a transfer can only be made by the machinery of trusts. Possibly it is intended to express this distinction by the words "for the benefit of," the trustees being the transferees who hold the property for the benefit of the unborn person.

Both under English (*s*) and Hindu (*t*) law a child *en ventre sa mere* is in existence; but this rule is not applied in English law, unless it is directly or indirectly for the benefit of the child (*u*).

(2) **Subject to a prior interest.**—The estate must vest in some person between the date of the transfer and the coming into existence of the unborn person. The interest of the unborn person must therefore be in every case preceded by a prior interest; and the section in effect says that the interest of the unborn person must be the whole remainder, so that it is impossible to confer an estate for life on an unborn person. In the illustration to the section the interest created for the benefit of the unborn eldest son is only a life interest and it therefore fails. In *Girjesh Dutt* v. *Data Din* (*v*) *A* made a gift of her property to *B*, her nephew's daughter, for life, and then to *B*'s male descendants, if she should have any, absolutely; but if she should have no male descendants then to *B*'s daughter without power of alienation; but if there were no descendants of *B*, male or female, then to her nephew. *B* died without issue. The gift

(*r*) *Shiba Prasad* v. *Lekhraj & Co.*, (1945) A.P. 162, 23 Pat. 871.

(*s*) *In re Wilmers Trusts, Moore* v. *Wingfield* (1903) Ch. 411.

(*t*) *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, I.A. Sup. Vol. 47.

(*u*) *Elliot* v. *Joicey (Lord)* (1935) A.C. 209.

(*v*) (1934) 9 Luck. 329, 147 I. C. 991, ('34) A. O. 35.

S. 13

to the unborn daughters, being of a limited interest and subject to the prior interest created in favour of *B*, was invalid under sec. 13 and the gift to the nephew therefore failed under sec. 16. The illustrations to sec. 113 of the Indian Succession Act, quoted in note (3) below, may also be referred to in this connection.

(3) Indian Succession Act.—The section is almost identical with sec. 113, Indian Succession Act, 1925, replacing sec. 100, Indian Succession Act, 1865. That section is as follows :

> "Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed."

An instance of a bequest held invalid under this section is the case of *Putlibai* v. *Sorabji Naoroji* (*w*). See also *Sopher* v. *Administrator General of Bengal* (*x*).

(3A) *Sopher* v. *Administrator General of Bengal* (1944) *A.PC.* 67—*S* died leaving a widow and two sons. By his will the trustees were directed to stand possessed of the residuary estate upon trust out of the income to pay the widow a monthly sum for her own use and benefit during the term of her natural life. As to the balance, the relevant clause in the will was as follows :—

"Upon trust during the lifetime of my said wife to pay the balance . . . . to my children, if more than one in shares such that each male child shall take double of each female child, and if there shall be only one such child, the whole of such balance of income shall be paid to each one child. And if any child of me shall die in my lifetime or in the lifetime of my said wife leaving children or a child him or her surviving, the share of the said balance which would have been payable to the child so dying, had he or she been living, shall during the lifetime of my said wife be paid to his or her children, if more than one, in shares such that each male child shall take double the share of each female child, and, if there shall be only one such child, the whole of such share of the said balance of income shall be paid to such one child. And if any child of me shall die in the lifetime of my said wife without having any children or child him or her surviving, the share of the said balance of income which would have been payable to the child so dying had he or she been living shall during the lifetime of my said wife be paid to such of my children as shall survive the child so dying and the child or children of such of my children as shall have predeceased the child so dying in shares such that males shall in all cases take double the shares of females and the child or children of any such predeceased child shall take only the share of his, her or their deceased parent would have taken, if living, and if there shall be only one such child or one grandchild of me who shall be entitled to the benefit of this provision then the whole of such balance of income shall during the lifetime of my said wife be paid to such one child or grandchild, as the case may be."

In regard to the corpus, after stating that the corpus of his residuary estate shall not be divided during the lifetime of the testator's wife, the will contained directions for distribution in similar terms. Relying upon illustrations (2) & (3) to sec. 113 of the Indian Succession Act, 1925, the Judicial Committee held that however complete may be the dispositions of the will, the gift after the prior bequest must not be a life interest to an unborn person, for that would be a bequest to a person not in existence at the time of the testator's death, of something less than the remaining interest of the testator. In other words a later bequest must comprise all the testator's remaining interest, if the legatee under it is not in existence at the testator's death. Further gifts, however,

(*w*) (1923) 25 Bom. L.R. 1099, 76 I.C. 996, ('23) A. PC. 122.

(*x*) (1944) A. PC. 67, 71 I.A. 93, (1944) Kar. P.C. 228, 216 I.C. 53, 46 Bom. L.R. 86.

complete in their operation do not save the bequest. The Judicial Committee relied on the previous decision of the Board in *Putlibai* v. *Naoroji* (23) A. PC. 122. It was observed that bequests in that case failed to comprise the whole of the testator's remaining interest, because there were contingent rights which might prove to be of value. In consistency with that decision it was held by their Lordships in *Sopher's* case that if under a bequest in the circumstances mentioned in sec. 113 there was a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest did not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him did not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed. S. 1

In regard to the recitals of the will in question, the Judicial Committee held that the interest of a grand-child in the surplus income during the lifetime of the widow, was contingent on his surviving his parent. No grand-child was to receive any income unless and until he survived his father. Further if no child or grand-child survived the widow, there would be intestacy as regards the surplus income. It seemed to their Lordships that the "thing bequeathed" in the circumstances of the case was the residuary estate of the testator, but the clause above related to the income of that fund until the death of the widow. All the bequests or dispositions after the death of the widow were, therefore, void.

The Judicial Committee also held that sec. 120 of the Indian Succession Act was inapplicable to the case. The exception to that section applied only to the case where a fund was given to any person on his attaining a particular age. It has no relation to any other contingency, *e.g.*, to his surviving a named person as was in the present case.

This decision was considered by Blagden J. of the Bombay High Court in *Ardeshir* v. *Dadabhoy* (45) A.B. 395. The learned Judge observed: 'It does seem unfortunate that their Lordships' attention was apparently focussed entirely on Section 113 and 120 of the Indian Succession Act and does not seem ever to have been called to illustration 3 to Section 114 . . . . Their Lordships held the bequests in the case before them bad though those in the illustrations just cited are expressly held valid by the legislature apparently on the ground that the question of an estate is diminished by uncertainty as to who will ultimately get it.'

Blagden J. also doubted whether in view of the decision of the Privy Council in *Sopher's* case, the case stated by illustration No. 3 to section 114 can be held to have been repealed.

In *Ardeshir* v. *Dadabhoy* the facts were as follows: *D* was a settlor who made a settlement. According to the terms of the settlement *D* was to get during life one third, one third each was to go to his sons *A* & *R*. After *D's* death, the trust property was to be divided into two equal parts. The net income of each part was to be given to *A* & *R* for life and after their death to the sons of each absolutely. If *A* & *R* were each to predecease *D* without male issue, the trusts were to determine and the trust property was to revert to the settlor absolutely. The settlor then took power to revoke or vary the settlement in whole or in part for his own benefit.

It was held that *R's* son who was not born either at the date of the settlement or his death did not take any vested interest and the gift to him was invalid.

A's son who was alive at these dates did not also take a vested interest.

In view of the decision in *Sopher's* case the question would arise whether a trust in favour of unborn person in which the power is reserved by the settlor to revoke it would

S. 13 not be valid. It would also be doubtful whether a trust in which provision has been made for the management of the interest of the unborn persons after their birth and during their minority would be valid.

(4) **English law.**—This section is in some respects analogous to the common law rule against remoteness of limitation.

An unborn person cannot hold an estate in land and so a limitation to an unborn person was originally void at common law as it was in pure Hindu law. Joshua Williams says that down to the reign of Henry VI there was no instance of a contingent remainder (*y*). The rule was however from early times relaxed, and the limitation of future estates to unborn persons was permitted. The unborn donee had of course no interest until his birth, but on his birth the estate vested in him. The English rule against remoteness of limitation refers to the commencement or first taking effect of limitations and not to the cesser or determination of them (*z*). So that provided that the estate vests within the proper period it is possible in England to limit an estate to an unborn person for life (*a*) or until marriage (*b*). Such limitation would be invalid under this section.

The limitation of estates to unborn persons was subject to a restriction called the rule against double possibilities, recognized in the case of *Whitby* v. *Mitchell* (*c*), that if land is limited to an unborn person during his life, a remainder cannot be limited so as to convey an estate to that person's issue. Under the English rule a remainder is too remote and void if it is limited to the children of a person unborn to whom a prior life estate is given. Thus if the limitations is to *A* for life, and then to *A*'s unborn eldest son for life, and then to the eldest son's sons, the remainder to the grandsons alone was void. Under the present section the limitation to both generations would be void.

The rule in *Whitby* v. *Mitchell* (*d*) was a common law rule applicable to legal estates in land. The rule against perpetuities was a subsequent development, and as it overlapped the rule against double possibilities, the latter rule has now been abolished by sec. 161 of the Law of Property Act, 1925.

(5) **Moveables.**—As its position in the Act shows the section applies to moveable as well as immoveable property (*e*). See the second heading of Chapter II just above sec. 5. "(A) Transfer of Property, whether moveable or immoveable."

(6) **Hindu law.**—According to pure Hindu law a gift or bequest in favour of an unborn person is void (*f*). But this rule has been modified by statute. The Madras Act 1 of 1914, the Hindu Disposition of Property Act 15 of 1916, and Act 8 of 1921 validate gifts to unborn persons. These Acts have been amended by secs. 11, 12 and 13 of Act 21 of 1929, and the amendments enact that subject to the limitations in Chapter II of this Act, and in secs. 113, 114, 115 and 116 of the Indian Succession Act, 1925, no transfer *inter vivos* or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such dispositions. The omission of the word Hindu in sec. 2 makes this section directly applicable to Hindus (*g*). These Acts are reproduced in App. I, App. II, and App. III respectively. See Mulla's Principles of Hindu Law, secs. 359, 360.

(*y*) William's Real Property 23rd Ed., p. 386.
(*z*) *Wainwright* v. *Miller* (1897) 2 Ch. 255, 261.
(*a*) *Re Ashforth Sibley* v. *Ashforth* (1905) 1 Ch. 535, 540.
(*b*) *Re Crichtons Settlement Sweetman* v. *Batty* (1912) 106 L.T. 588.
(*c*) (1890) 44 Ch. D. 85.
(*d*) (1890) 44 Ch. D. 85.
(*e*) *Cowasji* v. *Rustomji* (1896) 20 Bom. 511.
(*f*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377 I.A. Sup. Vol. 47; *Bai Mamubai* v. *Dossa* (1891) 15 Bom. 443; *Sri Raja Venkata* v. *Sri Rajah Suraneni* (1905) 31 Mad. 310.
(*g*) See note to sec. 2 (d).

Sec. 13, 14

(7) Mahomedan law.—A gift to a person not in existence is void under Mahomedan law (*h*).

Rule against perpetuity.

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

(1) Principle.—The rule against perpetuity is founded on the general principle of policy guiding judges, that the liberty of alienation shall not be exercised to its own destruction and that all contrivances shall be void which tend to create a perpetuity or place property for ever out of the reach of the exercise of the power of alienation (*i*). As long ago as 1732 Jekyll, M.R., said that if the rule were otherwise "the mischief that would arise to the public from estates remaining for ever, or for a long time unalienable or untransferable from one hand to another, being a damp to industry, and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered (*j*)."

(1A) Meaning of "Perpetuity".—According to Jarman (*k*) "A perpetuity in the primary sense of the word is a disposition which makes property inalienable for an indefinite period." In this sense it is concerned with certain interests created *in praesenti* which are sought to be made inalienable for an indefinite period. In its modern sense it is concerned with interests arising in *futuro* and not with interest arising *in praesenti*. The present section, strictly speaking, deals only with what Jarman calls "Modern rule against perpetuities." In this sense our Act appears to be incomplete. (See also note under sec. 18: "some points of difference between English and Indian law regarding perpetuities.")

(1B) Rule against perpetuity in its primary sense.—Examples of such interests *in praesenti* which have been held void under the name of perpetuity or as tending to a perpetuity are, as conveniently classified in Halsbury's Laws of England (Hailsham Ed., Vol. XXV, Art. 171, p. 81), as follows:

"(1) Estates and interests limited *in praesenti* with an unauthorised mode of devolution, for example an estate of inheritance not known to the common law; an unbearable entail; an estate in which successive heirs take life estates only; the attempted entail of a chattel made prior to 1926.

(2) Interests held on perpetual non-charitable trust, where no person or persons can take any benefit, for example, trusts to keep in repair a tomb not part of the fabric of a church.

(3) Gifts to trustees for non-charitable indefinite objects or for non-charitable unincorporated institutions or societies which may last for an indefinite time."

As regards the first class it will suffice to say that even under the Hindu law no estate can be created which is unknown to Hindu law. The principle on which the second class is put has been applied in India in *Administrator General* v. *Hughes* (*l*). The cases falling within the third class require consideration. In *In re Clarke* (*m*) Byrne, J.,

(*h*) *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158; *Mohamed Shah* v. *Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I.C. 291.

(*i*) William's Real Property, 24th Ed., p. 486.

(*j*) *Stanley* v. *Leigh* (1732) 2 P. Wms. 686.

(*k*) Jarman on wills, 7th Ed., Vol. I, p. 348.

(*l*) 40 Cal. 192, 21 I.C. 186.

(*m*) (1901) 2 Ch. 110 at p. 114.

S. 14 expressed the principles thus: "It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad. In *In re Drummond* (*n*), which was concerned *inter alia* with a trust for the Old Bradfordians' Club, and which was approved by the House of Lords in *Macaulay* v. *O'Donnell* (*o*). Eve., J., said that he could not hold that the residuary gift was a gift to the members individually. There was, in his opinion, a trust, but there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity and reference was made to *In re Clarke* (*supra*). The learned Judge said that the legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended. In *In re Price* (*p*) a testatrix bequeathed one-half of her residuary estate to the Anthroposophical Society in Great Britain—an unincorporated association—"to be used at the discretion of the chairman and the executive council of the society for carrying on the teachings of the founder, Dr. Rudolf Steiner." It was held that there was no absolute gift to the society but that the society was at liberty to spend both capital and income on the objects defined in the will, and, there being no perpetuity created, the bequest was valid. It was also held that it was a valid charitable gift. A recent Indian decision on the point is to be found in *M. A. F. Halfhyde* v. *C. A. Saldanha* (*q*). On the authorities it seems that the question of validity or otherwise of such a gift has to be approached by stages. First question is: is it a gift to the individual members for the time being constituting the association or is it a gift to the association? If the former, the gift is good. If it is a gift to the association as such, the next question is: is it a gift, free and unfettered or is it a trust? If it is an unfettered gift the gift is good. If it is a trust the final question arises: is it an endowment so that the donee must hold the corpus for all times to come cannot deal with the corpus as and when he pleases or is it an immediate beneficial gift so that the donee can use the corpus and income as it pleases and when it pleases. If it is an endowment the gift fails as offending the rule against perpetuities in its primary sense and if not it is good and valid. Our section does not in terms deal with "perpetuity" in its primary sense, and therefore a perpetual gift in *præsenti* whether free or fettered will not strictly be within the mischief of sec. 14 but it is submitted that the principles of English law explained above should be applied in India for those principles are based on broad grounds of public policy.

(2) Modern rule against perpetuities.—The modern rule against perpetuities is thus enunciated by Jarman (*r*): "Subject to the exceptions to be presently mentioned, no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards." The exceptions to the rule are conveniently set out in Halsbury, Vol. XXV, Arts. 206-220, pp. 111-122. It is this modern English rule which is, with certain modifications, adopted by our section. The only exception to the rule expressly recognized by our Act is that embodied in section 18. It will be presently seen that some of the exceptions recognized by English law have also been recognized by Courts in India.

So long as the transferees are living persons any number of successive estates can be created. A transfer may be made to *A* for life, and then to *B* for life, and then to *C*

(*n*) (1914) 2 Ch. 90.
(*o*) (1918) 2 Ch. 435.
(*p*) (1943) 1 Ch. 422.
(*q*) (1944) 49 C.W.N. 145.
(*r*) Jarman on wills, 7th Ed., Vol. I, p. 267.

for life, and so on, provided *A*, *B* and *C* are all living persons at the date of the transfer. But if the ultimate beneficiary is some one not in existence at the date of the transfer, sec. 13 requires that the whole residue of the estate should be transferred to him. If he is not born before the termination of the last prior estate, the transfer to him fails under this section. If he is born before the termination of the last prior estate, he takes a vested interest at birth and possession immediately on the termination of the last prior estate.

The rule against perpetuities, however, does not require that the vesting shall take place *at the birth* of the ultimate beneficiary. What it does require is that the vesting cannot be delayed in any case *beyond his minority*. Thus if after the life estates to *A*, *B* and *C*, the ultimate beneficiary is the eldest son of *C*, the limitation would be to *C* for life with remainder to *C*'s eldest son, in which case the eldest son would take a vested interest at birth, although he may not have been born at the date of the transfer. But if it is intended that the estate shall not vest in an infant, the limitation would be to *C* for life and then on trust for such son of *C* as shall first attain the age of 18; the son of *C* has then a contingent interest which becomes vested when he attains the age of 18. If the last limitation had been to *C* for life, and then on trust for such son of *C* as shall first attain the age of 19, the transfer after *C*'s death would be void. The result of the rule against perpetuity is that the minority of the ultimate beneficiary is the latest period at which an estate can be made to vest.

Regard must be had to possible and not actual events.—In deciding questions of remoteness, regard must be had to possible and not to actual events (*s*). This is made quite clear in the corresponding sec. 114 of the Indian Succession Act, where the words are "*may* be delayed"; see note (3) below. The rule was thus stated by Platt, J., in *Dungannon* v. *Smith* (*t*): "When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void, both at law and in equity. And even if in its actual event it should fall greatly within such limit, yet it is still as absolutely void as if the event, which would have taken it beyond the boundary, had occurred."

Illustration.

R had a share in a village which he sold to the defendant reserving two bighas of land under the following condition: "Two bighas of land which I have excluded from the sale shall remain in my possession for life, and after my death in the possession of my lineal descendants . . . . I and any my lineal descendants have no right to transfer the land excluded . . . . . If none of my lineal descendants be alive then the land shall be the own property of the vendee." This was a transfer to take effect on the death of the vendor's last lineal descendant. *R* had only one son who was alive at the date of the transfer, but who died childless. On actual facts the transfer operated within the period allowed, but as it was possible that the transfer might have been postponed for 100 or 200 years until the vendor's line was extinct, the transfer of the two bighas was void: *Ram Newaz* v. *Nankoo* (1926) 92 I.C. 401, ('26) A.A. 283.

In the case of special powers of appointment regard should be had to the facts which are ascertained when the power is exercised (*u*). See note below, "Power of appointment."

(*s*) *Soudaminey* v. *Jogesh* (1877) 2 Cal. 262; *Rangenadha* v. *Bagirrathi* (1906) 29 Mad. 412; *Ram Newaz* v. *Nankoo* (1926) 92 I.C. 401, ('26) A.A. 283; *Kalachand* v. *Jatindra Mohan* (1929) 56 Cal. 487, 117 I.C. 355, ('29) A.C. 263; *Nalini Chandra* v. *Rajani Chandra* (1921) 25 Cal. W.N. 901, 904, 63 I.C. 196, ('21) A.C. 162; *Srimati Bramamayi* v. *Joges Chandra* (1871) 8 Beng. L.R. 400; *Rajaramji* v. *Ramnath* (1927) 105 I.C. 54, ('27) A.P. 412; *Pan Kuer* v. *Ram Narain* (1929) 117 I.C. 33, ('29) A.P. 353, 357.

(*t*) (1845) 12 Cl. & Fin. 546, 563.

(*u*) *Re Thompson* (1906) 2 Ch. 199.

S. 14

Illustration.

A testator died in 1872 leaving his property to his wife for life. He also gave his wife power to appoint on trust for their son and his issue in such manner as she thought fit. The wife died in 1893 leaving a will whereby she appointed the property to her son for life with remainder to such of his children living at her death as shall attain 25. All the son's children attained 25 before the wife died, *i.e.*, before 1893. The appointment was held to be valid: *Re Thompson* (1906) 2 Ch. 199.

(3) Indian Succession Act.—The rule against perpetuity in the Indian Succession Act is in sec. 114 of the Indian Succession Act, 1925, replacing sec. 101 of the Indian Succession Act, 1865. That section says: "No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of," etc. The following are the illustrations to that section:—

(i) A fund is bequeathed to *A* for his life and after his death to *B* for his life; and after *B*'s death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B*. The bequest after *B*'s death is void.

(ii) A fund is bequeathed to *A* for his life, and after his death to *B* for his life; and after *B*'s death to such of *B*'s sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B*'s death it shall be divided among such of *B*'s children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

In *Anandrao Vinayak* v. *Administrator-General of Bombay* (*v*) there was a gift of moveable property to a son with a gift over of shares in the property to the son's sons when they should attain the age of 21. The gift was held void as offending against perpetuity. Similarly in *Kashinath* v. *Chimnaji* (*w*) a bequest to a son who might at any time be adopted by the life tenant was held to be invalid on the same ground.

(*v*) (1896) 20 Bom. 450; *Sivasankara* v. *Soobramania* (1908) 31 Mad. 517.

(*w*) (1906) 30 Bom. 477.

(4) Minority.—Minority in India terminates at the end of 18 years. In a Privy Council case (*x*), the bequest was to the testator's daughters for their lives with remainder to their children at the age of 21. The bequest to the children was held to be void under secs. 114 and 115 of the Indian Succession Act. An attempt, however, was made to support the bequest on the ground that if guardians of the children were appointed by the Court under the Indian Majority Act, 1875, they would not under that Act attain majority till the age of 21, but the contention failed because *at the testator's death*, it was not certain that any of the children would have guardians appointed.

(5) English law.—Section 13 represents the common law rule against remoteness of limitation while sec. 14 corresponds to the English rule against perpetuity. The rule against perpetuity in England was a later development. Jarman says: "It was soon perceived that when increased facilities were given to the alienation of property, and modes of disposition unknown to the common law arose . . . . it was necessary to confine the power of creating these interests within such limits as would be adequate to the exigencies of families without transgressing the bounds prescribed by a sound public policy" (*y*).

The English rule differs from that in this section and in sec. 114 of the Indian Succession Act as it fixes the period at one or more lives in being and 21 years afterwards irrespective of the minority of the person entitled (*z*). The rule has been modified as from the 1st January 1926, by sec. 163 of the Law of Property Act, 1925, which provides that a transfer shall no longer be void for remoteness merely because the property is to vest in the beneficiary on his attaining an age over 21 years, but that it shall take effect as if the age of 21 had been substituted for the age specified in the instrument.

(6) Hindu law.—Since the amendment of sec. 2 this section applies directly to Hindus. It was applied by the Hindu Disposition of Property Act, 1916, and similar provisions were contained in the Madras Act I of 1914 and in Act 8 of 1921. The amendments made to those Acts by Act 21 of 1929 make transfers by Hindus to unborn persons subject to the limitations contained in Chapter II of this Act and bequests by Hindus to unborn persons subject to the rules contained in secs. 113, 114, 115 and 116 of the Indian Succession Act, 1925. But irrespective of statute a perpetuity is repugnant to Hindu law except in the case of religious and charitable endowments (*a*). The three Acts referred to above are set out in Appendices I to III below.

(7) Mahomedan law.—With reference to Mahomedan law the Privy Council held in *Abul Fata Mahomed* v. *Rasamaya* (*b*) that a gift to remote and unborn generations is forbidden by Mahomedan law except in the case of a wakf, and that a wakf is invalid if the gift is illusory. But the law has since been altered by the Mussulman Wakf Validating Act 6 of 1913, under which a wakf is valid even if the gift to charity is unsubstantial and illusory, provided there is an ultimate gift to charity. To this act retrospective effect has been given by Act 32 of 1930.

(8) Moveable and immoveable property.—The rule against perpetuity applies to moveable as well as to immoveable property (*c*). This is indicated by the position of the section in this chapter. See heading (A) of Chapter II.

(*x*) *Soundara Rajan* v. *Natarajan* (1925) 48 Mad. 906, 52 I.A. 310, 92 I.C. 289, ('25) A.P.C. 244.

(*y*) Jarman, 7th Ed., p. 266n.

(*z*) *In re Ridley* (1879) 11 Ch. D. 645. See the difference pointed out in *Soundara Rajan* v. *Natarajan*, *supra*.

(*a*) *Shookmoy Chandra* v. *Monohari Dasi* (1885) 11 Cal. 684, 12 I.A. 103; *Vallabhdas* v. *Gordhandas* (1890) 14 Bom. 360; *Kumara Ashima* v. *Kumara Krishna* (1869) 2 Beng. L.R. 11 O.C.; *Chandi Charn* v. *Sidheswari* (1889) 16 Cal. 71, 15 I.A. 149; *Anantha* v. *Nagamuthu* (1882) 4 Mad. [illegible]

(*b*) (1894) 22 Cal. 619, 22 I.A. 76; *Yusuf Khan* v. *Misal Khan* (1922) 72 I.C. 99.

(*c*) *Cowasji* v. *Rustomji* (1896) 20 Bom. 511.

S. 14 **(9) Charities.**—The rule against perpetuity does not apply to charities. See section 18.

(9a) Power of appointment.—A general power of appointment does not tie up land, and therefore the period for the application of this section does not begin to run until the date of the exercise of the power (*d*). Under special powers of appointment, the donee can transfer only to specified persons, and the effect therefore of such a power is to tie up land. In the case of a special power the period is to be reckoned from the date of creation of the power (*e*). In ordinary cases [as already noted in note (2)] in applying the section regard should be had to possible and not actual events, but in the case of special powers, the facts to be regarded are ascertained when the power is exercised (*f*). In *In re Legh's Settlement Trusts* (*g*) the facts (simplified) were as follows: By a deed of arrangement and re-settlement dated October 2, 1891, the trustees were, amongst other things, directed to hold the residue of the trust funds and the income thereof upon trust to pay the income thereof to J.R.P.L. during his life and after his death to hold the capital and income in trust for all or any one or more of the issues of J.R.P.L. whether children or remote issue as J.R.P.L. should by deed or by will appoint. J.R.P.L. had 5 children including one Margaret Cowie who predeceased J.R.P.L. leaving 2 children D.C. and J.J.C. who were born respectively on March 13, 1929 and May 12, 1931. J.R.P.L. died on March 5, 1935, having made his will dated March 3, 1933. By that will J.R.P.L., amongst other things, made an appointment of a share to D.C. and J.J.C. for their joint lives and after the death of either of them to the survivor for life. It will be noted that (1) the power of appointment given to J.R.P.L. was a special power, (2) that the appointees were persons not in being at the date of the deed of arrangement, (3) at the date of the death of J.R.P.L. when his will took effect the appointees were in being. In these circumstances the appointment in so far as it was to D.C. and J.J.C for their joint lives was quite good for the vesting of that interest must take place immediately upon the death of J.R.P.L. and therefore could not be delayed beyond a life in being at the date of the deed (*i.e.*, the life of J.R.P.L.) and 21 years thereafter. The question was: whether the appointment in so far as it was to the survivor of them for life was hit by the rule against perpetuities. That depended on whether that appointment was a vested or a contingent one. It was held that it was contingent, for there was no knowing as to who would be the survivor. It was quite possible that both of them might live for more than 21 years after the death of J.R.P.L. (the life in being at the date of the deed) and therefore the vesting of the life estate to the survivor might be delayed beyond the life in being at the date of the deed and 21 years. In the premises it was held that the reversionary life interest of the survivor being a contingent interest offended against the rule. The same principle was followed in *In re Johnson's Settlement Trusts: McClure* v. *Johnson* (*h*).

(9b) Provisions for payment of debts of settlor.—See sec. 17 (2) (1) and note "*Exception* (i)—*Payment of debts.*"

(10) Agreements and rule against perpetuities—covenant for pre-emption.—The rule against perpetuity does not apply to personal agreements (*i*), that is, agreements which do not create an interest in property.

Illustration.

The shebaits of a temple agree to appoint the family of *C* as pujaris from generation to generation to perform the services of the temple and make provision for the expenses and remuneration of the office. The agreement is valid and not affected by the rule

(*d*) *Rous* v. *Jackson* (1885) 29 Ch. D. 521.
(*e*) *Re Nash, Cook* v. *Frederick* (1910) 1 Ch. 1.
(*f*) *Re Thompson* (1906) 2 Ch. 199.
(*g*) (1938) 1 Ch. 39.
(*h*) (1943) 1 Ch. 341.
(*i*) *Walsh* v. *Secretary of State* (1863) 10 H. L. C. 367; *London & S. W. Rly.* v. *Gomm* (1882) 20 Ch. D. 562; *Borlands Trustee* v. *Steel Bros.* (1901) 1 Ch. 279; *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1910) 1 Ch. 12, 33; *Nafar Chandra* v. *Kailash* (1921) 25 Cal. W. N. 201, 62 I. C. 510, ('21) A. C. 328.

against perpetuity: *Nafar Chandra* v. *Kailash* (1921) 25 Cal. W. N. 201, 62 I. C. 510, ('21) A. C. 328. S. 14

A condition in a mortgage that the mortgagor may redeem whenever he likes refers only to the exercise of the equity of redemption which is a present interest. It is therefore outside the scope of the rule against perpetuity (*j*).

An agreement for the purchase of land creates in English law an equitable interest in the land and is therefore so far as specific performance is concerned subject to the rule against perpetuity. The leading case on this point is *London & S. W. Rly.* v. *Gomm* (*k*).

Illustration.

The plaintiff Railway no longer required a piece of land for the purpose of the railway and by a deed of 1865 conveyed the land to *G. P.* absolutely, and *G. P.* covenanted that he and his heirs would at any time thereafter, whenever the land was required by the Railway and after six months' notice reconvey the land to the Railway for £100. In 1879 the defendant *Gomm* purchased the land from *G. P.*'s heir with notice of the covenant. In 1880 the plaintiff Railway gave notice to *Gomm* to reconvey the land and on his refusal sued for specific performance of the covenant. Kay, J., held that the covenant did not create an estate or interest in land and was therefore not affected by the rule against perpetuity and decreed the suit. This was reversed on appeal, and Jessel, M.R., said that there was no real distinction between a contract of purchase and an option of purchase, and an option of purchase created an equitable interest which, if unlimited in duration, was void for remoteness as against an assignee of the land: *London & S. W. Rly.* v. *Gomm* (1882) 20 Ch. D. 562.

Before the Transfer of Property Act a contract of sale of land was treated as creating an equitable interest in land, for Indian cases followed the English law. Accordingly in a case decided in 1875 a covenant for pre-emption unlimited in point of time and occurring in a deed of partition was held to offend the rule against perpetuity (*l*).

Section 54 of the Transfer of Property Act enacts that an agreement for the sale of land does not, of itself, create an interest in land, and since this enactment there has been considerable conflict of decisions as to the application of the rule against perpetuity to such agreements. Some cases treat the agreements as personal agreements and therefore not affected by the rule; while others continue to apply the English rule, or treat the agreement as a personal agreement but void under sec. 23 of the Indian Contract Act as being of such a nature as to defeat the law as enacted in this section.

The only Privy Council decision on the point is that of *Maharaj Bahadur Singh* v. *Balchand* (*m*), but the agreement was of 1872 before the Transfer of Property Act and seems to have been treated as creating an equitable interest in land. In that case a Raja who was the proprietor of a hill agreed in compromise of litigation that he and his heirs would give a society of Jains a building site for a temple free of cost whenever they should require it. Subsequently the Raja granted a lease of the hill to a third person. The society then brought a suit against the lessee for possession basing its title upon the agreement. The suit was dismissed by the High Court, and the dismissal was confirmed by the Privy Council on appeal. In delivering the judgment of the Board, Lord Buckmaster said:—

"For the appellants [*i.e.*, the Jains] to succeed it is essential to show that this agreement created in them some present estate or interest which would prevent

(*j*) *Padmanabha* v. *Sitarama* (1928) 54 Mad. L. J. 96, 106 I. C. 158, ('28) A. M. 28. 33.

(*k*) (1882) 20 Ch. D. 562.

(*l*) *Sreemutty Tripoora* v. *Jugger Nath* (1876) 24 W. R. 321.

(*m*) (1921) 48 I. A. 376, 61 I. C. 762, 25 Cal. W. N. 770, ('22) A. PC. 165.

S. 14 the Raja from having made the grant. That could only be effected by reading the compromise as creating in the Jains Society a grant in perpetuity of the Parasnath hill. This cannot, however, be supported. . . . such a covenant as this does not, and cannot, run with the land, and could not be so enforced.

Further, if the case be regarded in another light—namely, an agreement to grant in the future whatever land might be selected as a site for a temple—as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest *in præsenti* but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

In this passage the Privy Council speak of the agreement creating an interest in land. This expression, would not be appropriate if the case were one under sec. 54 of the Transfer of Property Act. The agreement, however, was of 1872.

The Bombay High Court followed the Privy Council case in reference to a covenant for pre-emption contained in a sale deed of 1878. This was in *Dinkarrao* v. *Narayan* (*n*). The Court did not proceed on the ground that the covenant being before the Transfer of Property Act created an equitable interest in the land; but Macleod, C.J., said that the covenant was void on general principles as offending the rule against perpetuity, while Kanga, J., said that the contract was void under sec. 23 of the Indian Contract Act as calculated to defeat the rule against perpetuity which is now public policy. The correctness of this reasoning is open to question. The covenant was either a personal covenant or a covenant creating an interest in land. If it created an interest in land, it offended the rule against perpetuity. If it was a personal contract, then there is no rule of law or of public policy which makes the rule against perpetuity applicable. It will be remembered that in the leading case of *London & South Western Rly.* v. *Gomm* (*o*) where the covenant gave an option for the purchase of land Kay, J., held that the covenant did not create an interest in land and did not offend the rule against perpetuity. He was reversed on appeal by Jessel, M.R., on the ground that there was no substantial distinction between an option for purchase and a conditional limitation, and that the option created in English law an interest in land. The rule is limited to future interest in land and there is no public policy which requires it to be extended to agreements which the Act (s. 54) expressly says do not create an interest in land. However, the actual decision or conclusion in *Dinkarrao* v. *Narayan* (*p*) was correct as the agreement was before the Transfer of Property Act, and it was followed by the same High Court in another case (*q*) where there was a covenant of pre-emption unlimited in point of time occurring in an agreement of 1874.

The Allahabad High Court has dissented from the Bombay case, and regards agreements for the sale of land or for pre-emption as an obligation arising out of contract and annexed to the ownership of land and binding on transferees with notice under sec. 40 of this Act (*r*). A subsequent Bombay decision (*s*) expresses a preference for the view taken by the Allahabad High Court.

(*n*) (1923) 47 Bom. 191, 24 Bom. L. R. 449, 82 I. C. 628, ('22) A. B. 84.

(*o*) (1882) 20 Ch. D. 562.

(*p*) *Supra.*

(*q*) *Alkibhai* v. *Dada* (1931) 33 Bom. L. R. 1296, 136 I. C. 509, ('31) A. B. 578.

(*r*) *Basdeo Rai* v. *Jhagru Rai* (1924) 46 All. 333, 83 I. C. 890, ('24) A. A. 400; *Aulad Ali* v. *Ali Atdar* (1927) 49 All. 527, 100 I. C. 693, ('27) A. A. 170 F. B. overruling *Balli Singh* v. *Raghubar Singh* (1923) 45 All. 492, 82 I. C. 642, ('23) A. A. 511 and *Gopi Ram* v. *Jeet Ram* (1923) 45 All. 478, 82 I. C. 646, ('22) A. A. 514; *Muhammad Jan* v. *Fayaluddin* (1924) 46 All. 514, 85 I. C. 482, ('24) A. A. 657; *Ratanlal* v. *Ramanujadas* (1944) A. N. 187.

(*s*) *Harkisondas Bhagwandas* v. *Bai Dhanu* (1926) 50 Bom. 566, 591, 98 I.C. 634, ('26) A. B. 497 (F. B.)

The Madras High Court at one time held that there was no substantial difference as regards such agreements between the English and the Indian law (*t*). But that Court has subsequently treated such covenants as personal covenants, not affected by the rule against perpetuity the benefit of which is assignable by the covenantee, and which are enforceable against the representatives of the covenantor (*u*). Accordingly that High Court has also held that an agreement by a permanent lessee to surrender the lease whenever the land should be required by the landlord is a personal agreement which is not void for remoteness (*v*). On the other hand, although a covenant of indemnity is a personal contract (*w*), the same High Court in a later case (*x*), expressed the opinion that a covenant of indemnity which included an agreement to substitute other land might offend against the rule against perpetuity. This again is open to question.

The Calcutta High Court formerly applied the rule on the analogy of the English law (*y*). The point was not taken in *Haris Paik* v. *Jahuruddi* (*z*), and did not arise in *Kalimuddin* v. *Reazuddin* (*a*), and in *Jogesh Chandra* v. *Asalia Khatun* (*b*), as the covenant was not expressed to bind the heirs and assigns or to endure for any particular time. But in *Kalachand* v. *Jatindra Mohan* (*c*) an agreement between two co-sharers to give each other a right of pre-emption at a fixed price was expressed to be binding on "us, our heirs and representatives in interest", and the Court held that the agreement was void under the rule against perpetuity, and therefore incapable of being enforced even between the contracting parties. The ground of the decision would appear to be that what vitiates a transfer vitiates also an agreement for a transfer. The learned judges also relied upon the analogy of sec. 27 (b) of the Specific Relief Act, 1877, and sec. 91 of the Indian Trusts Act, 1882, but the Transfer of Property Act itself contains a similar provision in sec. 40, para. 2. In the recent case of *Ali Hossain Miya* v. *Raj Kumar Halder* (*d*) a full Bench of the Calcutta High Court has held that a covenant for pre-emption, in respect of a land unrestricted in point of time and expressed to be binding on the parties as well as upon their heirs and successors, does not offend the rule against perpetuities enacted in sec. 14 of the Transfer of Property Act. The earlier Calcutta decisions to the contrary are no longer good law.

The Patna High Court follows the earlier Calcutta decisions in adopting the English rule (*e*).

Illustrations.

(1) The Bombay Port Trust in 1900 sell a plot of land to *A* who covenants that he and his heirs will at any time reconvey the land, when required to do so to the Port Trust. In 1920 *A* sells the land to *B* who has notice of the covenant. In 1930 the Port

(*t*) *Kolathu Ayyar* v. *Ranga Vadhyar* (1915) 38 Mad. 114, 18 I. C. 203; *Ramasami* v. *Chinnan* (1901) 24 Mad. 449.

(*u*) *Munuswami Nayudu* v. *Sagalaguna Nayudu* (1926) 49 Mad. 387, 100 I. C. 339, ('26) A. M. 699; *Pichi Naidu* v. *Jefferson* (1921) 44 Mad. 230, 60 I. C. 591, ('21) A. M. 541. See also *Charamudi* v. *Raghavulu* (1916) 39 Mad. 462, 28 I. C. 871.

(*v*) *Rama Rao* v. *Thimmappa* (1925) 48 Mad. L. J. 463, 87 I. C. 433, ('25) A. M. 732; *Raja of Karvetnagar* v. *Velayuda* (1915) 18 Mad. L. T. 83, 29 I. C. 435.

(*w*) *Mst. Banti* v. *Mandu* (1928) 9 Lah. 659, 110 I. C. 425, ('28) A. L. 357.

(*x*) *Natesa Vanniyan* v. *Gopalswami* (1928) 51 Mad. 688, 691, 110 I. C. 830, ('28) A. M. 894.

(*y*) *Nobin Chandra* v. *Navab Ali* (1901) 5 Cal. W. N. 343; *Anath Nath* v. *Keshab Chandra* (1910) 14 Cal. W. N. 601, 5 I. C. 487; *Kumar Nabin Chandra* v. *Rajani Chandra* (1921) 25 Cal. W. N. 901, 68 I. C. 196, ('21) A. C. 162; *Rash Behari* v. *Sha Bharanjan* (1921) 64 I. C. 1001; *Swurga Kumar* v. *Prahlad Chandra* (1922) 26 Cal. W. N. 874, 67 I. C. 719, ('22) A. C. 474.

(*z*) (1897) 2 Cal. W. N. 575.

(*a*) (1901) 14 Cal. W. N. 295, 10 Cal. L. J. 626, 4 I. C. 743.

(*b*) (1927) 44 Cal. L. J. 220, 98 I. C. 46, ('27) A. C. 41.

(*c*) (1929) 56 Cal. 487, 498, 117 I. C. 855, ('29) A. C. 263.

(*d*) I.L.R. (1943) 2 Cal. 605, 47 C.W.N. 557.

(*e*) *Matura Subba Rao* v. *Surrendranath Sahu* (1929) 8 Pat. 243, 118 I. C. 329, ('29) A. P. 637; *Rajaramji* v. *Ramnath* (1927) 105 I. C. 54, ('27) A. P. 412. But see *Dahya Bhai* v. *Maharaj Bahadur* (1917) 1 Pat. L. J. 238, 244, 84 I. C. 482; S. C. on appeal to P.C. 48 I.A. 376; *Shiba Prasad Singha* v. *Lakhaji Shamalram* 23 Pat. 871 at p. 885.

S. 14

Trust requires *B* to reconvey the land to them.—According to the Allahabad and later Calcutta and Madras decisions the covenant is not affected by the rule against perpetuity and is enforcible by the Port Trust against *B* under s. 40.—According to the Bombay, and Patna decisions the covenant is void under the rule against perpetuity and is not enforcible.

(2) The Bombay Port Trust in 1900 sell a plot of land to *A* who covenants that he and his heirs will at any time reconvey the land when required to do so to the Port Trust. In 1920 *A* dies and his son *B* inherits the land. In 1930 the Port Trust require *B* to reconvey the land to them.—According to the Allahabad and later Calcutta and Madras decisions the covenant is not affected by the rule against perpetuity and is enforcible by the Port Trust against *B* as the personal representative of *A*.—According to the Bombay and Patna decisions the covenant is void under the rule against perpetuity and is not enforcible.

(3) The Bombay Port Trust in 1900 sell a plot of land to *A* who covenants that he and his heirs will at any time reconvey the land to the Port Trust or their assigns when required to do so. In 1920 the Port Trust assign their rights under the covenant to the Bombay Municipality, and give notice of the assignment to *A*. In 1930 the Bombay Municipality require *A* to transfer the land to them.—According to the Allahabad and later Calcutta and Madras decisions the covenant is not affected by the rule against perpetuity and is enforcible by the Bombay Municipality as assignee of the Bombay Port Trust.—According to the Bombay, and Patna decisions the covenant is void under the rule against perpetuity and not enforcible.

In conclusion it is submitted that an agreement for the sale of land, as is does not create an interest in land, is not subject to the rule against perpetuity. It is a personal contract and has the following incidents, *viz.*, (1) it is binding on the immediate parties and on their personal representative; (2) the benefit of it can be assigned by the intending purchaser; and (3) it creates an obligation arising out of contract and is enforcible, under section 40 against a purchaser for value with notice or against a gratuitous transferee. (*f*) A covenant for pre-emption operates as an agreement for sale and is a personal agreement. It has incidents (1) and (3), but not incident (2), for the benefit of a covenant for pre-emption is restricted to the covenantee and cannot be transferred by him. See note (17), "Pre-emption," under sec. 6 (d).

(11) Charge and rule against perpetuities.—A charge does not amount to a transfer of an interest in land and is therefore not affected by the rule against perpetuities (*g*). But if there is no charge on land a trust for payment of income to a payee and his descendants from generation to generation is void as offending against the rule of perpetuity (*h*).

(12) Mortgage and rule against perpetuities.—In *Padmanabha Ayyar* v. *Sitarama Ayyar* (*i*) it was held that the rule against perpetuities applied only to cases where there was a new interest in immoveable property contemplated to be created after the expiry of the time prescribed by the rule, namely the lifetime of a person living and the minority of one who might be in existence then and that in the case of a mortgage, there was no such future interest in property contemplated to be created because it was of the very essence of the mortgage that the equity of redemption was a present interest in the property in exercise of which alone the property was sought to be redeemed. In a recent

(*f*) *Ali Hossain* v. *Raj Kumar Haldar* I.L.R. (1943) 2 Cal. 605, (1943) A.C. 417, 77 C.L.J. 216, 47 C.W.N. 557, 208 I.C. 473 (F.B.).

(*g*) *Matlub Hasan* v. *Mt. Kalwati* (1933) 147 I. C. 302, ('33) A.A. 984; *Raja of Ramnad* v. *Sundara Pandiyasami Tevar* (1918) 46 I. A. 64, 42 Mad. 581, 49 I. C. 704.

(*h*) *Wahajuddin* v. *Ali Ahmad* (1934) 153 I. C. 595, ('34) A. A. 983.

(*i*) (1928) 54 M.L. 796, 106 I.C. 156, (1928 A.M. 28, 33.

case before the House of Lords (*j*) where by a mortgage deed of 1931 the mortgagor covenanted to repay the mortgage mostly with interest by 80 half-yearly instalments and also demised the mortgaged premises to the mortgagee for 3000 years with the usual proviso for cessar on repayment of the mortgage mostly with costs and interest the mortgagors being desirous of redeeming the mortgage brought an action for a declaration that the mortgagor was so entitled. It was contended on behalf of the mortgagor, amongst other things, that the mortgage which fixed the date of redemption so many years ahead offended the rule against perpetuities. The House of Lords in agreement with both the courts below on this point held that the rule against perpetuities had no application to mortgages.

Transfer to class, some of whom come under sections 13 and 14.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *in regard to those persons only and not in regard to the whole class.*

(1) Amendment.—Before the amending Act 20 of 1929 the section was as follows:—"If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *as regards the whole class.*"

Before the amendment the section was exactly the opposite. In the section as it now stands the words "in regard to those persons only and not in regard to the whole class" have been substituted for the words "as regards the whole class." The reason for the amendment will be explained presently. If a transfer is intended to take effect immediately all persons constituting the class at the time of the transfer would take and no question of remoteness could arise. The section therefore only refers to cases where the benefit is to accrue at a future time. Thus in the case of a bequest to *A* for life and then to such of *A*'s children as shall attain the age of 25, the class might not be ascertained within the period allowed by the rule against perpetuity. In such a case *Leake* v. *Robinson* (*k*) decided that the gift to the whole class of *A*'s children must fail. In *Pearks* v. *Mosely* (*l*) Lord Selbourne said "the rule is, that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members." This was the rule enacted in the old section. The old section did not apply to Hindus. The present section does apply to them.

(2) Indian Succession Act.—The corresponding sec. 115 of the Indian Succession Act, 1925, which replaced sec. 102 of the Indian Succession Act, 1865, was similarly amended about the same time by sec. 14 (1) of the Transfer of Property (Amendment) Supplementary Act 21 of 1929. The first two illustrations to that section are as follows:—

Illustrations.

(i) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. [The gift to *A*'s children is a gift to a class]. *A* survives the testator, and has some children living at the testator's death. Each child of *A*'s living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest [sec. 385 (2)]. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the

(*j*) (1940) A.C. 613.
(*k*) (1817) 2 Mer. 363.
(*l*) (1880) 5 App. Cas. 714.

S. 15

decease of *A*. The bequest to *A*'s children, therefore, is inoperative as to any child born after the testator's death and in regard to those who do not attain the age of 25 within 18 years after *A*'s death, but is operative in regard to the other children of *A*.

(ii) A fund is bequeathed to *A* for his life, and after his death to *B*, *C*, *D*, and all other children of *A* who shall attain the age of 25. *B*, *C* and *D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in ill. (i). Although the mention of *B*, *C* and *D* does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children *B*, *C* or *D*, who attains the age of 25 within 18 years after *A*'s death.

As already stated, sec. 15 of the Transfer of Property Act and sec. 115 of the Indian Succession Act, before they were amended as aforesaid, were enacted on the principle of the decision in *Leake* v. *Robinson*. That principle is thus stated in Theobold on Wills: "Where there is a gift to a class, any members of which may have to be ascertained *beyond the limits of perpetuity*—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void." The longest period in England is 21 years after an existing life or lives.

Gift to a class.

(3) Hindu law as to gift to a class.—Before the Acts of 1914, 1916 and 1921, relating to gifts and bequests to unborn persons [see sec. 13, note (6)], a gift to a person who was not in existence at the date of the gift was void; and so was a bequest to a person who was not in existence at the date of the testator's death. This proceeded on the principle that a person who was not in existence at the material date was *incapacitated* from taking. Thus if a gift was made by a Hindu to his grandsons, and none of them was in existence at the date of the gift, none of them had the *capacity* to take, and the gift was therefore void. But what if a gift was made by a Hindu to his grandson *S* who was in existence at the date of the gift, and to other grandsons (brothers of *S*) who might be born *after the date of the gift*, and some grandsons are born in fact after the date of the gift? It is obvious that the grandsons who were born after the date of the gift could not take, but could *S* take? In some of the earlier cases it was held on the analogy of the rule in *Leake* v. *Robinson*, that the gift having failed as to the other grandsons, it was wholly void, and that *S* too could not take. But it was held in later cases and also by the Judicial Committee that the rule in *Leake* v. *Robinson* was a rule of construction of the English law, and that it did not apply to Hindus, and that the *incapacity* of the other grandsons to take did not incapacitate *S* from taking, with the result that *S* took the whole of the property which was the subject-matter of the gift (*m*). Further, the rule in *Leake* v. *Robinson* is confined in terms to cases where the members of the class may have to be ascertained *beyond the limits of perpetuity*. But the sections of the Transfer of Property Act and the Indian Succession Act which contain the rule against perpetuity did not then apply to Hindus, and *Leake* v. *Robinson* therefore could not possibly apply to Hindu gifts and bequests and ought not to have been applied to them.

(*m*) *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164; *Ram Lall Sett* v. *Kanai Lal Sett* (1886) 12 Cal. 663; *Bhagabati* v. *Kali Charan* (1911) 38 Cal. 468, 38 I.A. 54, 10 I.C. 641, [affirming s.c. in 32 Cal. 992]; *Ranimoni Dassi* v. *Radha Prosad* (1914) 41 I.A. 176, 23 I.C. 713, 41 Cal. 1007; *Manjamma* v. *Badmanabhayya* (1889) 12 Mad. 393; *Ranganadha* v. *Bhagirathi* (1906) 29 Mad. 412; *Mangaldas* v. *Tribhuvandas* (1891) 15 Bom. 652; *Tribhuvandas* v. *Gangadas* (1894) 18 Bom. 7; *Krishnarao* v. *Benabai* (1896) 20 Bom. 571; *Khimji* v. *Morarji* (1898) 22 Bom. 533; *Advocate General* v. *Karmali* (1905) 29 Bom. 133, 155-156; *Kanai Lal Ghosal* v. *Kumar Purnendu Nath Tagore* (1946) 51 C.W.N. 227.

Observe now the course of legislation. First came the Madras Act of 1914. It validated gifts and bequests in favour of unborn persons, and *thus removed the bar of incapacity*. It also applied for the first time the rule against perpetuity to cases governed by that Act. Similar provisions were introduced by the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921. The result of this legislation was that in the case put above grandsons other than *S*, though not in existence at the date of the gift, could also take under the deed.

The Indian Succession Act in force when the three Acts were passed was that of 1865. Section 100 related to bequests for the benefit of unborn persons; it is now sec. 113 of the Indian Succession Act, 1925. Section 101 related to the rule against perpetuity; it is now sec. 114 of the Indian Succession Act, 1925. Section 102 related to bequests to a class; this corresponds to sec. 115 of the Indian Succession Act, 1925, before it was amended in 1929. Another Act in force when the three Acts were passed was the Hindu Wills Act, 1870. Certain sections of the Indian Succession Act, 1865, were made applicable to cases governed by the Hindu Wills Act, one of them being sec. 102. Section 102 was in the following terms:—

"If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or, either of them, such bequest shall be *wholly void*."

Though sec. 101 was incorporated in all the three Acts, sec. 102 was not, the intention being to keep alive the rule of Hindu law that if a gift or bequest was made to a class of persons with regard to some of whom it was inoperative by reason of the fact that they were not in existence at the material date, the gift or bequest failed in regard to those persons only and not in regard to the whole class. But the legislature, it would appear, overlooked the Hindu Wills Act, and particularly the inclusion in that Act of sec. 102. This was not noticed until the decision of the Judicial Committee in *Soundara Rajan* v. *Natrajan* (n). The will in that case was governed by the Madras Act of 1914. Amongst the properties disposed of by the will were some immoveable properties situated in the *city* of Madras. This attracted the applicability of the Hindu Wills Act. The testator died in 1904, leaving three daughters, *A*, *B* and *C*. *A* had four children, *three born before* and one after 1904. *B* had one child *born before* 1904. *C* had six children all born after 1904. By his will the deceased directed his trustees to apportion his residuary trust fund into as many equal shares as there were daughters, to pay the income from each of such shares to the daughters for life respectively, and after the death of each daughter to hold the share appropriated to her "upon trust for the children of such daughter who shall attain the *age of twenty-one years*." The testator was survived by the three daughters. After their death a suit was brought by the children of the third daughter *C* against the children of *A* and *B* for construction of the will and for administration of the estate of the testator. The Judicial Committee held that the bequest to the unborn children was invalid under sec. 101 of the Indian Succession Act, 1865 [now the Indian Succession Act, 1925, sec. 114], as it offended the rule against perpetuity, and that the bequest being to a *class*, and being invalid as to some members, it failed also in regard to the children born *before* the death of the testator under sec. 102 of that Act (corresponding to the Indian Succession Act, 1925, sec. 115, before it was amended in 1929). In the case under consideration the bequest to the children born after the testator's death failed not because of the rule of Hindu law that a bequest to an unborn person is void, for the Madras Act validated such bequest, but because of the rule against perpetuity contained in sec. 101. The bequest being void as to some members of the class under sec. 101 it was *wholly* void under sec. 102.

(n) (1925) 52 I.A. 310, 48 Mad. 906, 92 I.C. 289, ('25) A.PC. 244. See *Sewdayal* v. *Official Trustee* (1931) 58 Cal. 768, 134 I.C. 436, ('31) A.C. 651.

Sec. 16

This led to the amendment of sec. 15 of the Transfer of Property Act, 1882, and sec. 115 of the Indian Succession Act, 1925, in the manner stated above.

(4) Mahomedan law as to gift to a class.—The rule in *Leake* v. *Robinson* mentioned above has been held not to apply to Khojas in Bombay (o). It has accordingly been held that where there is a bequest to a class of persons some of whom are in existence at the testator's death and some are born after his death, the gift fails in regard only to those who were born after the testator's death and not in regard to the whole class. This decision coincides with the amended sec. 15. There is no reason why other sects of Mahomedans should be governed by a different rule.

Transfer to take effect on failure of prior interest.

16. Where, by reason of any of the rules contained in sections 13 and 14, an interest *created for the benefit of a person or of a class of persons* fails *in regard to such person or the whole of such class*, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

(1) Amendment—Before the amending Act of 1929 the section was as follows :—

"Where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails."

The amendment of sec. 15 rendered a reference to that section unnecessary, but on the other hand provision is made for the case where a gift fails as to all the members of the class by reason of the rules in secs. 13 and 14.

(1a) Principle.—The section follows the English law that a limitation following upon a limitation void for remoteness is itself void even though it may not of itself transgress the rule against perpetuity. In *Monypenny* v. *Derring* (p) Lord St. Leonards said that—"The gift over was void, not because it was not within the line of perpetuity, but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence, but could not take." But Gray in his work on Perpetuities points out that "the imputation of such an intent to the testator seems unwarranted" (q). The real reason why the ulterior disposition cannot take effect is that it is part of a scheme for tying up land by means of void limitations.

Illustration.

A settles property in trust for *B* and his intended wife successively for their lives and then on their eldest son for his life, and then on the eldest son of such eldest son for his life and then on *C*. The prior interests of the son and grandson of *B* fail under secs. 13 and 14 and therefore the subsequent interest of *C* also fails.

The case of *Girjesh Dutt* v. *Data Din* (r) cited in the note on sec. 13 is an illustration of the rule under this section. *A* made a gift of her property to *B*, her nephew's daughter, for life, and then to *B*'s male descendants, if she should have any, absolutely; but if

(o) *Advocate-General* v. *Karmali* (1905) 29 Bom. 133.

(p) (1847) 2 DeG.M. & G. 145, 182; *In re Abbot* (1893) 1 Ch. 54, 57.

(q) Gray on Perpetuities, 3rd Edn. p. 242.

(r) (1934) 9 Luck. 329, 147 I.C. 991, ('34) A.O. 35.

she should have no male descendants, then to *B*'s daughters without power of alienation; but if there were no descendants of *B*, male or female, then to her nephew. *B* died without issue. The gift to the unborn daughters, being of a limited interest and subject to the prior interest of *B*, was invalid under sec. 13, and the gift to the nephew therefore failed under sec. 16. S. 16

(2) Prior interest otherwise invalid.—The prior interest may be invalid otherwise than under the rules contained in secs. 13 and 14. It may depend upon a condition precedent which is invalid under sec. 25. If so the subsequent interest, if it is to take effect *after* the prior interest, would fail under sec. 25, for it would also be dependent on the invalid condition. If the subsequent interest is to take effect *upon failure of* the prior interest and the prior interest is invalid under sec. 25, the subsequent interest would fail under the combined effect of secs. 25 and 28.

Illustrations.

(1) *A*, on condition that *B* murders *C*, transfers his field to *B* for life and then to *D*. The interest of *D* is as much dependent on the illegal condition as the interest of *B* and it also fails under sec. 25.

(2) *A* transfers his field to *B* on condition that *B* murders *C*, with a proviso that in case of *B*'s death without issue the field shall belong to *D*. The interest of *B* fails under sec. 25 and the interest of *D* fails under secs. 25 and 28.

(3) Prior interest not invalid but subsequently fails.—If the prior interest is not invalid but subsequently fails because the condition upon which it depends is not fulfilled, section 27 applies, and the subsequent interest is as a rule accelerated.

Illustration.

A, on condition that *B* pays *C* Rs. 500 within three months, transfers his field to *B* for life and then to *C*. *B* does not pay *C* Rs. 500 within three months. *C* is entitled to the field at the expiry of three months although *B* is still alive.

(4) Indian Succession Act.—The corresponding section 116 of the Indian Succession Act, 1925, which replaced sec. 103 of the Indian Succession Act, 1865, has been similarly amended by sec. 14 (2) of Act 21 of 1929.

(5) Alternative limitations.—The rule does not apply if the subsequent interest is not dependent on the prior interest, but is alternative to it. If there are two alternative limitations, one branch of which is remote and the other capable of taking effect, the Court will disregard the void limitation and give effect to that which is legal (*s*) An alternative or independent gift or a gift which can take effect independently of a void limitation is valid (*t*). Thus in *Monypenny* v. *Derring* (*u*), the gift was to *PM* for life, then to his first son for life, then to the first son of that first son and his heirs male and in default of such heirs male to other sons of *PM* "and in default of issue of the body of *PM*, or in case of his not leaving any at his decease, for *TM* for life." Lord St. Leonards held that the limitation to the unborn grandson of the unborn son was void, but in the event that actually happened, *i.e.*, *PM* not leaving any issue at his decease, the alternative gift to *TM* was valid. For a modern instance of an alternative gift see the undernoted case (*v*).

(6) Vested gift.—The section in terms hits "any interest created in the same transaction and intended to take effect after or upon the failure of such prior interest." Any interest created in the same transaction and intended to take effect immediately and

(*s*) *Evers* v. *Challis* (1859) 7 H.L.C. 531.
(*t*) *Re Davey* (1915) 1 Ch. 837.
(*u*) (1852) 2 De G. M. & G. 145.
(*v*) *In re Curryer's Will Trusts, Wyly* v. *Curryer* (1938) 1 Ch. 952.

S. 16 independently of the prior gift and which does so take effect is clearly not within the mischief of the section. A gift may be vested in interest although it is not vested in possession. An ulterior gift which is vested in interest *in praesenti* does not fail if the prior gift is bad by reason of sections 13 and 14. In *In re Coleman, Public Trustee* v. *Coleman* (w) the share of residue given to one of the testator's sons was settled upon discretionary trusts for the son during his life and after his death upon similar discretionary trusts for any widow the son might leave and for all or any of the children of the son and after the death of such widow, upon the trust for the children of the son at twenty-one or marriage, in equal shares. In this case the discretionary trust in favour of the son was clearly valid because the son was a person in being. The discretionary trust in favour of the son's widow was bad because it may be exercisable at a date beyond the period of a life in being at the testator's death and 21 years afterwards, for the wife may not be a person born before the death of the testator. The question was : whether the final gift to the children of the son after the death of the widow of the son fell with the prior gift. It was held that the ulterior gift to the children took effect on the death of the testator, *i.e.*, was vested in interest although it was to fall in possession after the death of the widow of the son and therefore was not bad. In this case the earlier case of *In re Canning's Will Trust—Sknes* v. *Lyon* (x) was followed.

(7) **Hindu law.**—Some cases decided under the Hindu law are illustrations of the section. In the *Tagore* case (y) property was beqeathed to *A* and his heirs in tail male and after the failure or determination of that estate, to *B* and his heirs in tail male, and then to *C* and his heirs in tail male. The limitations in tail male were void both under Hindu law and the rule against perpetuities. *A* took an estate for life, and though *B*'s son and *C*'s grandson were alive at the death of the testator the estate passed at *A*'s death to the heir at law. Again in *Brajanath* v. *Anandamayi* (z) the testator, not having any great-grandsons living at his death, bequeathed his property to great-grandsons on their attaining majority, and in case there were no great-grandsons, to the daughter's sons. The gift to the great-grandsons was void for remoteness, and the Court held that the gift to the daughter's sons was dependent on and not alternative to it, and therefore also failed.

Alternative limitations are also illustrated by Hindu law cases. In *Javerbai* v. *Kablibai* (a), *M* by will bequeathed his property to his wife and his brother *J* for their lives, and after the death of the survivor of them to the male issue of *J*, and in default of such male issue, to such person as *J* may appoint. *J* had no male issue and exercised the power of appointment in favour of his daughter. The gift to the male issue of *J* was void, but the gift over under the power of appointment was an independent and alternative gift and therefore valid. It should be observed that the daughter took from the testator *M* and not from *J*, for under a power of appointment the property is taken not from the donee of the power but from the grantor of the power (b). Another instance is *Tarakeswar* v. *Shoshi* (c). *A* bequeathed his property to three nephews *B*, *C* and *D* and their descendants in the male line without power of alienation, with a gift over in the following terms: "if any of the nephews should die without leaving a male child, then his share shall devolve on the surviving nephews and their male descendants." Here the attempt to create an estate in tail male failed and each nephew took an estate for life. But though the estate in tail male which was dependent on each life-estate failed, the independent gift over from one nephew to another was not affected. On the death of *B* and *C* without issue their shares passed to *D*, but only for a life-estate, for the estate in tail male of the surviving nephew was also void.

(w) (1936) 1 Ch. 528.
(x) (1936) 1 Ch. 309.
(y) (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47.
(z) (1872) 8 Beng. L.R. 208.
(a) (1891) 16 Bom. 492.
(b) *Motivahoo* v. *Mamoobai* (1897) 21 Bom. 709, 24 I.A. 93.
(c) (1883) 9 Cal. 952, 10 I.A. 51, 56.

When the donor made gifts to relations and for charitable purposes the Privy Council have held that the provisions for his relations would fail in so far as they were contrary to law and the other dispositions would also fail if they were dependent thereupon and inseparable therefrom but the invalidity of certain of the gifts to relatives would not be fatal to other dispositions apparently separable, and charitable gifts would not be bad because, though substantial, they did not involve a sufficiently large part of the settled property or because the beneficial interest was not given to a specified individual or individuals. The Privy Council further held that though the settlor had certain religious objects the case was in its general character one of private bounty and educational trusts and under ss. 14, 16, 17 and 18 of the Transfer of Property Act 1882, non-charitable dispositions bad for perpetuity would not be validated by the presence of charitable trust (*d*). Here the gift to charity was not dependent on the gift to the relatives.

Direction for accumulation.

17. (1) *Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—*

(*a*) *the life of the transferor, or*

(*b*) *a period of eighteen years from the date of the transfer, such direction shall, save, as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.*

(2) *This section shall not affect any direction for accumulation for the purpose of—*

(*i*) *the payment of the debts of the transferor or any other person taking any interest under the transfer, or*

(*ii*) *the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or*

(*iii*) *the preservation or maintenance of the property transferred;*

and such direction may be made accordingly.

(1) **Amendment.**—This section was inserted by the amending Act of 1929. Before that, the section was numbered 18 and was as follows:—

"Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void and the property shall be disposed of as if no such accumulation had been directed.

(*d*) *Kayastha Pathshala, Allahabad* v. *Musst. Bhagwati Devi* (1936) 64 I.A. 5.

S. 17

Exception.—Where the property is immoveable or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation had been directed to be made had elapsed."

The exception to the old section was obscure and seemed to lead to anomalous results. For a direction for accumulation of the income of moveable property was invalid, unless it commenced from the date of the transfer, and on the other hand a direction for accumulation of income of immoveable property did not require to be made from the date of the transfer, but could not be effective for more than a year from the date of the transfer.

The period of one year allowed by this section was very much shorter than the period allowed by the English statute, the Accumulations Act, 1800 (*e*), popularly called the "Thellusson Act" as it had been passed in consequence of directions for accumulation and investment of income contained in the eccentric will of Mr. Peter Thellusson upheld by the House of Lords in *Thellusson* v. *Woodford* (*f*). It appears from the report of the Indian Law Commissioners that the shorter period was only taken as that was the period adopted in the Succession Act. The Thellusson Act has been repealed by the Law of Property Act, 1925, and sec. 164 of that Act fixes the following periods for accumulation:

(a) the life of the grantor or settlor; or

(b) a term of 21 years from the death of the grantor, settlor or testator; or

(c) the duration of the minority or respective minorities of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator; or

(d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulation would, for the time being, if of full age, be entitled to the income directed to be accumulated.

These periods are modified in certain respects by secs. 165 and 166 of the same Act.

The amendment while following the English law in allowing a longer period for accumulation has fixed periods which are in accord with the Indian rule against perpetuity.

(2) Accumulation of income.—A direction which separates the income from the ownership of property so as to form a separate fund, or so as to postpone the beneficial enjoyment of property is a direction for accumulation. The rule against perpetuities has for its object the circumscription of the period during which property might be tied up in such a way as to prevent its being transferred absolutely. Before the Thellusson Act an accumulation of income could be directed for so long as the property could be tied up without infringing the rule against perpetuities. The object of that Act, as of this section, is to make a separate rule further restricting the period for the accumulation of income.

A direction for accumulation may be implied as well as express. The question is one of construction, and if the disposition cannot be carried out without an accumulation, the section applies (*g*).

A direction for accumulation may be void under the rule against perpetuities.—Independently of this section a direction for accumulation may be void under the perpetuity rule if the accumulation is directed for a period in excess of that allowed by the

(*e*) 39 & 40 Geo. III c. 98.

(*f*) (1805) 11 Ves. 112.

(*g*) *Tench* v. *Cheese* (1855) 6 De G. M. & G. 453, 462, 473.

perpetuity rule. Thus *A* transfers property to *B* for life and then to the son of *B* who shall first attain the age of 25, with a direction to accumulate the income till the son attain that age the direction would be void under the perpetuity rule. But if *A* transfers property to *B* for life, and then to the first son of *B* who shall attain the age of 18 with a direction to accumulate the income during the lifetime of *B* and until the son attain that age, there is no infringement of the perpetuity rule, and the direction would be valid for one of the statutory periods allowed by this section. English cases illustrating directions for accumulation void for perpetuity are cited in footnote (*h*). S. 17

A direction for accumulation may be void for repugnancy.—Independently of this section a direction for accumulation may be void for repugnancy. A direction for accumulation is a restriction on enjoyment such as is referred to in sec. 11. But while sec. 11 is limited to transfers which create an absolute interest in the transferee, sec. 17 refers indifferently to any transfer. When a transfer is of an absolute interest, the exceptions to this section are also exceptions to sec. 11. But if there is an absolute gift a direction for accumulation for the benefit of the donee, merely postpones enjoyment and is void for repugnancy. This is illustrated both by English (*i*) and by Indian (*j*) cases. The first illustration to sec. 56 of the Indian Trusts Act, 1882, shows that a direction for the accumulation of the income of a minor is determinable when he attains majority.—See notes "Enjoyment postponed" and "Accumulation of income" under sec 19.

Savings out of income.—The section does not apply to savings out of income made voluntarily by the person entitled to the income or by the Court on behalf of an infant (*k*). Nor does it affect the discretionary power of trustees to make accumulations out of a minor's income under sec. 41 of the Indian Trusts Act, 1882.

(3) Period.—The periods are expressed to be in the alternative so that an accumulation cannot be directed during a combination of two periods. This has been so settled in England with reference to the period under the Thellusson Act (*l*). The appropriate period is a question of construction and is the one that best accords with the intention expressed in the instrument (*m*).

Excessive accumulation.—If accumulation is directed to be for a longer time than that allowed by the section, it is invalid for the excess over the appropriate period and the income for the excess period as well as the interest on the accumulated fund belongs to the person, who would have been entitled, if there had been no direction to accumulate (*n*). In *Berry* v. *Green* (*o*) the testator after giving various annuities, some being to religious institutions, directed that these last annuities should determine on the death of the last of the personal annuitants. He further directed that so long as any of the annuitants were alive the balance of the income of the residuary estate should be accumulated and invested and subject as aforesaid he gave the whole of his property after the death of the last annuitant to a named religious and charitable institution. The secretary of the last mentioned institution asked for an order that the trust for accumulation should be determined and that either the surplus income in each year should be paid to the institution or that provision should be made for the payment of the annuities and that subject thereto

(*h*) *Southampton* (Lord) v. *Hertford* (Marquis) (1813) 2 Ves. & B. 54; *Marshall* v. *Holloway* (1820) 2 Swan. 432; *Vawdrey* v. *Geddes* (1830) 1 Russ. & M. 203.

(*i*) *Wharton* v. *Masterman* (1895) A. C. 186; *Re Smith, Mansiton* v. *Hands* (1905) 1 Ch. 669; *Gosling* v. *Gosling* (1859) John 265. See also *Saunders* v. *Vautier* (1841) Cr. & Ph. 240; *In re Couturier, Couturier* v. *Shea* (1907) 1 Ch. 470, 473.

(*j*) *Gully Nath* v. *Chunder Nath* (1882) 8 Cal 378; *Mokoonda Lall* v. *Ganesh Chandra* (1876) 1 Cal. 104; *Srimati Bramamayi* v. *Joges Chandra* (1871) 8 Beng. L. R. 400.

(*k*) *Tench* v. *Cheese* (1855) 6 De. G. M. & G. 453, 463 C. A.

(*l*) *Jagger* v. *Jagger* (1884) 25 Ch. D. 729.

(*m*) *Re Errington, Errington-Turbutt* v. *Errington* (1897) 76 L. T. 716; *Jagger* v. *Jagger*, *supra*.

(*n*) *Griffiths* v. *Vere* (1803) 9 Ves. 127; *Re Walpole, Public Trustee* v. *Canterbury* (1933) Ch. 431.

(*o*) (1938) A.C. 575.

S. 17

the residuary estate should be made over to the institution. The House of Lords affirming the decision of the Court of appeal held that if any of the annuitants survived the period of 21 years from the death of the testator the accumulations would cease by virtue of s. 164 of the Law of Property Act, 1925 but the surplus income down to the death of the last annuitant would pass as on an intestacy. The direction for accumulation was valid upto 21 years after the death of the testator but the bequest to the institution was "subject as aforesaid," *i.e.*, subject to the whole direction for accumulation and, therefore, the surplus income from the expiry of 21 years after the testator's death upto the death of the last annuitant was undisposed of and would go to the next of kin. If however the direction is to accumulate for a time which exceeds the perpetuity period, the direction is entirely void. See note *supra*—"A direction to accumulate may be void under the rule against perpetuities".

Failure of purpose.—When on a true construction of the instrument directing accumulation and investment the purpose or object to which that accumulation and investment is directed entirely fails the provision cannot be directed and the direction for accumulation cannot be read as an independent provision. Thus where a testator after bequeathing an annuity to his mother directed his trustees out of the income of his residuary estate to pay an annuity to his wife and to accumulate the surplus income during the life of his wife or for 21 years from his death (whichever was the shorter) and directed that at the end of the period of accumulation the residuary estate including the accumulations for his children and died without issue, it was held that the testator having died without issue there was no effective disposal by his will within the meaning of s. 49 of the Administration of Estates Act, 1925 of the residuary estate and that the direction for accumulation was not a direction to which the property not effectively disposed of by the will was subject. The direction for accumulation here came to an end by reason of the failure of its object and purpose and the widow became entitled to the surplus income as on an intestacy (*p*).

(4) Exceptions.—The first two exceptions closely follow those in sec. 164 of the Law of Property Act, 1925. The third exception is not in the English Act but follows the case of *Vine* v. *Raleigh* (*q*).

Exception (*i*)—*Payment of debts.*—A provision for the payment of debts, not being the debts of the transferor, but payable on a contingency which might happen outside the perpetuity period would be void as infringing the rule against perpetuities. So also a transfer contingent on the payment of specified debts, for the debts might not be paid within the perpetuity period (*r*). But directions for the payment of debts or provisions for the accumulation of income for that purpose, for however long a period; are not only exempt from the statutory restriction on accumulation but do not infringe the rule against perpetuities. Such a provision does not tie up property absolutely so as to prevent its being transferred absolutely, because the creditor may at any time insist on payment, or the person indebted can at any time discharge the debt (*s*). A trust or direction to pay a debt is therefore, if possible, construed as a charge for the payment of debts and the transferee is considered as taking a vested interest subject to the charge (*t*). Thus on an assignment of a lease for 99 years, a trust to accumulate half the rent for the whole term, for the payment of the debts of the transferor, would be valid as creating a charge on the lessee's interest. A direction for the payment of debts has been held to be valid

(*p*) *In re Thornber Crabtree* v. *Thornber* (1937) 1 Ch. 29.
(*q*) (1891) 2 Ch. 13.
(*r*) *Re Bewick Ryle* v. *Ryle* (1911) 1 Ch. 116.
(*s*) *Briggs* v. *Oxford* (*Earl*) (1852) 1 De G. M. & G. 363, 370; *Bateman* v. *Hotchkin* (1847) 10 Beav. 426, 434; *Southampton* (*Lord*) v. *Hertford* (*Marquis*) (1813) 2 Ves. & B. 54, 65; *In re Stanford and Warrington* (*Earl*) *Payne* v. *Grey* (1912) 1 Ch. 243 C.A. Grey on Perpetuity, s. 675.
(*t*) *Bacon* v. *Proctor* (1822) Turn. & R. 31 40; Grey on Perpetuity, s. 415; Lewis on Perpetuity, p. 632.

even when it is annexed to and forms part of a series of limitations, all or some of which infringe the rule against perpetuities. Thus when the premier Baronet of England by his will devised land to trustees upon trust out of the income to pay certain debts, and after they had been paid, the trustees were to pay the income to the person who should from time to time succeed to the title of premier Baronet of England (some of which limitations were obviously invalid) it was held that the direction for the payment of debts was good, without deciding whether any of the limitations beyond the lifetime of the Baronet then living were valid (*u*).

The debts may be existing debts, or contingent liabilities to arise in future (*v*). If the debts are paid not out of income, but out of capital, the exception ceases to apply and the trust for accumulation of income to recoup capital is valid only for one of the statutory periods (*w*). If the provision is not made in good faith the exception will not apply (*x*). So a provision to accumulate income against a liability that is not likely to become a debt (*y*), or to retain and set apart income to create a reserve fund against future liabilities in business (*z*) is subject to the statutory periods.

The English exception is wider for it includes the debts of the grantor, settlor, testator or any other person and it has been held that the other person may be a stranger (*a*).

Exception (ii)—Provision of portions.—The word portion ordinarily means a share and points to the raising of something out of something else for the benefit of some children or class of children (*b*). It does not apply to the making of additions of income to capital in order to increase the capital for the person to whom it is given (*c*).

Exceptions (iii)—Preservation and maintenance.—The third exception is not in the English Act, but it has, no doubt, been suggested by the case of *Vine* v. *Raleigh* (*d*), where a trust out of income to maintain houses in good repair was held to be outside the Thellusson Act. A fund provided to meet dilapidations at the end of a lease is within the exception (*e*). A direction which simply keeps the property at its present value is not affected by the rule restricting accumulation of income (*f*).

(5) Indian Succession Act.—A similar amendment has been made in the corresponding sec. 117 of the Indian Succession Act, 1925 (sec. 104 of Indian Succession Act, 1865). Sec. 117 has now been applied to Hindus by sec. 14 (4) of Act 21 of 1929.

(6) Hindu law.—As stated above a direction for accumulation for the benefit of the donee was under Hindu law repugnant to an absolute gift (*g*). The section is not inconsistent with any rule of Hindu law and is made applicable to Hindus by the amendment of sec. 2.

Before the application of sec. 117, Indian Succession Act, to Hindu wills Sir Lawrence Jenkins said that "a direction to accumulate with a gift of the accumulations is not fundamentally bad; it only fails if it offends some independent rule of Hindu law (*h*)." The direction is valid unless the conditions are so unreasonable as to be against public policy or unless it is given for an illegal object or its effect is inconsistent with Hindu

(*u*) *Bacon* v. *Proctor*, *supra*; *cf. Southampton (Lord)* v. *Hertford (Marquis)*, *supra*.

(*v*) *Varlo* v. *Faden* (1859) 1 Deg. F. & J. 211, 224.

(*w*) *Re Heathcote, Heathcote* v. *Trench* (1904) 1 Ch. 224.

(*x*) *Mathews* v. *Keble* (1868) 3 Ch. App. 691.

(*y*) *Re Mason, Mason* v. *Mason* (1891) 3 Ch. 467.

(*z*) *Re Cox, Cox* v. *Edwards* (1909) W. N. 89.

(*a*) *Barrington (Viscount)* v. *Liddell* (1852) 2 Deg. M. & G. 480, 497.

(*b*) *Eyre* v. *Marsden* (1838) 2 Keen 564.

(*c*) *In re Elliot, Public Trustee* v. *Pinder* (1918) 2 Ch. 150 dissenting from *Middleton* v. *Losh* (1852) 1 Sm. & Griff. 61.

(*d*) (1891) 2 Ch. 13.

(*e*) *Re Hurlbatt, Hurlbatt* v. *Hurlbatt* (1910) 2 Ch. 553.

(*f*) *Re Gardiner, Gardiner* v. *Smith* (1901) 1 Ch. 697, 701.

(*g*) *Cally Nath* v. *Chunder Nath* (1882) 8 Cal. 378; *Mokoonda Lal* v. *Ganesh Chandra* (1876) 1 Cal. 104; *Srimati Brahmamayi* v. *Jages Chandra* (1871) 8 Beng. L.R. 400.

(*h*) *Watkins* v. *Administrator General of Bengal* (1920) 47 Cal. 88, 95, 56 I.C. 376.

Ss. 17, 18

law (*i*). Thus in *Krishnaramani* v. *Ananda Krishna* (*j*) there was a trust of surplus income to be accumulated, and every time the accumulations amounted to three lacs they were to be divided among the sons and descendants *per stirpes*. Macpherson, J., said that the direction was part and parcel of a perpetuity and was wholly bad. This is always the case when the trust for accumulation is not accompanied with any disposition of the *corpus* of the property (*k*). A direction to accumulate surplus income for the benefit of a son to be adopted (*l*), or for the payment of debts or the benefit of the minor donee (*m*), or for the marriage expenses of the testator's son (*n*), has been held to be valid.

In *Amrito Lall* v. *Surnomoye* (*o*), Jenkins, J., said that for the period of accumulation under Hindu law "the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by the testator." In *Gosavi Shivgar* v. *Rivett Carnac* (*p*), where the devise was to a minor disciple for whom a portion of the income was to be accumulated until he was of the age of 30, it was held that he was entitled to all the income after he attained majority.

In the absence of any direction to the contrary the rule of Hindu law is that accumulations of income go with the capital (*q*).

Transfer in perpetuity for benefit of public.

18. The restrictions in sections 14, 16 *and* 17 shall not apply *in the case of a transfer of property for* the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

(1) Amendment.—Before the Amending Act 20 of 1929, the section was numbered 17, and was as follows :—

"The restrictions in secs. 14, 15 and 16 shall not apply to property transferred, for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind."

The reference to sec. 15 has been omitted being no longer necessary in view of the amendment of that section. A reference has been added to the new sec. 17 which treats of accumulations of income.

(2) Principle.—The rules restricting remoteness and perpetuity and against accumulations of income prevent fetters being put upon the free circulation and enjoyment of property. But when property is given for an object beneficial to the public it is withdrawn from commerce and it is generally necessary that it should be kept intact and its use restricted to the object for an indefinite period.

(2A) Some points of differences between English and Indian law relating to perpetuities.—(*i*) The English rule against perpetuities deals with both interests created *in præsenti* and interests to arise *in futuro*; but the rule incorporated in the Transfer of Property Act (sec. 14) and the Succession Act (sec. 114) deals with interests

(*i*) *Rajendra Lall* v. *Raj Coomari* (1907) 34 Cal. 5; see also *Benode Behari* v. *Nistarini Dassi* (1906) 33 Cal. 180, 32 I. A. 193.
(*j*) (1872) 4 Beng. L.R. 231 O.C.
(*k*) *Sookhmoy Chunder* v. *Monoharri Dassi* (1885) 11 Cal. 684, 12 I. A. 103; *Kumara Asima* v. *Kumara Krishna* (1868) 2 Beng. L.R. 11, 37 O.C.
(*l*) *Amrito Lall* v. *Surnomoye* (1897) 24 Cal. 589.
(*m*) *Amrito Lall* v. *Surnomoni* (1898) 25 Cal. 662, 691; *Ramlal Sen* v. *Bidhumukhi* (1920) 47 Cal. 76, 56 I. C. 373; *Jamnabai* v. *Dharsey* (1902) 4 Bom. L. R. 893.
(*n*) *Nafar Chandra* v. *Ratan* (1910) 15 Cal. W. N. 66, 7 I. C. 921.
(*o*) (1897) 24 Cal. 589.
(*p*) (1889) 13 Bom. 463; *Husenbhoy* v. *Ahmedbhoy* (1902) 26 Bom. 319.
(*q*) *Bissonauth* v. *Bamasoondry* (1867) 12 M.I.A. 41, 60; *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66.

to arise *in futuro* only and there is no express provision prohibiting or dealing with interests *in præsenti* which are sought to be made of indefinite duration. S. 1

(*ii*) There is difference in the period during which vesting may be delayed the English law allowing 21 years in gross after life or lives in being, the Indian law allowing only the period of majority after a life or lives in being.

(*iii*) Some interests created *in præsenti*, *e.g.*, charitable trusts and unfettered present gifts to perpetual institutions are permissible and valid in England and they are regarded as exceptions to the rule against perpetuities in so far as that rule applies to interests *in præsenti*. There is no provision in the Transfer of Property Act or the Succession Act expressly prohibiting the creation of perpetual estates or interests *in præsenti* or providing for any permissible exception thereto.

(*iv*) Charitable trusts *in futuro* are no exceptions to the modern English rule against perpetuities which deals with estates *in futuro*. Therefore charitable trusts, to be valid in England must vest within the period allowed by the English law and if the vesting may be delayed beyond that period even the charitable trust will fail (*r*). But the position in India is different. Thus the Transfer of Property Act, sec. 18, relaxes the rule against perpetuities embodied in sec. 14 in respect of transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind and therefore the vesting of such transfers *inter vivos* may be delayed beyond the period mentioned in sec. 14. There is no similar relaxation of the rule against perpetuities laid down in sec. 114 of the Succession Act. On the contrary sec. 118 of that Act imposes an additional restriction on charitable or religious bequests by a person who has near relations.

(3) Charitable trusts.—The exception enacted in this section is based on the English law as to charitable trusts. Charitable trusts are trusts for purposes enumerated in the Statute of Charitable Trusts 43 Eliz. c. 4, and those so far analogous as to be within the spirit and intendment of the Statute. These purposes have been classified by Lord Macnaghten in the leading case of *Commissioners of Income Tax* v. *Pemsel* (*s*) as (1) for the relief of poverty, (2) for the advancement of education, (3) for the advancement of religion, and (4) other purposes beneficial to the community not falling under any of the preceding heads. A gift merely for the encouragement of sport is not a charity (*t*). But the sport may be beneficial to the community and so a gift for playing fields, parks and gymnasiums to promote the health and welfare of the working classes is a charity (*u*). So also is a gift for the constitution of a regimental fund for the promotion of outdoor sport, as tending to increase the physical efficiency of the army (*v*); or a gift to maintain a library for an officers' mess, as tending to increase the mental efficiency of the army (*w*) or to buy a site for building a public hall (*x*), but not so a gift for maintenance of property for the benefit of distinguished visitors to neighbourhood (*y*). A bequest for relief of infirm, sick and aged Roman Catholic priests (*z*) or for the benefit of the choir (*a*) has been upheld as a charitable bequest as tending to advance religion. But a gift to "such charitable institution or institutions or other charitable or benevolent object or objects in England" has been held void for uncertainty by the House of Lords (*b*).

(*r*) *Chamberlayne* v. *Brockett* 8 Ch. 206, 211; *Re Bowen* (1893) 2 Ch. 491; *Re Strathcden & Campbell* (1894) 3 Ch. 265; *Re Swain* (1905) 1 Ch. 669.

(*s*) (1891) A.C. 531, 583 following Sir Samuel Romilly's arguendo in *Morice* v. *Bishop of Durham* (1805) 10 Ves. 522, 531.

(*t*) *Re Nottage Jones* v. *Palmer* (1895) 2 Ch. 649 (yacht racing).

(*u*) *In re Hadden, Public Trustee* v. *More* (1932) 1 Ch. 133, 142.

(*v*) *In re Gray, Todd* v. *Taylor* (1925) Ch. 362; *In re Mariette, Mariette* v. *Governing Body of Aldenham School* (1915) 2 Ch. 284 (squash racket courts for a school).

(*w*) *In re Good, Harington* v. *Watts* (1905) 2 Ch. 60.

(*x*) *In re Spence* (1938) 1 Ch. 96.

(*y*) *In re Corelli* (1943) 1 Ch. 332.

(*z*) *In re Forster* (1939) 1 Ch. 22.

(*a*) *In re Royce* (1940) 1 Ch. 514.

(*b*) *Chichester Diocesan Fund* v. *Simpson* (1944) A.C. 341.

S. 18 A gift for the benefit of a volunteer corps has been held to be a charity (c). A gift for feeding poor pilgrims, distribution of oil among them and saying prayers has also been held in India to be for the benefit of the public within the meaning of this section (d). A bequest to two charities and to the respective Vicars and wardens of two named churches for "parish work" has recently been held by the House of Lords as not charitable (e).

(3A) Indian Succession Act.—*Illustrations of religious or charitable uses.*— The word "charitable" does not occur in this section, but the transfers to which it refers are the same as those described in sec. 92 of the Code of Civil Procedure, 1908, as trusts created for a public purpose of a charitable or religious nature. The illustration to sec. 118 of the Indian Succession Act, 1925 (sec. 105 of the Indian Succession Act, 1865), gives the following list of bequests for religious or charitable uses : the relief of poor people ; the maintenance of sick soldiers ; the erection or support of a hospital, the education and preferment of orphans ; the support of scholars ; the erection or support of a school ; the building and repair of a bridge ; the making of roads, the erection or support of a church ; the repairs of a church, the benefit of ministers of religion, and the formation or support of a public garden.

Gifts for charitable uses have been the subject of restrictive legislation in England, *i.e.*, the Mortmain Act, 1736, and the Mortmain and Charitable Uses Acts of 1888 and 1891. These Acts do not apply in India (*f*); but there is a restrictive provision in sec. 118 of the Indian Succession Act, 1925, designed to prevent death-bed gifts by will to religious or charitable uses by persons having near relations (*g*). It is rather anomalous, as pointed out by Ameer Ali A. C. J. in *M. A. F. Halfhyde* v. *C. A. Saldanha* (*h*), that no protection is given to the near relations against death-bed gifts to non-religious or non-charitable uses. There is no such restrictive provision with regard to gifts *inter vivos*.

Charitable trusts which create interest *in præsenti* are not subject to the rule against perpetuity in England in the sense that property may be tied up for an indefinite period for a charitable purpose (*i*). In England property may also be tied up indefinitely for even a non-charitable purpose, *e.g.*, where there is an unfettered gift *in præsenti* to a perpetual institution so that the *corpus* and income may be used by the institution as and when it pleases. (See note *supra* under sec. 14 : Rule against perpetuity in its primary sense). In England these are exceptions to the rule against perpetuities in so far as it deals with estates or interests *in præsenti*. But charitable trusts to arise *in futuro* are no exceptions to the English rule which deals with estates or interests *in futuro*. (See note 2A *supra*). Therefore a gift to charity upon a remote event is void (*j*), except in the one case of a gift over from one charity to another (*k*). This last mentioned exception in English law was followed by a Calcutta Judge in the case of a will where there was a bequest to a charity and a bequest over upon a remote event to another charity (*l*). But in later case (*m*) a division bench of the same High Court while construing the same will held that the positive language of the Indian Succession Act precluded the application of that exception in English law and that the rule against remoteness of vesting in sec. 101 of the Indian Succession Act, 1865 (now sec. 114, Indian Succession Act, 1925)

(c) *In re Lord Stratheden and Campbell* (1894) 3 Ch. 265.
(d) *R. M. S. Firm* v. *Muthu Swami* (1941) A. M. 188, (1940) 2 M.L.J. 803, 52 M.L.W. 793, (1940) M.W.N. 1180.
(e) (1939) A. C. 430.
(f) *Mayor of Lyons* v. *East India Co.* (1837) 1 M. I. A. 175; *Broughton* v. *Mercer* (1875) 14 Beng. L. R. 442.
(g) *Mariado* v. *Rt. Rev. F. Provost* (1941) Rang. 410.
(h) (1944) 49 C.W.N. 145.
(i) *Goodman* v. *Saltash Corporation* (1882) 7 Ap. Cas. 633 ; *Re Christchurch Inclosure Act* (1888) 38 Ch. D. 520.
(j) *In re Lord Strathden and Campbell*, and other cases under (r) *supra*.
(k) *Christ's Hospital* v. *Grainger* (1849) 1 Mac. and G. 560 ; *In re Tyler, Tyler* v. *Tyler* (1891) 3 Ch. 252.
(l) *Administrator General* v. *Hughes* (1913) 40 Cal. 192, 21 I. C. 183.
(m) *Jones* v. *Administrator General* (1919) 46 Cal. 485, 47 I. C. 383.

applied to charitable bequests. The Court further observed that as to gifts *inter vivos* the Transfer of Property Act had relaxed the rule against remoteness of vesting in the case of charities. This is undoubtedly correct. Not only is a gift *inter vivos* to charity upon a remote event valid, but as the rule in sec. 16 is also relaxed, a gift to charity after prior interests which fail under secs. 13 and 14 would be valid. Thus A settles property on his son and his son's intended wife successively for their lives, and then on their eldest son for his life, and then on the eldest son of such eldest son for his life and then to a charity. The gift to charity would be valid though, if the ultimate beneficiary were not a charity, the gift would fail under sec. 16 as the prior interests of the son and grandson are void under secs. 13 and 14.

(4) **Religion.**—A gift for the advancement of religion is recognized in the section as entitled to the exemption. A gift in perpetuity for the performance of masses for the soul of the donor was held to be bad in one case (*n*), and good in another (*o*). In England such a gift was formerly held to be bad, but has since been decided to be good on further evidence of the nature of the mass (*p*). A permanent bequest by a Parsi for the performance of Muktad ceremonies is valid, for such ceremonies include prayers for the spiritual welfare of all Zoroastrians and tend to the advancement of the Zoroastrian religion (*q*).

(5) **Health.**—A bequest by an Englishman to a hospital was held to be exempt from the rule against perpetuity (*r*).

(6) **Beneficial to mankind.**—The question whether any particular object is for the benefit of public so as to exempt it from the rule against perpetuity must be determined with reference to the terms of this section. It is submitted that the words "beneficial to mankind" must be construed *ejusdem generis* and as referring to objects of a nature analogous to those specified. The language of the section is very wide and probably embraces objects not regarded as charities in English law.

(7) **Hindu law.**—Since the Amending Act of 1929 the section applies to Hindus, but the Hindu law has always regarded gifts for religious or charitable purposes as exempt from the rule against perpetuity (*s*). A Hindu can make a permanent endowment for maintaining a sadavarat for giving food to travellers (*t*); or for the performance of religious ceremonies (*u*); or for the endowment of a university (*v*); or of a hospital (*w*); or a sadavarat for giving food to Brahmins (*x*). He may even make a permanent gift for the establishment and worship of an idol (*y*), for the English law as to superstitious uses does not apply in India (*z*). A gift in favour of an idol which would be invalid in English law is not only lawful (*a*), but is highly commendable in Hindu law (*b*). But if the object of the gift is uncertain it cannot take effect; and so the Privy Council have held that a gift for "dharam" is void, the word meaning law, virtue, legal or moral duty (*c*). For the

---

(*n*) *Colgan* v. *Administrator General* (1892) 15 Mad. 424.

(*o*) *Andrews* v. *Joakim* (1868) 2 Beng. L. R. 148 O. C.

(*p*) *In re Caus, Lindeboom* v. *Camille* (1934) 1 Ch. 162.

(*q*) *Jamsed* v. *Soonabai* (1911) 33 Bom. 122, 200, 1 I.C. 834 dissenting from *Limji* v. *Bapuji* (1889) 11 Bom. 441.

(*r*) *Broughton* v. *Mercer* (1875) 14 Beng. L. R. 442.

(*s*) *Bhuggobutty* v. *Gooroo* (1897) 25 Cal. 112; *Prafulla* v. *Jogendra Nath* (1905) 9 Cal. W. N. 528; *Shookmoy* v. *Monoharri* (1883) 11 Cal. 684, 12 I. A. 103.

(*t*) *Jamnabai* v. *Khimji* (1890) 14 Bom. 1; *Jugal Kishore* v. *Lakshmandas* (1901) 23 Bom. 659, 664; *Morarji* v. *Nenbai* (1893) 17 Bom. 351.

(*u*) *Prafulla* v. *Jogendra Nath*, *supra*; *Lakshmishankar* v. *Vaijnath* (1881) 6 Bom. 24.

(*v*) *Manorama* v. *Kalicharan* (1903) 31 Cal. 166.

(*w*) *Fanindra* v. *Administrator General* (1901) 6 Cal. W. N. 321.

(*x*) *Dwarkanath* v. *Burroda* (1878) 4 Cal. 443; *Manorama* v. *Kalicharan*, *supra*; *Rajendra Lall* v. *Raj Coomari* (1906) 34 Cal. 5.

(*y*) *Bhupati Nath* v. *Ramlal* (1909) 37 Cal. 128, 3 I. C. 642; *Khusalchand* v. *Mahadevgiri* (1875) 12 Bom. H. C. 214.

(*z*) *Judah* v. *Judah* (1870) 5 Beng. L. R. 433; *Advocate General* v. *Vishvanath* (1870) 1 Bom. H. C. 9 A. C.; *Khusalchand* v. *Mahadevgiri*, *supra*.

(*a*) *Juggut Mohini* v. *Sokheemoney* (1871) 14 M. I. A. 289.

(*b*) *Bhupati Nath* v. *Ram Lal* (1909) 37 Cal. 128, 134, 3 I. C. 642.

(*c*) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71; *Parthasarathy* v. *Thiruvengada* (1907) 30 Mad. 340; *Devshankar* v. *Motiram* (1894) 18 Bom. 136.

18, 19 [illegible] reason a gift for the spread of the Hindu religion has been held to be void (*d*). A direction for accumulation of income for charitable purposes is valid in Hindu law, although it infringes the rule against perpetuity (*e*).

(*5*) **Mahomedan law.**—The section does not apply to Mahomedans, but Mahomedan law allows property to be tied up in perpetuity for religious or charitable purposes. A permanent dedication of property to such objects is called wakf. Instances of wakfs are the performance of *Kadam Sharif* ceremonies (*f*); repairs of imambaras (*g*); reading the koran in public (*h*); or the performance of death ceremonies of the settlor (*i*). In a Bombay case (*j*), West, J., said that objects which would be regarded as superstitious uses in English law were commendable under Mahomedan law. Mahomedan law allows property to be tied up in perpetuity by family settlement provided the ultimate gift after the extinction of the family is to charity. Such illusory wakfs were held by the Privy Council to be invalid (*k*), but the practice has received legislative sanction in the Mussulman Wakf Validating Act 6 of 1913, to which retrospective effect has been given by Act 32 of 1930. A direction for accumulation of income infringing the law against perpetuity has been held valid in a wakf (*l*).

Vested interest.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

(1) **Vested interest.**—Vested interests as defined in this section are to be distinguished from contingent interests as defined in sec. 21. When an interest is vested the transfer is complete, but when an interest is contingent the transfer depends upon a condition precedent. When that condition is fulfilled the transfer takes effect and the interest is vested. If the condition refers to an event, which is certain to occur, the interest dependent upon it is not contingent but is vested. If it is an uncertain event it is contin-

(*d*) *Venkatanarasimha* v. *Subba Rao* (1923) 46 Mad. 300 73 I. C. [illegible] ('23) A. M. 376.

(*e*) *Rajendra Lall* v. *Raj [illegible]* (1906) 34 Cal. 5; *Sarojini [illegible]* v. *Gnanendra Nath* (1916) 23 Cal. L. J. [illegible] 38 P.C. 102.

(*f*) *Phulchand* v. *Akbar Yar Khan* (1896) 19 All. 211.

(*g*) *Biba Jan* v. *Kalb Husain* (19[illegible]) [illegible] All. 136.

(*h*) *Mazhar Hussain* v. *Abdul* (1910) 33 All. 400, 9 I. C. 753.

(*i*) *Biba Jan* v. *Kalb Husain*, *supra*.

(*j*) *Fatmabibi* v. *Advocate General* (1881) 6 Bom. 42.

(*k*) *Abul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619, 22 I. A. 76.

(*l*) *Mutu Ramanadan* v. *Vava* (1914) 40 Mad. 116, 44 I. A. 21, 93 I. C. 235.

gent, for the condition may never be fulfilled and the transfer may never take [illegible] Thus a gift to *A* on the death of *B* creates a vested interest in *A* even during *B*'s [illegible] for there is nothing more certain than death. But a gift to *A* [illegible] the marriage of *B* [illegible] only a contingent interest, for *B* may never marry; but that contingent interest [illegible]mes vested if and when *B* marries.

The distinction between a vested and a contingent interest may seem simple, but in practice it is not always easy to distinguish the one from the other. The difficulty arises from the fact that a vested interest is not necessarily in possession. An interest may be vested and not yet in possession in any one of the three cases referred to in the Explanation, *i.e.*, (1) by a provision postponing enjoyment, or (2) by the intervention of a prior interest or (3) by a provision for accumulation. Again an interest may be vested although, it is liable to be divested by a condition subsequent. The difference between a condition precedent and a condition subsequent is that when the condition is precedent the estate is not in the grantee until the condition is performed, but when the condition is subsequent the estate vests immediately in the grantee and remains in him till the condition is broken. Conditions subsequent are dealt with in secs. 28 and 31. The question whether an interest is vested or contingent arises most frequently in wills and is best explained by the illustrations to the corresponding section in the Indian Succession Act quoted below.

(2) Indian Succession Act.—Illustrations of Vested Interest.—The corresponding section of the Succession Act, is sec. 119 of the Indian Succession Act, 1925 (sec. 106 of the Indian Succession Act, 1865). To it are appended the following illustrations:—

(i) *A* bequeaths to *B* 100 rupees, to be paid to him at the death of *C*. On *A*'s death the legacy becomes vested in interest in *B*, and if he dies before *C*, his representatives are entitled to the legacy.

(ii) *A* bequeaths to *B* 100 rupees, to be paid to him upon his attaining the age of 18. On *A*'s death the legacy becomes vested in interest in *B*.

(iii) A fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death the legacy to *B* becomes vested in interest in *B*.

(iv) A fund is bequeathed to *A* until *B* attains the age of 18, and then to *B*. The legacy to *B* is vested in interest from the testator's death.

(v) *A* bequeaths the whole of his property to *B* upon trust to pay certain debts out of the income, and then to make over the fund to *C*. At *A*'s death the gift to *C* becomes vested in interest in him.

(vi) A fund is bequeathed to *A*, *B* and *C* in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon *D*. On the death of the testator, the shares vested in interest in *A*, *B* and *C*, subject to be divested in case *A*, *B* and *C* shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

In Illustration (i) the interest of *B* takes effect on the happening of an event that is certain and so it is vested.

In illustration (ii) the interest is one of which the [illegible]ment is postponed. It illustrates the well settled rule that the words "to be paid" [illegible] payable" at a certain age do not render a bequest contingent (*m*). On the other [illegible] a gift "at" a certain

(*m*) *Re Couturier, Couturier* v. [illegible] 1 Ch. 470.

[illegible] or "if" or "when" a certain age is attained, or upon attaining a certain age, is [illegible]ingent (*n*), as is shown by the second illustration to sec. 120 of the Indian Succession [illegible]925. See s. 21, note (2).

In illustration (iii) a prior interest intervenes, but the legacy is vested as the determination of that prior interest is a certain event.

In illustration (iv) it might be supposed that *B*'s interest was contingent on his attaining the age of 18, but it is construed as a gift to *A* for a term of years with remainder to *B*. This as applied to devices of real estate is known to English lawyers as the rule in *Boraston*'s case (*o*). It rests on the principle that the law favours the vesting of estates. In *Blackwell* v. *Blackwell* (*p*), Pollock, M.R., quoted with approval the following passage from Hawkins on Wills :—"In the construction of devises of real estates, it has long been an established rule for the guidance of Courts . . . that all estates are to be holden vested, except estates in the devise of which a condition precedent is so clearly expressed, that the Court cannot treat them as vested without deciding in direct opposition to the terms of the will." In this matter the law in India makes no distinction between real and personal property. The rule applies here both to immoveable and moveable property.

In illustration (v) there is a devise after the payment of debts. The payment of debts postpones enjoyment but the interest vests immediately. Jarman says that such a devise confers an immediately vested interest, the payment of debts constituting only a charge (*q*).

In illustration (vi) the words "to be paid" import [as in illustration (ii)] a vested interest, but that interest is liable to be divested on the happening of the event specified and vested in another person. This is an instance of a conditional limitation, *i.e.*, an interest liable to be divested by a condition subsequent and vested in some one else. Conditional limitations are the subject of sec. 28.

(3) Enjoyment postponed.—A condition postponing enjoyment does not prevent the interest vesting immediately; but it is itself void for repugnancy after the transferee has attained majority (*r*).

Illustration.

A transfers property to *B* in trust for *C*, and directs *B* to give possession of the property to *C* when he attains the age of 25. *C* has a vested interest and is entitled to possession at the age of 18.

In the leading English case of *Gosling* v. *Gosling* (*s*) Vice-Chancellor Wood said :—"The principle of this Court has always been to recognize the right of all persons who attain the age of 21 to enter upon the absolute use and enjoyment of the property given to them by will, notwithstanding any direction by the testator to the effect that they are not to enjoy it until a later age unless, during the interval, the property is given for the benefit of another." Accordingly in *Lloyd* v. *Webb* (*t*) a testator dying in 1896 left the whole of his property to his only adult son, subject to certain legacies and an annuity to his wife, but directed the trustees not to allow the son to enjoy it until 1900. The Court held that the son took an immediate vested interest and that the restriction was void.

(*n*) *Hanson* v. *Graham* (1801) 6 Ves. 239; *Leake* v. *Robinson* (1817) 2 Mer. 363; *Davies* v. *Fisher* [illegible] 5 Beav. 201; *Blackwell* v. *Black*[illegible]) 1 Ch. 223.

(*o*) (1587) Co. Rep. [illegible]*dittle* v. *Whitby* (1758) 1 Burr. [illegible]

(*p*) (1926) 1 Ch. 223, [illegible] *Scott* v. *Tyler* (1788) 2 W. & T. L. C. [illegible]; *Taylor* v. *Graham* (1878) 3 App. Cas. 1287.

(*q*) Jarman on Wills, 7th Ed., p. 1357.

(*r*) *Sewdayal* v. *Official Trustee* (1931) 58 Cal. 768, 134 I.C. 436, ('31) A. C. 651.

(*s*) (1859) Johns 265, 272; *Saunders* v. *Vautier* (1841) Cr. and Ph. 240; *Re Johnston* (1894) 3 Ch. 204.

(*t*) (1897) 24 Cal. 44.

In *Harris* v. *Brown* (u) a proviso in a will was that until the eldest of two devisees attain majority "the estate shall remain in the hands of the executor absolutely and for all purposes"—but the Privy Council said that those words merely pointed to possession and enjoyment of shares already vested. The appointment of an executor or guardian during the minority of the devisee with a direction to hand over the property on his attaining majority does not postpone the vesting of the bequest (v). When the rights of an adopted son are curtailed by an agreement giving the widow of the adoptive father the right to enjoy the property during her lifetime, the interest of the son is a vested interest which he can dispose of (w).

Illustration.

A executed a deed of gift in favour of *B*, but directed that *B* was not to take possession of a portion of the property until after the deaths of *A* and *A*'s wife. *B* has a vested interest, enjoyment only being postponed: *Lachman* v. *Baldeo* (1919) 21 O.C. 312, 48 I.C. 396.

(4) Prior interest.—*A* prior interest does not postpone the vesting of the subsequent interest. This is the case put in illustration (iii) to sec. 119 of the Indian Succession Act, 1925: "A fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death the legacy to *B* becomes vested in interest in *B*." The expression "after his death" refers to the time when the gift becomes reduced to possession, and not to the time when the interest vests. A bequest to *A* from and after his attaining the age of 18 is *prima facie* contingent because it is postponed until the happening of an event which may never happen. But a bequest to *B* for life and then to *A* from and after the death of *B* vests immediately in *A*, for enjoyment is postponed until the termination of a life estate, an event which must happen (x). In *Rewun Persad* v. *Radha Beeby* (y) a case decided under Hindu law, the testator gave his wife a life estate, and after her death one moiety of the estate to his brother *B*, and the other moiety to his sons *C* and *D*. *B* and *C* died during the lifetime of the widow, but as their shares were vested, and as *C* and *D* took as tenants in common, *C*'s widow was entitled to succeed to *C*'s share. In *Bhagabati* v. *Kali Charan* (z) the bequest was to the mother for life, then to the wife for her life, and then to the nephews, and it was held that the nephews took a vested and transmittable interest on the death of the testator. In *Chunilal* v. *Bai Muli* (a) there was a bequest to a widow for life and then to a daughter and the daughter took an immediate vested interest.

Illustration.

Property is settled in trust for *A* for life with a direction to the trustees to pay *A* Rs. 2,000 a year out of the rents and profits and to apply the balance to the discharge of a mortgage; and after *A*'s death to convey the land to *B*. Although *B* may not survive *A*, yet *B*'s interest is vested in *A*'s lifetime: *U Zoe* v. *Ma Mya May* (1930) 127 I.C. 170, ('30) A. R. 184.

(5) Accumulation of income.—A direction for accumulation of income if in excess of the period sanctioned by sec. 17 is invalid for the excess. Within the limits sanctioned by the section it is a provision for the postponement of enjoyment; and as such it does

(u) (1901) 28 Cal. 621 [P.C.].

(v) *Tarachurn Chatterji* v. *Suresh Chunder* (1890) 17 Cal. 122, 16 I.A. 166; *Bachman* v. *Bachman* (1884) 6 All. 583.

(w) *Balwant Singh* v. *Joti Prasad* (1918) 40 All. 692, 47 I. C. 599.

(x) *Halifax* v. *Wilson* (1809) 16 Ves. 168.

(y) (1846) 4 M.I.A. 137.

(z) (1911) 38 Cal. 468, 38 I.A. 54, 10 I. C. 641; *Bilas* [illegible] *Lal* (1911) 33 All. 558, 11 I.C. [illegible] *Das* v. *Sunder Das* (1927) [illegible], ('27) A. L. 166; *Sree Chen*[illegible] v. *Kasi Chetty* (1933) 65 Mad. L. J. [illegible] 47 I.C. 333, ('33) A.M. 335.

(a) [illegible] 24 Bom. 420; *Lallu* v. *Gaymohan* [illegible] 22 Bom. 409.

S. 19 [illegible] postpone the vesting of the interest (b). The first illustration to sec. 56 of the Trusts Act, 2 of 1882 shows that a direction for the accumulation of the income of a minor is ineffective after he attains majority.

(6) **Conditional limitation.**—A provision that if a particular event shall happen the interest shall pass to another person is what is called in English law a conditional limitation. A conditional limitation divests an estate which has vested and vests it in another person. A condition subsequent divests an estate which has vested and revests it in the grantor. Section 28 treats of conditional limitations, while conditions subsequent are dealt with in sec. 31.

A conditional limitation therefore does not prevent an estate from vesting; for on the contrary the condition itself implies that the estate which preceded it had vested. This is explained in *Sundar Bibi* v. *Rajendra Narain* (c). In that case the terms of a compromise provided that *L* should have an estate for life, and that after his death *R* was to be full owner of the estate, if he survived *L*; but that if he did not survive *L*, the estate would pass to *R*'s lineal male descendants according to the rule of primogeniture. Before the death of *L* the question arose whether *R* had only a contingent interest, or a vested interest which could be attached. Now if the provision had been merely this that the estate would pass to *R*, if he survived *L* and nothing more had been said, there can be no doubt but that *R* would have had an estate contingent on his surviving *L*. But the further provision of a gift over to another person was a conditional limitation which had the effect of vesting the estate in *R*. The reason given by the Court was that the condition affected the retention of the interest and not its acquisition. *R* therefore took a vested interest liable to be divested if he did not survive *L*. A very similar case is *Raja Lal Bahadur* v. *Rajendra Narain* (d). A compromise between two brothers *L* and *R* provided that *L* was to have a life interest and that if *R* survived *L*, *R* would be 'permanent owner with powers of transfer and transmitting inheritance', but that if *R* did not so survive, 'his male descendants according to the rule of lineal primogeniture will be entitled to the said property'. This was held to confer, not a contingent, but an immediate vested interest in *R*, although the estate tail in the event of *R* not surviving *L* was probably invalid. A condition precedent followed by a gift over is generally construed as a conditional limitation so as to favour the vesting of the prior estate. This is known to English lawyers as the rule in *Edwards* v. *Hammond* (e). See note (4) under sec. 21, "Condition precedent construed as condition subsequent."

(7) **Time of vesting.**—As soon as the transfer is complete the interest vests. Words are to be construed according to their ordinary meaning and no particular form of words is necessary to effect a vesting (*f*).

(7A) **Power of appointment.**—A power of appointment confers upon the donee of the power a right of disposition of the property of the creator of the power, *i.e.*, the appointor. The power may be either general, to appoint to any one the donee pleases, or special to appoint to anyone of a specified class of persons. The appointee, or person in whose favour the donee exercises the power derives title from the creator of the power and not from the donee. But the property vests when the power is exercised and not when it is created (*g*). Until the power is exercised the property does not vest in the donee of the power; but if there is an independent gift to a class with a power to apportion the shares of each member of the class the property vests by virtue of the gift even though the power

(b) *Saunders* v. *Vautier* [illegible] Cr. and Ph. 240.

(c) (1925) 47 All. 496, [illegible] I.A. [illegible] 684, ('25) A.A. 239.

(d) (1934) 9 Luck. 173, ('34) A.O. [illegible]

(e) (1683) 1 B. & P. N. R. 324 N.

(f) [illegible] Harris v. Brown (1901) 28 Cal. 621, [P.C.].

(g) [illegible] Marlborough (Duke) v. Godolphin (Lord) (1750) 2 Ves. Sen. 61.

is not exercised (*h*). Again the power may be such that it is the duty of the donee to exercise it, and in that case if there is no gift over (*i*), the Court will imply a gift for the objects of the power (*i*).

(8) Contrary intention.—The grantor may however specify the time of vesting (*k*); for under sec. 5 a transfer may be not only in the present but also in the future (*l*). But the time of vesting cannot be beyond the period allowed by the rule against perpetuity. In the case of *In re Wrightson, Battie Wrightson* v. *Thomas* (*m*), the testator by a codicil to his will directed that no devisee should have a vested interest or be entitled to possession until attainment of the age of 24. This provision invalidated the future interests given in the will.

(9) Death of transferee.—When an interest is vested it becomes the property of the transferee and is, under sec. 6 transferable by him even before he has obtained possession; for a transfer of property not in possession is effective. If the transferee dies, his interest vests in his representatives whether or not he has obtained possession (*n*). In English law a bequest to *A* payable at 21 is vested, and if *A* dies under 21 his representatives are entitled (*o*).

(10) Hindu law.—The amendment of sec. 2 makes sec. 19 applicable to Hindus. Sec. 106 of the Indian Succession Act, 1865, was applied to Hindu wills by the Hindu Wills Act, 1870; and sec. 119 of the Indian Succession Act, 1925, is applied to some Hindu wills by sec. 57 and Schedule III of the same Act. The principle of the section has always been recognized by Hindu law and some of the cases noted were decided under that law. The case of *Gosling* v. *Gosling* (*p*) has been followed in cases decided under Hindu law. Thus in *Gosavi Shivgar* v. *Rivett-Carnac* (*q*) there was a bequest of property to a minor with a direction that it should not be given to him till he attained the age of 30, but the direction was held to be inoperative after he attained majority. On the other hand as there was a charge on the income for the maintenance of another disciple the trustee was allowed to retain the *corpus* till the age of 30, paying the devisee the whole income subject to the charge. In *Ram Kaur* v. *Atma Singh* (*r*) the testator devised his estate to his sons and directed that the widow should manage it during her lifetime, but it was held that the estate vested immediately in the sons, and as the widow was given no prior interest they were entitled to immediate possession. On the other hand in *Srinivasa* v. *Dandayudapani* (*s*) there was a bequest to a daughter with a direction to enjoy the income and pass the *corpus* intact to her son. The daughter took a vested interest but the direction was ineffective and the son who predeceased her took no interest at all. It has also been held under Hindu law that the creation of partial trusts and charges will not postpone the vesting in possession (*t*). When a testator made a provision for an allowance to his widow and directed the estate to be divided by the executors between themselves at her death, the executors took an immediate vested interest although they died before the widow (*u*).

(*h*) *Lambert* v. *Thwaites* (1866) L.R. 2 Eq. 151; *Bradley* v. *Cartwright* (1867) L. R. 2 C.P. 511; *Wilson* v. *Duguid* (1883) 24 Ch. D. 244; *In re Master's Settlement, Master* v. *Master* (1911) 1 Ch. 321.

(*i*) *Jenkins* v. *Quinchant* (temp. *Hardwicke*) 5 Ves. 596n.

(*j*) *Brown* v. *Higgs* (1799) 4 Ves. 708; *Salusbury* v. *Denton* (1857) 3 K. & J. 529, 535.

(*k*) *Glanvill* v. *Glanvill* (1816) 2 Mer. 38.

(*l*) *Samsuddin* v. *Abdul Husein* (1906) 31 Bom. 165, 172.

(*m*) (1904) 2 Ch. 95.

(*n*) See Illustration (i) to s. 119, I. Suc. Act, 1925.

(*o*) *Williams* v. *Clark* (1851) 4 De G. & Sm. 472; *In re Couturier, Couturier* v. *Shea* (1907) 1 Ch. 470.

(*p*) (1859) Johns 265.

(*q*) (1888) 13 Bom. 463; *Husenbhoy* v. *Ahmedbhoy* (1901) 26 Bom. 319.

(*r*) (1927) 8 Lah. 181, 103 I.C. 506, ('27) A.L. 404.

(*s*) (1886) 12 Mad. 411.

(*t*) *Cally Nath* [illegible] *Chunder Nath* (1882) 8 Cal. 378; *Ja*[illegible] v. *Kuverbai* (1885) 9 Bom. 491 (vested interest subject to right of residence).

(*u*) *Subramaniam* v. *Subramaniam* (1842) 4 [illegible] 124.

Ss. 19-21

A bequest to a daughter of a house after the mortgage debt has been paid is not contingent, but creates a present vested interest (v).

(11) Mahomedan law.—Sunni law does not recognize an estate for life with a vested remainder (w). There is some doubt as to whether the law on this point has been altered by the decision of the Privy Council in *Amjad Khan* v. *Ashraf Khan* (x). It led to a difference of opinion in a Bombay case (y). Such estates are recognized in shia law (z) and in the case of a talukdari estate owned by a Mahomedan family in Oudh (a). A life estate with a vested remainder is recognized both for Shias and Sunnis by the Mussalman Wakf Validating Act, 1913, in the case of wakfs.

When unborn person acquires vested interest on transfer for his benefit.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.—An interest created for the benefit of an unborn person vests as soon as that person is born. Thus if *A settles* property on himself and his intended wife for their joint lives and then on the eldest son of their marriage, the son takes a vested interest as soon as he is born. It matters not that he is not entitled to possession during the lifetime of his parents. Nor will the vesting be affected by a provision that if his parents die during his minority, the trustees should not deliver possession to him until he attains majority.

Under sec. 13 it is necessary that the estate which vests in the unborn person must be the whole remainder. In English law it is possible to limit an estate to *A* for life, then to *A*'s unborn eldest son for life, and then to *B*. In this case until *A*'s son is born the estate vests in *A* with a contingent remainder to his son with a vested remainder to *B*. But as soon as the son is born, the estate is in *A* with a vested remainder to the son, with a vested remainder to *B*. But under this Act the interest of the son fails by reason of sec.13 and that of *B* fails under sec. 16.

A contrary intention that the estate shall not vest at birth may appear as when the interest is contingent, *e.g.*, a transfer to *A* and *B* for their joint lives and then to the son of their intended marriage who shall first attain the age of 18.

Under Hindu law as amended by Statute, no transfer or bequest by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition. See sec. 13, note (6).

Contingent interest.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen,

(v) *Ranganatha* v. *Mohankrishna* (1926) 93 I.C. 111, ('26) A. M. 645; *Subramaniam* v. *Subramaniam*, *supra*; cf. illustration (v) to s. 119, I. Suc. A., 1925.

(w) *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91.

(x) (1929) 56 I. A. 213, 4 Luck. 305, 116 I.C. 405, ('29) A. PC. 149.

(y) *Rasoolbibi* v. *Yusuf Ajam* (1933) 57 Bom. 737, 35 Bom. L. R. 643, 146 I. C. 82, ('33) A.B. 324.

(z) *Banoo Begam* v. *Mir Abed Ali* (1908) 32 Bom. 172; *Siraj Husain* v. *Mushaf Husain* (1922) 65 I.C. 182, 24 O.C. 321, ('22) A.O. 93; *Muhammad Ahsan* v. *Umardaraz* (1906) 28 All. 633.

(a) *Abdul Qayum* v. *Abdul Rahman* (1933) 146 I.C. 710, ('33) A.O. 439

such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible. S. 21

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

(1) Contingent interest.—The distinction between a contingent interest and a vested interest has been explained in note (1) to sec. 19. If the transfer is subject to a condition precedent there is no transfer at all until the condition is fulfilled. Till then the interest is contingent on the condition being fulfilled. When the condition is fulfilled, the transfer takes effect and the interest becomes vested. See the illustrations given in note (2) below.

The specified uncertain event may be one which depends upon the will of the intended transferee, *e.g.*, marriage, execution of a deed, or payment of a sum of money. The performance of such conditions is the subject of sec. 26.

(2) Indian Succession Act—Illustrations of contingent interest.—The corresponding section of the Indian Succession Act, 1925, is sec. 120 (sec. 107 of the Indian Succession Act, 1865). The following are the illustrations to that section :—

(i) A legacy is bequeathed to *D* in case *A*, *B* and *C* shall all die under the age of 18, *D* has a contingent interest in the legacy until *A*, *B* and *C* all die under 18, or one of them attains that age.

(ii) A sum of money is bequeathed to *A* "in case he shall attain the age of 18" or "when he shall attain the age of 18." *A*'s interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

(iii) An estate is bequeathed to *A* for life, and after his death to *B* if *B* shall then be living; but if *B* shall not then be living to *C*. *A*, *B* and *C* survive the testator. *B* and *C* each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened.

(iv) An estate is bequeathed as in the last case supposed. *B* dies in the lifetime of *A* and *C*. Upon the death of *B*, *C* acquires a vested right to obtain possession of the estate upon *A*'s death.

(v) A legacy is bequeathed to *A* when she shall attain the age of 18, or shall marry under that age with the consent of *B*, with a proviso that, if she neither attains 18 nor marries under that age with *B*'s consent, the legacy shall go to *C*. *A* and *C* each take a contingent interest in the legacy. *A* attains the age of 18. *A* becomes absolutely entitled to the legacy although she may have married under 18 without the consent of *B*.

(vi) An estate is bequeathed to *A* until he shall marry and after that event to *B*. *B*'s interest in the bequest is contingent until the condition is fulfilled by *A*'s marrying.

S. 21

(vii) An estate is bequeathed to *A* until he shall take advantage of any law for the relief of insolvent debtors, and after that event to *B*. *B*'s interest in the bequest is contingent until *A* takes advantage of such a law.

(viii) An estate is bequeathed to *A* if he shall pay 500 rupees to *B*. *A*'s interest in the bequest is contingent until he has paid 500 rupees to *B*.

(ix) *A* leaves his farm of Sultanpur Khurd to *B*, if *B* shall convey his own farm of Sultanpur Buzurg to *C*. *B*'s interest in the bequest is contingent until he has conveyed the latter farm to *C*.

(x) A fund is bequeathed to *A* if *B* shall not marry *C* within five years after the testator's death. *A*'s interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without *B*'s having married *C*, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible.

(xi) A fund is bequeathed to *A* if *B* shall not make any provision for him by will. The legacy is contingent until *B*'s death.

(xii) *A* bequeaths to *B* 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a component part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(xiii) *A* bequeaths to *B* 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

In illustration (ii) the instances follow English cases which hold that a bequest "at" a given age (*b*), or "upon attaining" or "as" the legatee shall attain, or "after" his attaining a given age (*c*) is *prima facie* contingent.

In illustration (v) the conditions are in the alternative and it is sufficient if one is fulfilled. This recalls the case of *Austen* v. *Halsey* (*d*).

In illustration (vii) the condition of defeasance on insolvency is a condition subsequent as regards *A*, but a condition precedent as regards *B*. Such a condition is invalid in a transfer *inter vivos*, see sec. 12 and the note thereon.

In illustration (x) the condition is a negative condition which is discharged by the event becoming impossible. The marriage of *B* and *C* would be rendered impossible by the death of either party or by the marriage of *B* or *C* with another person. See in this connection illustration (ii) to sec. 136 of the Indian Succession Act, 1925, and the note on sec. 12 of this Act.

In illustrations (xii) and (xiii) the exception to the section is referred to. In illustration (xiii) the income is of another fund and so the exception does not apply.

(3) Additional instances of contingent interest.—The following are some of the decisions on contingent interest illustrating contingent interests occurring in wills :—

(1) Bequest to a daughter for life and after her death to her lawful children who being a son shall attain the age of 21, or who being a daughter shall attain that age or marry—Held that the interest of a son was contingent till he attained the age of 21 and then became vested (*e*).

(*b*) *Stapleton* v. *Cheales* (1711) Pre. Ch. 315.

(*c*) *Leake* v. *Robinson* (1817) 2 Mer. 363; *Hanson* v. *Graham* (1801) 6 Ves. 239; *Davies* v. *Fisher* (1842) 5 Beav. 201.

(*d*) (1842) 13 Ves. 125.

(*e*) *Ernest William Adams* v. *Mrs. Gray* (1925) 48 Mad. L. J. 707, 90 I.C. 5, ('25) A.M. 599.

(2) Bequests to five sons in equal shares with a condition that in the event of any son dying without sons or son's sons, his share will be taken by the surviving sons—Held that each son gets a life-estate, but the absolute estate of each son was contingent on his death leaving a son or a son's son (*f*).

(3) Bequests to wife and son whom she was empowered to adopt, with a provision that if she died without adopting a son or if the son died in her lifetime, the estate should pass to a sister's son. Held that the nephew had a contingent interest which was vested when the adopted son died without issue in the lifetime of the widow (*g*).

(4) Condition precedent construed as condition subsequent.—A condition precedent, when followed by a gift over, is sometimes construed as a condition subsequent so that the interest dependent on it is not contingent but vested. Thus a devise to *A* "if" or "when" he attains the age of majority with a gift over in the event of his dying under that age has been held to be a condition subsequent so that *A* takes a vested interest liable to be divested by his death under the age specified. This is known to English lawyers as the rule in *Edwards* v. *Hammond* (*h*). Similarly a devise to *A* if or when he shall attain a given age, with a limitation over on his death under that age without issue, confers a vested estate on *A* defeasible only in the event of his death without issue under the specified age (*i*). The English Courts have adopted two rules of construction, namely (1) that the gift of the income of the same fund, until the contingency happens, to the very person who will on attaining a particular age take the fund makes the gift of the fund, apparently contingent upon the attainment of that age, a vested interest, and (2) that a gift over upon failure of a prior gift may have the effect of converting the prior gift apparently contingent upon attainment of a particular age into a vested interest subject to be divested on the death before that age. The first of the above two rules of constructions has been adopted in India by the exception to sec. 21. The second rule has not been adopted in any section of this Act or the Succession Act. It is submitted that in such circumstances there is no reason for importing here the second rule about which the English Courts have taken divergent views. This opinion has been expressed in a recent Calcutta case (*j*).

But the rule in *Edwards* v. *Hammond* does not apply if the attainment of a given age is part of the *description* of the devisee as in the case of a devise to such of the children of *A* as shall attain a given age and then a gift over (*k*). In *Ballin* v. *Ballin* (*l*) Wilson, J., said that in the case of "words of contingency occurring in the description of the class of persons to take, a mere gift over is not sufficient to change their meaning."

(5) Spes successionis.—A mere *spes successionis* is neither a contingent interest nor a vested interest (*m*).

(6) Exception.—Illustrations of the exceptions are given in sec. 120 of the Indian Succession Act, 1925, and have already been quoted; see note (2) above and ills. (xii) and (xiii), and contrast ill. (xii) with ill. (xiii). Under the exception there must be either a *gift* of the interest or a *direction* to apply the whole or part of it. The *gift* of interest in a legacy involves an immediate gift, for the particular legacy has to be immediately

(*f*) *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123, s. c. 6 M.I.A. 526; *Gurusami* v. *Sivakami* (1895) 18 Mad. 347, 22 I.A. 119 (life-estate to daughters but absolute estate contingent on their having issue); *Bai Kamala* v. *Bhavashankar* (1924) 26 Bom. L.R. 249, 80 I.C. 520, ('24) A. B. 350 (ditto).

(*g*) *Bhupendra* v. *Amarendra* (1915) 43 Cal. 432, 43 I.A. 12, 34 I.C. 802 on app. from (1913) 41 Cal. 642, 24 I.C. 458.

(*h*) (1683) 1 B. & P. N. R. 324 N.

(*i*) *Phips* v. *Ackers* (1835-42) 9 Cl. & Fin. 583.

(*j*) *Kanai Lal* v. *Kumar Purendu Nath* (1946) 51 C.W.N. 227.

(*k*) *Festing* v. *Allen* (1854) 12 M. & W. 279; *Bull* v. *Prichard* (1846) 5 Hare 567.

(*l*) (1881) 7 Cal. 218.

(*m*) *Samsuddin* v. *Abdul Hossein* (1906) 31 Bom. 165.

Ss. 21, 22

separated from the bulk of the property in order to provide for the interest (*n*). If there is no *gift* of the income, there must be a *direction* to apply it for the benefit of the minor. In English law a *mere power* to apply income for maintenance has in some cases been held to be insufficient (*o*); but a *direction to trustees* to apply the income in whole or in part will raise an inference in favour of vesting (*p*).

The exception in the corresponding section of the Indian Succession Act, 1865, was considered in a case before the Privy Council (*q*). A Parsi by will appointed his brother his executor, and directed him to bring up and maintain the child which his wife was expecting and to maintain himself and the family "out of my property and effects." If the child was a son the will directed that he "shall be cherished and maintained and educated and when he comes of age my executor shall make over the whole of my remaining properties to my son." Their Lordships held that the case was not within the exception, (1) because there was no gift out of any ascertainable fund to the son, (2) because the executor was to maintain not only the son but also the whole family, and (3) because he was entitled to spend not only the income but also the *corpus*. It has been held that the exception applies only to the case where a fund is given to a person "on his attaining a particular age." It has no relation to any other contingency *e.g.*, his surviving a named person (*r*).

The exception makes no reference to gifts to a class, but the same rule has been applied in England to gifts to a class (*s*). The exception has no reference to gifts to a contingent class, and it is submitted that in India the principle of the exception cannot be extended to a gift to a contingent class. See note under sec. 22.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

(1) Contingent class.—The case dealt with in this section is a gift to a contingent class. This is not the same thing as a gift to a class on a contingency. Thus a gift to the children of *A* in case *B* dies without issue is a gift to a class on a contingency. But a gift to such of the children of *A* as shall attain the age of 18 is a gift to a contingent class. No child of *A* has a vested interest until he has attained that age (*t*), and until then he does not completely answer the description of the transferee (*u*). Until then his interest is contingent even though there may be a gift over. See note (4) under sec. 21, "Condition precedent construed as condition subsequent."

(2) Ascertainment of class.—For the ascertainment of a class the rule is that the objects of the testator's bounty should be ascertained as soon as possible. In the case of a gift to the children of *A* when they attain the age of 18, the class is ascertained when

(*n*) *Vawdry* v. *Geddes* (1830) 1 Rus. & My. 203 approved by Buckley, J., in *Re Nunburnholme (Lord), Wilson* v. *Nunburnholme* (1912) 1 Ch. 489, 496; *Bolding* v. *Strungell* (1918) 48 L.J. Ch. 208.

(*o*) *Re Wintle, Tucker* v. *Wintle* (1896) 2 Ch. 711; *In re Parker, Barker* v. *Barker* (1880) 16 Ch. D. 44; *In re Mervin, Mervin* v. *Crossman* (1891) 3 Ch. 197; *Sewdayal* v. *Official Trustee* (1931) 58 Cal. 768, 134 I.C. 436, ('31) A.C. 651 (obiter).

(*p*) *Fox* v. *Fox* (1873) L.R. 19 Eq. 286; *Re Turney, Turney* v. *Turney* (1899) 2 Ch. 739; *Re Williams, Williams* v. *Williams* (1907) 1 Ch. 180; *Re Usher, Foster* v. *Usher* (1922) 2 Ch. 321; *In re Blackwell, Blackwell* v. *Blackwell* (1926) 1 Ch. 223, 228, 229 per Warrington, L.J.

(*q*) *Dadachanji* v. *Ratanbai* (1925) 49 Bom. 167, 52 I.A. 95, 84 I.C. 892, ('25) A. PC. 27; *Kanai Lal* v. *Kumar Purnendu Nath* (1946) 51 C.W.N. 227.

(*r*) *Sopher* v. *Administrator General of Bengal* (1944) A.PC. 67, 71 I.A. 93.

(*s*) *Fox* v. *Fox*, supra.

(*t*) *Bull* v. *Prichard* (1826) 47, 1 Russ. 213; *Leake* v. *Robinson* (1817) 2 Mer. 363; *Thomas* v. *Wilberforce* (1862) 31 Beav. 299.

(*u*) *Duffield* v. *Duffield* (1825-29) 3 Bli. 260.

the first child of *A* attains 18, and no child born after that time can take (*v*). Similarly if the gift is to *A* for life, and then to such of *B*'s children as attain the age of 18, then if a child of *B* has attained the age of 18 in *A*'s lifetime, the class is ascertained on the death of *A*, and no child born after *A*'s death can take (*w*). In the first case the class consists of the children of *A* who are in existence when the first child of *A* attains the age of 18. In the second case the class consists of the children of *B* in existence at the death of *A*, provided one of them has attained the age of 18 in the lifetime of *A*. If no child of *B* has attained the age of 18 in the lifetime of *A*, any child of *B* born before the first child of *B* reaches 18 becomes a member of the class subject to his attaining the age of 18.

(3) Not contingent.—If the gift is to the children of *A* to be *divided* among them when they attain the age of 18, there is no contingency at all, and the children take an immediate vested interest (*x*) and enjoyment only is postponed.

(4) Indian Succession Act.—The corresponding section of the Indian Succession Act, 1925, is sec. 121, (s. 108 of the Indian Succession Act, 1865). The illustration to that section is as follows :—

> "A fund is bequeathed to such of the children of *A* as shall attain the age of 18, with a direction that, while any child of *A* shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied to his maintenance and education. No child of *A* who is under the age of 18 has a vested interest in the bequest."

(5) Exception to sec. 21 not applicable to contingent class.—Compare the above illustration under sec. 121 of the Succession Act with ill. (xii) under sec. 120 of that Act which explains the meaning of the exception to the last mentioned section. It will be at once clear that the exception to sec. 120 does not apply in the case of a bequest to a contingent class, for in spite of the provision for maintenance the interest is not vested. Although no illustrations are given under secs. 21 or 22 of the Transfer of Property Act the meaning of those sections must be the same as those of the corresponding secs. 120 and 121 of the Indian Succession Act as explained by the illustrations. It follows, therefore, that the exception to sec. 21 does not apply in the case of a contingent class, for in spite of a provision for maintenance the share is not vested. It has been so held in a recent Calcutta case (*y*). In *DeSouza* v. *Vaz* (*z*) Farran, J., said—"The same rule, however, does not apply where there is a gift of an entire fund payable to a *class* of persons equally upon their attaining a certain age. There a direction to apply the income of the whole fund, in the meantime, for their maintenance does not create a vested interest in a member of the class who does not attain that age."

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

(*v*) *Whitbread* v. *Lord St. John* (1804) 10 Ves. 152; *Andrews* v. *Partington* (1791) 3 Bro. C.C. 401.

(*w*) *In re Mervin, Mervin* v. *Crossman* (1891) 3 Ch. 197.

(*x*) *Williams* v. *Clark* (1851) 4 Deg. & Sm. 472; *Masoyk* v. *Ferguson* (1877) 4 Cal. 304.

(*y*) *Kanai Lal* v. *Kumar Purnendu Nath* (1946) 51 C.W.N. 227.

(*z*) (1888) 12 Bom. 137, 146; *In re Parker, Barker* v. *Barker* (1880) 16 Ch. D. 44.

S. 23

(1) Subsequent contingent interest.—The case put in this section is that of a prior interest followed by a subsequent contingent interest. The contingent interest cannot vest until the event on which it is contingent happens. If that event happens sometime after the prior interest has determined, there is a gap or interval during which the estate would be in suspense and would be a *res nullis*. The section therefore enacts that the contingent interest will fail or cannot vest unless the event happens before or at the same time as the prior interest ceases. Thus if there is a gift for life to *A*, and then to *B* in case *B* gets called to the Bar, the gift to *B* fails unless he is called to the Bar in the lifetime of *A* or at the same time as *A* dies. For further illustrations, see note (2) below.

The rule in this section corresponds to the English real property rule that every contingent remainder must vest during the continuance of the particular estate which supports it or *eo instanti* that such particular estate determines.

In a Madras case (*a*), the testator disinherited his son, and left his estate to the grandson or grandsons who might be born within ten years after his death. Ramesam, J., said that the result was that there would be an interval of ten years after the testator's death during which the estate is not vested in any person and that for this reason the disposition was void. It is submitted that this decision cannot be accepted as correct since the decision of the Judicial Committee in *Gadadhar Mullick* v. *Official Trustee of Bengal* (*b*). The artificial rule of English real property law that every contingent gift must be supported by a prior estate and that it must vest at least *eo instanti* the determination of the particular estate which supports it ought not to be imported to India. It is submitted that there is no reason why a contingent gift by a Hindu to a living person *inter vivos* without a prior gift supporting it should not be upheld. The reasonings adopted by the Judicial Committee in *Soorjeemony*'s case (*c*) and *Gadadhar Mullick*'s case (*b*) though cases of contingent bequests in a will are, it is submitted, applicable to contingent gifts *inter vivos* (*d*).

(2) Indian Succession Act.—The section corresponds with sec. 124 of the Indian Succession Act, 1925 (s. 111 of the Indian Succession Act, 1865), according to which if no period is specified a contingent bequest fails unless the event on which it is contingent happens before the period of distribution. The following are the illustrations to the section :—

(i) A legacy is bequeathed to *A*, and in case of his death, to *B*. If *A* survives the testator, the legacy to *B* does not take effect.

(ii) A legacy is bequeathed to *A*, and in case of his death without children to *B*. If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect.

(iii) A legacy is bequeathed to *A* when and if he attains the age of 18 and, in case of his death, to *B*. *A* attains the age of 18. The legacy to *B* does not take effect.

(iv) A legacy is bequeathed to *A* for life, and, after his death to *B*, and, "in case of *B*'s death without children" to *C*. The words "in case of *B*'s death without children" are to be understood as meaning in case *B* dies without children during the lifetime of *A*.

(v) A legacy is bequeathed to *A* for life, and, after his death to *B*, and, "in case of *B*'s death" to *C*. The words "in case of *B*'s death" are to be considered as meaning "in case *B* dies in the lifetime of *A*."

(*a*) *Official Assignee of Madras* v. *Vedavalli Thayarammal* (1926) 51 Mad. L.J. 182, 192, 97 I.C. 168, 192, ('26) A.M. 986.

(*b*) (1940) L.R. 67 I.A. 129.

(*c*) (1862) 9 M. I.A. 123.

(*d*) *Kanai Lal* v. *Kumar Purnendu Nath* (1946) 51 C.W.N. 227.

These illustrations represent the rules in *Edwards* v. *Edwards* (*e*), and are said to rest on the principle of interfering as little as possible with the prior gift, for if death is spoken of as a contingent event, it must be considered to mean death *before* the period of distribution. But the second and fourth illustrations do not represent the English law as it has been since the decision of the House of Lords in *O'Mahoney* v. *Burdett* (*f*). The rule in *O'Mahoney* v. *Burdett* is that a bequest in case of death of the first taker will be read as meaning death before the period of distribution, but in case of death coupled with other circumstances which may or may not occur such as "without issue," death will be read as meaning death at any time under the circumstances stated, unless there are directions in the will inconsistent with such a meaning. The case of *O'Mahoney* was referred to by Lord Shaw as "one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense." This was in the case of *Chunilal* v. *Bai Samrath* (*g*), where the testator bequeathed his property to his two sons with a proviso that in case of either dying without male issue his share was to go to the survivor. The gift over to the surviving son was contingent on the death of the other son without male issue. The Privy Council held that the gift over was effective although the other son died two years *after* the testator. This was a case to which the Hindu Wills Act did not apply; but in other cases in which sec. 111 of the Indian Succession Act, 1865, was applicable or was made applicable by the Hindu Wills Act it was held that the prior gift was absolute and indefeasible on the death of the testator (*h*).

(3) Section to be applied only to cases strictly coming within its scope.— In *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (*i*) the Judicial Committee observed, with reference to sec. 111 of the Succession Act, 1865, now reproduced in sec. 124 of the Succession Act, 1925, which corresponds with sec. 23 of this Act: "sec. 111 embodies the rule enunciated in *Edwards* v. *Edwards*. The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force .... Their Lordships think that it should be applied only to cases strictly coming within its scope." In that case time was mentioned for the occurrence of the specified uncertain event and consequently sec. 111 was not applied, for that section applied only when no time was mentioned for the occurrence of the event. It will be noticed that sec. 23 is concerned with a gift to a specified person upon certain contingency. Although in sec. 124 of the Succession Act, 1925, which corresponds to this section the expression "specified person" is not used, the illustrations to that section clearly indicate that the contingent bequest contemplated by that section is one to a specified person. Sec. 23 of this Act and sec. 124 of the Succession Act, 1925, therefore, like the exceptions to sec. 21 of this Act and sec. 120 of the Succession Act, have no reference to a gift or bequest to a contingent class. It has already been submitted [see note (5) under sec. 22] that the exceptions to the last mentioned sections do not apply to a gift or bequest to a contingent class. On a parity of reasoning sec. 23 of this Act and sec. 124 of the Succession Act ought not to apply to a gift or bequest to a contingent class. A gift or bequest to a contingent class does not strictly come within the scope of sec. 23 of this Act or sec. 124 of the Succession Act, for those sections are concerned with gifts or bequests to specified persons and, on the authority of the observations of the Judicial Committee quoted above, those sections should not be applied to a gift or bequest to a contingent class (*j*).

(*e*) (1852) 15 Beav. 357.

(*f*) (1874) 7 H.L. 388.

(*g*) (1914) 38 Bom. 399, 412, 23 I. C. 645, ('14) A. PC. 60; *Mst. Belo* v. *Kokian* (1930) 11 Lah. 657, 57 I.A. 325, 127 I.C. 787, ('30) A. PC. 270.

(*h*) *Narendra Nath* v. *Kamalbasini Dasi* (1896) 23 Cal. 563, 23 I.A. 18; *Lala Ramjewan* v. *Dal Koer* (1897) 24 Cal. 406; *Nowroji Pudumji* v. *Putlibai* (1913) 37 Bom. 644, 19 I. C. 832; *Nistarini Debya* v. *Behary Lal* (1914) 19 Cal. W.N. 52, 27 I.C. 239.

(*i*) (1915) I.L.R. 43 Cal. 432 at p. 440; 43 I.A. 12.

(*j*) *Kanai Lal* v. *Kumar Purnendra Nath* (1946) 51 C.W.N. 227.

S. 24

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustration.

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them, or to the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

(1) Gift to survivor.—This section enacts a rule of construction and is best explained by the following passage from the judgment of Turner, L.J., in *White* v. *Baker* (*k*): "Where there is a bequest to *A* for life and after his death to *B* and *C* or the survivor of them, some meaning must of course be attached to the words "the survivor." They may refer to any one of three events—to one of the persons named surviving the other, or to one of them only surviving the testator, or to one of them only surviving the tenant for life, and in the absence of any indication to the contrary they are taken to refer to the latter event as being the more probable one to have been referred to." This is the case put in the illustration. For further illustrations, see note (2) below.

(2) Indian Succession Act.—The corresponding section in the Indian Succession Act, 1925, is sec. 125 (sec. 112 of the Indian Succession Act, 1865). Under that section the period of survivorship is the time of payment or distribution, unless a contrary intention appears from the terms of the will. The general rule is established by the leading case of *Cripps* v. *Wolcott* (*l*), where Leach, V.C., stated the rule as follows: "I consider it, however, to be well settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there is no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. . . . . .But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at his death will take the whole legacy."

The section in the Indian Succession Act has the following illustrations :—

(i) Property is bequeathed to *A* and *B* to be equally divided between them, or to the survivor of them. If both *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*.

(ii) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* dies during the life of *A*; *C* survives *A*. At *A*'s death the legacy goes to *C*. [See the illustration to the present section 24 (*m*).]

(*k*) (1860) 2 De G. F. & J. 55, 64.

(*l*) (1819) 4 Madd. 11, 15; *Neathway* v. *Reed* (1853) 3 De G. M. & G. 18; *Hearn* v. *Baker* (1856) 2 K. & J. 383; *Re Gregson's Trust Estate* (1864) 2 De G.J. & Sm. 428.

(*m*) *Ramchandra* v. *Jagdeshwari Prasad* (1936) 168 I.C. 605, (1937) A.P. 247.

(iii) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, or the survivor, with a direction that, if *B* should not survive the testator, his children are to stand in his place. *C* dies during the life of the testator; *B* survives the testator, but dies in the lifetime of *A*. The legacy goes to the representative of *B*.

(iv) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, with a direction that, in case either of them dies in the lifetime of *A*, the whole shall go to the survivor. *B* dies in the lifetime of *A*. Afterwards *C* dies in the lifetime of *A*. The legacy goes to the representative of *C*.

In the first illustration no antecedent interest precedes the gift and the period of distribution is the death of the testator. In *Ellokassee Dassee* v. *Durponarain* (n) the testator left his property to his two sons, an infant grandson, and a widow in equal shares, and directed that "if any of these four persons happen to die the survivors of them will receive this estate in equal shares; but if there be a son or grandson surviving as heir and representative of the party dying, such survivor shall succeed to his share; . . . . so long as my infant grandson shall not have attained his majority the whole of my estate shall remain undivided." It was held that the period of distribution was the death of the testator; and *as all four persons survived the testator* they took vested interests from that date, but that the estate was not divisible until the grandson attained majority.

The second illustration is of the rule in *Cripps* v. *Wolcott* (o), and the period of division is the death of the life tenant *A*.

The third illustration is of the "contrary intention" ["unless a contrary intention appears from the terms"], for although there is a prior interest, the time of distribution is the death of the testator. The illustration was probably suggested by the case of *Rogers* v. *Towsey* (p).

The fourth illustration is another instance of "contrary intention", for the time of distribution is that of one legatee surviving the other. In the passage already quoted from the judgment in *White* v. *Baker* (q) his Lordship continued: "But where, as in the present case, the bequest is to *A* for life and after his death to *B* and *C*, and in case either of them dies in the lifetime of *A*, the whole to the survivor, it is plain that the words in their natural import refer to one surviving the other."

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Conditional transfer.

Illustrations.

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs. 500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer, *C* was dead. The transfer is void.

(n) (1880) 5 Cal. 59.
(o) (1818) 4 Madd. 11.
(p) (1845) 9 Jur. 575.
(q) (1860) 2 De G. F. & J. 55, 64; see also *Scurfield* v. *Howes* (1790) 3 Bro. C. C. 90.

S. 25

(c) *A* transfers Rs. 500 to *B* on condition that he shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

(1) Void condition precedent.—The expression "dependent upon a condition" shows that the section refers to conditions precedent. If the condition precedent to a transfer is of the nature described in this section the transfer fails. Under section 6 (h) (2) of this Act no transfer can be made for an object or consideration which is unlawful within the meaning of sec. 23 of the Indian Contract Act. In *Egerton* v. *Brownlow* (r) Lord Lyndurst said: "It is a well-established rule of law that a condition against the public good or public policy, as it is usually called, is illegal and void."

A condition the fulfilment of which is impossible may refer to an act which is impossible in itself, as in the first two illustrations. As to conditions the fulfilment of which becomes impossible by the act of the party benefited by the nonfulfilment, see sec. 34.

The conditions referred to in this section are conditions which as agreements would be void. See in this connection notes to secs. 23, 26, 27 and 56 of the Indian Contract Act in Pollock and Mulla's Indian Contract Act.

Void conditions subsequent are the subject of sec. 32. If a condition subsequent is void the condition fails, but the interest created by the transfer is not affected; while if a condition precedent is void, the transfer fails. *A* makes a gift of his field to *B* on condition that he sets fire to *C*'s haystack. This is a void condition precedent and the gift fails. *A* makes a gift of his field to *B* with a proviso that if he does not within a year's time set fire to *C*'s haystack the gift shall be void. This is a void condition subsequent. The gift is a good gift and is not affected by the void condition.

A gift to which an immoral condition is attached is a good gift, but the condition is void (s); but a transfer in consideration of future immoral relations is void (t). In *Dawson* v. *Oliver-Massey* (u) Jessel, M. R., observed—"The rule is that where a condition precedent annexed to a legacy becomes impossible by the act of God, the legatee takes nothing. It is otherwise if the condition is a condition subsequent; there the legatee takes absolutely, because there is nothing to take the legacy away from him."

Illustration (d) to the section recalls the case of *Wilkinson* v. *Wilkinson* (v) where it was held that a gift on condition that a woman should cease to live with her husband is void, as the condition is void as against public policy. In a Bombay case (w), *N* advanced money to *V*, a married woman, to enable her to divorce her husband and remarry *N*. He then sued to recover the advances. The Court held that the agreement was against public policy and void.

Indian Succession Act.—The section corresponds to secs. 126 and 127 of the Indian Succession Act, 1925 (ss. 113 and 114 of the Indian Succession Act, 1865). A condition in partial restraint of marriage is valid in English law (x), and this would apparently be so under the Indian Succession Act; see illustration (x) to sec. 120 of the Indian Succession Act, 1925. A condition in a will that the testator's son's daughter should not take any interest under the will, if she married before the death of the son, was upheld

(r) (1853) 4 H. L. Cas. 1, 160.
(s) *Ram Sarup* v. *Bela* (1884) 6 All. 313, 11 I.A. 44.
(t) *Thasi Muthukannu* v. *Shunmugavelu* (1905) 28 Mad. 413; *Ghumna* v. *Ram Chandra Rao* (1925) 47 All. 619, 88 I. C. 411, ('25) A.A. 437.
(u) (1876) 2 Ch. D. 753, 755.
(v) (1871) 12 Eq. 604; *Bai Vijli* v. *Nansa Nagar* (1885) 10 Bom. 152.
(w) *Bai Vijli* v. *Nansa Nagar*, *supra*.
(x) Jarman 7th Ed., P. 1496.

by the Calcutta High Court as not being intended to penalize her marriage, but as being a reasonable disposition having regard to the son's duty to see to his daughter's marriage during his lifetime (*y*). A condition precedent involving a breach of public duty (*z*), or in restraint of trade (*a*), invalidates a bequest.

An instance of an impossible condition is the case of *Rajendra Lal* v. *Mrinalini Dasi* (*b*). The testator left a legacy on condition that the legatee should excavate a tank, but as he had himself excavated the tank before his death the bequest failed. Mookerjee, J., said that the performance of the condition was the motive of the bequest, and the impracticability of performance barred the claim of the legatee.

Fulfilment of condition precedent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(b) *A* tranfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

(1) **Performance of condition precedent.**—The law favours the early vesting of estates (*c*), and so a condition precedent may be carried out *cypres* and is fulfilled if it is *substantially* carried out. For the same reason sec. 29 enacts that a condition subsequent must be *strictly* fulfilled in order to prevent the divesting of an estate which has vested. This is well illustrated by a comparison of illustration (a) to this section with illustration (1) to sec. 132 of the Indian Succession Act, 1925, where the same illustration is put in the form of a condition subsequent thus:—

> "A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, *C* and *D*, the legacy shall go to *E*. *D* dies. Even if *A* marries without the consent of *B* and *C*, the gift to *E* does not take effect."

The condition in the above illustration, being a condition subsequent, is strictly construed to prevent the legacy to *A* being divested; so on the death of *D* the condition becomes impossible and void. Therefore *A* may neglect it and marry without the consent of *B* and *C*. If it were so construed in the illustration (a) to sec. 26, where it is a condition precedent, *A* would take nothing, for performance of the condition would be impossible. Therefore the condition is treated as fulfilled by substantial compliance and the transfer to *A* takes effect, if he marries with the consent of the survivors *B* and *C*.

Illustration (a) recalls the case of *Dawson* v. *Oliver-Massey* (*d*), where the condition was marriage with the consent of parents, and the consent of a surviving parent was held to suffice.

(*y*) *Cohen* v. *Cohen* (1932) 59 Cal. 102, 137 I.C. 482, ('32) A. C. 250.

(*z*) *Brannegan* v. *Mirbly* (1896) 1 Ir. R. 418.

(*a*) *Cooke* v. *Turner* (1846) 15 M. & W. 727, 736; *Mitchel* v. *Reynolds* (1711) 1 P. Wms. 181.

(*b*) (1921) 48 Cal. 1100, 64 I.C. 977, ('22) A.C. 116.

(*c*) *Blackwell* v. *Blackwell* (1929) 1 Ch. 222, 231; *Scott* v. *Tyler* (1788) 2 W. & T. L. C. 146; *Taylor* v. *Graham* (1878) 3 App. Cas. 1287.

(*d*) (1876) 2 Ch. D. 753.

S. 26

Illustration (b) shows that if the condition is clear it cannot be evaded. Where the condition was marriage with the consent of guardians, and the sole guardian appointed by the will had died, and no guardian was appointed, the condition was not complied with, for the Court could have on application appointed a guardian (e). For further illustrations, see note (2) below.

A condition of residence is valid (f), and when no manner of residence is prescribed, is complied with by occasional residence (g). In an Allahabad case (h) a dispute as to succession between a Mahomedan mother and cousins was compromised on terms that the mother should have an estate for life with power of alienation with the consent of the cousins who were to be the reversionary heirs. After the death of two cousins the mother effected an alienation with the consent of the survivor. The Judges differed as to whether this was a substantial compliance within the meaning of this section. It is submitted, however that this was not a case of a condition precedent to the vesting of an estate, but merely a condition affecting the mother's authority to alienate, and the section had no application.

(2) Indian Succession Act.—The corresponding section of the Indian Succession Act, 1925, is sec. 128 (sec. 115 of the Indian Succession Act, 1865). The following are the illustrations to the section :—

(i) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C, D* and *E*. *A* marries with the written consent of *B*, *C* is present at the marriage. *D* sends a present to *A* previous to the marriage. *E* has been personally informed by *A* of his intentions, and has made no objections. *A* has fulfilled the condition.

(ii) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C* and *D*. *D* dies. *A* marries with the consent of *B* and *C*. *A* has fulfilled the condition.

(iii) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C* and *D*. *A* marries in the lifetime of *B, C* and *D*, with the consent of *B* and *C* only. *A* has not fulfilled the condition.

(iv) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C* and *D*. *A* obtains the unconditional assent of *B, C* and *D* to his marriage with *E*. Afterwards *B, C* and *D* capriciously retract their consent. *A* marries *E*. *A* has fulfilled the condition.

(v) A legacy is bequeathed to *A* on condition that he shal marry with the consent of *B, C* and *D*. *A* marries without the consent of *B, C* and *D*, but obtains their consent after the marriage. *A* has not fulfilled the condition.

(vi) *A* makes a will whereby he beaqueaths a sum of money to *B* if *B* shall marry with the consent of *A*'s executors. *B* marries during the lifetime of *A*, and *A* afterwards expresses his approbation of the marriage. *A* dies. The bequest to *B* takes effect.

(vii) A legacy is bequeathed to *A* if he executes a certain document within a time specified in the will. The document is executed by *A* within a reasonable time, but not within the time specified in the will. *A* has not performed the condition, and is not entitled to receive the legacy.

Illustrations (ii) and (v) are the same as those in sec. 26 of the Transfer of Property Act. Illustration (vii) like illustration (v) shows that if the condition is clear it is not to be evaded. In a case decided by the Privy Council a legacy was bequeathed on condition

(e) *In re Brown's Will* (1881) 18 Ch. D. 61.
(f) *Wynne* v. *Fletcher* (1857) 24 Beav. 430.
(g) *Ganendro Mohun Tagore* v. *Rajah Juttendro Mohun Tagore* (1874) 1 I. A. 387, 22 W. R. 377; *Re Moir, Warner* v. *Moir* (1884) 25 Ch. D. 605.
(h) *Beni Chand* v. *Ekram Ahmad* (1926) 90 I.C. 887, ('26) A.A. 181.

that the legatee should "humbly apply for subsistence," but as the legatee claimed as of right maintenance suitable to his rank and position, it was held that there was no substantial compliance with the condition and that the legacy failed (*i*). Ss. 26, 27

(3) **English Cases.**—The following are some English instances of conditions precedent fulfilled by substantial compliance :—

(1) A gift over to "my nephew *W.L.* if he shall be living and able duly to discharge my executors." *W.L.* was a minor unable to give a discharge, but it was held that he could fulfil the condition and duly discharge the executors by a suit in Chancery (*j*).

(2) A gift to nieces who should then be living in England. It was held that nieces settled in America were excluded but not so a niece who was living in Ireland where her husband's regiment was quartered or a niece who was staying with her (*k*).

(3) A legacy to a daughter on condition of her executing a deed of trust within a year of the testator's death. As the trust fund was intact and the daughter was willing to execute a deed this was construed as a directory provision and time was held not to be of the essence of the provision (*l*).

The last instance is far more indulgent than illustration (vii) to sec. 128 of the Indian Succession Act, 1925, and therefore cannot be taken as representing the law in India.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and, if he should neglect to do so, to *C*. *B* dies in *A*'s lifetime. The disposition in favour of *C* takes effect.

(b) *A* transfers property to his wife; but, in case she should die in his lifetime, transfers to *B* that which he had transferred to her. *A* and his wife perish together under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

(1) **Shall fail.**—These words are important for they indicate that the *prior interest is valid* and fails subsequently by reason of the valid condition not being fulfilled. If

(*i*) *Veerabhadra* v. *Chiranjivi* (1905) 28 Mad. 173, 32 I.A. 105.

(*j*) *Ledward* v. *Hassells* (1856) 2 K. & J. 370.

(*k*) *Woods* v. *Townley* (1853) 11 Hare 314.

(*l*) *Re Packard, Packard* v. *Waters* (1920) 1 Ch. 596; *Re Goodwin, Ainslie* v. *Goodwin* (1924) 2 Ch. 26.

S. 27

the prior interest is invalid under sec. 13 or sec. 14, the subsequent interst fails also under sec. 16. If the prior interest is invalid under sec. 25, the subsequent interest fails also under that section or under the combined effect of sec. 25 and sec. 28. This has been explained and illustrated in note (2) under sec. 16.

(2) Acceleration.—In other cases, *i.e.*, where the prior interest is valid and fails as the valid condition on which it rests has not been fulfilled (*m*), this section applies. The law favouring the vesting of estates says that the subsequent interest takes effect as if the prior interest had never been in the way. This results in an acceleration of the subsequent interest. In *Jull* v. *Jacobs* (*n*), there was a bequest to *A* for life and then to his children. The gift to *A* failed as he had attested the will; but Malins, V.C., held that the life estate being out of the way the gift to the children took effect. This case was followed by the Privy Council in a case where there was a bequest to a wife for life and then to her children (*o*). The gift to the wife failed under a local Act for want of registration, but the effect was to accelerate the gift to the children. In *Eavestaff* v. *Austin* (*p*) Lord Romilly decided that the rule applied not only to realty but to personalty. The principle of the section was applied in the following case which occurred in Oudh (*q*). The right to manage a Hindu religious endowment was declared by an award to be vested for successive periods of 21 years, first in *D*, then in *R*, then in *S*, then in *D*'s eldest son, then in *R*'s eldest son, and then in *S*'s eldest son. *R* and *S* both died in the second period of 21 years which belonged to *R*. The Court held that the turn of management of *D*'s eldest son was accelerated.

The rule has been justified on the ground that it gives effect to the intention of the grantor. In *Lainson* v. *Lainson* (*r*), Lord Romilly said—"Although the expression used was that the estate to the son of John Lainson is only to take effect 'from and after John Lainson's decease,' I am of opinion that the meaning is 'from and after the determination of his estate by death or otherwise.' In deciding thus I fulfil the intention of the testator."

Illustration (a) is the case of *Avelyn* v. *Ward* (*s*). A devise was on condition that the devisee should execute a release within three months of the testator's death, but if he should neglect to do so there was a gift over. The devisee died in the lifetime of the testator, but the gift over took effect. Illustration (b) is of the exception (2nd para); see note (3) below.

A failure of a prior gift does not accelerate a subsequent transfer not taking effect on the determination of the prior interest; thus a subsequent gift cannot be accelerated, where the persons who are to take under it are only ascertainable at a future date. It also cannot take effect unless two gifts are dependent on each other (*t*).

(3) Exception.—The second clause refers to the exceptional case where the intention has been expressed that the gift over shall not take effect unless the prior gift fails in the particular manner stated.

Illustration (b) is the case of *Underwood* v. *Wing* (*u*), where there was a gift to the testator's wife absolutely, and a gift over, in case she should die in the testator's lifetime. The testator and his wife both died in the same shipwreck and as it was impossible to prove who survived, the result was an intestacy. This case is no longer law in England,

(*m*) *Ismail Haji* v. *Umar Abdulla* (1942) A. B. 155, (1942) Bom. 441, 44 Bom. L. R. 256, 201 I.C. 34.
(*n*) (1876) 3 Ch. D. 703.
(*o*) *Ajudhia* v. *Rakhman Kuar* (1883) 10 Cal. 482, 11 I.A. 1.
(*p*) (1854) 19 Beav. 591.
(*q*) *Debi Shankar* v. *Nand Kishore* (1932) 135 I.C. 395, ('32) A.O. 161.
(*r*) (1853) 18 Beav. 1, 6, on app. (1854) 5 DeG. M. & G. 754 (prior bequest revoked by codicil).
(*s*) (1750) 1 Ves. sen. 420.
(*t*) *Gopaldas* v. *Hemandas* (1942) Kar. 292, (1942) A.S. 145.
(*u*) (1855) 4 DeG. M. & G. 633, 19 Beav. 459.

for it is now enacted by sec. 184 of the Law of Property Act, 1925, that where two persons have died in circumstances which render it uncertain which of them survived the other, such death shall be presumed to have occurred in order of seniority.

(4) Indian Succession Act.—The rule of acceleration is enacted in sec. 129 of the Indian Succession Act (sec. 116 of the Indian Succession Act, 1865). Two illustrations are annexed, one of which is the same as illustration (a) to sec. 27 of the Transfer of Property Act and the other is as follows :—

(i) *A* bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to *B*. *A* dies without having ever had a child. The bequest to *B* takes effect.

This illustration follows the English cases of *Meadows* v. *Parry* (v) and *Murray* v. *Jones* (w). A case frequently cited in Indian case law is *Jones* v. *Westcombe* (x), where the devise was to a child *en ventre sa mere*, and then over on the death of the child; and the gift over took effect although the wife proved not to be enceinte.

The exception to the rule of acceleration is enacted in sec. 130 of the Indian Succession Act, 1925 (sec. 117 of the Indian Succession Act, 1865). The section has one illustration which is the same as illustration (b) to sec. 27 of the Transfer of Property Act. An instance of the exception is the case of *Official Assignee of Madras* v. *Thayarammal* (y). The testator wished to disinherit his son and left his property to any grandson or grandsons who might be born in his lifetime or within ten years of his death, and "if there shall be no such grandsons to be born as aforesaid" the whole estate to his granddaughters. A grandson was born within ten years of his death but the gift to the grandson failed not only under the rule in the *Tagore* case but also because the estate could not be left in suspense. The question then arose whether the gift having failed in a different manner from that contemplated, the granddaughters could take. It was held that they could not, because the testator's intention was that they should not take if here was a grandson in existence.

(5) Indian cases.—The following are some Indian instances of the rule :—

(1) The testator's wife was enceinte and the testator left his property to the expected son and made a provision for the maintenance of the daughter should the expected child prove to be a daughter. There was a gift over in case the son died before attaining majority. On the birth of a daughter, the Court held that the gift over took effect, although the failure of the gift to the son was not in the manner contemplated by the testator (z).

(2) The testator made a gift to a son to be adopted by his wife and, in case of his death without issue, to his daughters. The power of adoption proved to be invalid, but although the prior bequest failed the gift over to the daughters took effect (a).

(3) *A* made a bequest to a minor son, and on his death before attaining majority to the widow for life and then to the daughters. It was held that the daughters were not deprived of their legacy by the death of the widow before the minor son (b).

A Bombay case may perhaps be cited here, although it was not decided under the Succession Act. The bequest was to the widow Parwati for life, and on her death, to

---

(v) (1812) 1 Ves. & B. 124.

(w) (1813) 2 Ves. & B. 313.

(x) (1711) 1 Eq. Cas. Abr. 245, Pre. Ch. 316.

(y) (1926) 51 Mad. L.J. 182, 191, 97 I.C. 163, ('26) A.M. 936.

(z) *Okhoymoney Dassee* v. *Nilmoney* (1888) 15 Cal. 282.

(a) *Radha Prasad* v. *Rani Mani* (1906) 33 Cal. 947, but decided on another ground on app. 35 Cal. 896, 35 I.A. 118.

(b) *Durga Parshad* v. *Raghunandan Lal* (1915) 19 Cal. W.N. 480, 28 I.C. 597.

Ss. 27, 28

the daughter Saraswati's sons, but in case Saraswati had no sons, then to Saraswati for life, and on her death to the testator's cousin. Parwati died in April 1907 and Saraswati had a son born in December 1907. The son could not take under Hindu law as he was not in existence at the death of the testator. The Court said that although the intention of the testator to give his property to his daughter's son's son was defeated, yet as his next intention was to keep the property in the family the gift over to the cousin took effect (c).

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

(1) **Conditional limitation.**—The ulterior transfer, as it is called in the marginal note to this section, or ulterior disposition, as it is called in secs. 27, 29 and 30, is effected by a conditional limitation. A conditional limitation, as explained in note (6) under sec. 19, is one containing a condition which divests an estate that has vested and vests it in another person. *As regards the prior interest it is a condition subsequent, but as regards the ulterior interest it is a condition precedent.*

Illustrations.

(1) *A* settled property on his second wife for her life, and then on her son if she should have a son; but if she should not have a son, then on the sons by his first wife. The Privy Council held that the sons by the first wife took a vested interest liable to be divested by the birth of a son to the second wife: *Umes Chunder* v. *Zahur Fatima* (1891) 18 Cal. 164, 17 I.A. 201.

(2) The terms of a compromise provided that *L* should have an estate for life, and that after her death *R* should be full owner if he survived *L*, and if he did not, the estate would pass to *R*'s lineal male descendant according to the rule of primogeniture. The Court held that the condition affected the retention of the estate and not its acquisition, and construed the compromise as conferring on *R* a vested interest liable to be divested if he did not survive *L*: *Sunder Bibi* v. *Lal Rajendra* (1925) 47 All, 496, 86 I.C. 684, ('25) A.A. 389; *Jitendra Nath* v. *Banku* (1926) 96 I.C. 565, ('26) A.C. 1177.

For other instances, see note (3) below.

(2) **Specified sections.**—The ulterior transfer or conditional limitation, is subject to the rules contained in the sections specified in this section. The application of these sections is best explained by illustrations:—

S. 10.—*A* transfers his field to *B* without power of alienation and in case of *B*'s death without issue, to *C* also without power of alienation. The restriction is void in both cases.

S. 12.—*A* transfers his field to *B*, and if *B* becomes insolvent, to *C*. *B* becomes insolvent. The field vests not in *C* but in the Official Receiver or the Official Assignee as the case may be.

(c) *Narandas* v. *Bai Saraswati* (1914) 38 Bom. 397, 16 Bom. L.R. 577, 23 I.C. 130. See the criticism of this case in *Official Assignee of Madras* v. *Vedavalli Thayaramma* (1926) 51 Mad. L.J. 182, 191, 97 I.C. 163, ('26) A.M. 986.

S. 21.—*A* transfers his field to *B*, and in case of *B*'s death without issue, to *C*. *C* has a contingent interest which becomes vested on *B*'s death without issue.

S. 22.—*A* transfers his field to *B* and on *B*'s death to such of the children of *C* as shall attain the age of 18. All the children of *C* who are alive at *B*'s death have an interest, which vests when they attain the age of 18.

S. 23.—*A* transfers his field to *B* for life and then to *C*, if *C* goes to England. *C* does not go to England until a year after *B*'s death. *C*'s interest fails.

S. 24.—*A* transfers his field to *B* and on *B*'s death without issue to the sons of *C* or the survivor of them. The sons of *C* who survive *B* take the field.

S. 25.—*A* transfers his field to *B* on condition that he murders *C* with a proviso that on *B*'s death without issue the field shall belong to *D*. The interest both of *B* and of *D* fails.

(3) **Indian Succession Act.**—The corresponding section of the Indian Succession Act, 1925, is sec. 131 (sec. 118 of the Indian Succession Act, 1865). The following illustrations are annexed to the section :—

(i) A sum of money is bequeathed to *A*, to be paid to him at the age of 18, and if he shall die before he attains that age, to *B*. *A* takes a vested interest in the legacy, subject to be divested and to go to *B* in case *A* dies under 18.

(ii) An estate is bequeathed to *A* with a proviso that if *A* shall dispute the competency of the testator to make a will, the estate shall go to *B*. *A* disputes the competency of the testator to make a will. The estate goes to *B*.

(iii) A sum of money is bequeathed to *A* for life, and after his death, to *B* ; but if *B* shall then be dead, leaving a son, such son is to stand in the place of *B*. *B* takes a vested interest in the legacy, subject to be divested if he dies leaving a son in *A*'s lifetime.

(iv) A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect, but the representative of *A* takes one-half of the money, and the representative of *B* takes the other half.

(v) *A* bequeaths to *B* the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at her death. All the children of *B* die in *B*'s lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

These are all illustrations of conditional limitations. As to illustration (ii) it is to be observed that a condition that the legatee shall not dispute a will is valid in English law as to real property (*d*), but not as to personality if the condition is merely imposed *in terrorem* without any gift over (*e*). Illustration (ii) shows that the condition is not valid unless there is a gift over. The fourth illustration is the case of *Harrison* v. *Foreman* (*f*) ; as neither *A* nor *B* survived *C*, the divesting condition does not occur, and the absolute gift to both stands.

(*d*) *Cooke* v. *Turner* (1846) 15 M. & W. 727. Cf. *Soorjomonee Dayee* v. *Suddanund* (1875) 1 I.A. Supp. Vol. 212, 219.

(*e*) *Morris* v. *Burroughs* (1738) 1 Atk. 398, 404.

(*f*) (1800) 5 Ves. Sen. 207.

S. 28

In the reported cases divesting conditions in wills have generally been on account of death without issue (*g*), or non-residence (*h*). In *Gooroo Das* v. *Sarat Chunder* (*i*) there was a gift for life to the widow and then an absolute estate of inheritance to the brothers liable to be divested, if the widow adopted a son; it was held to be a valid conditional limitation.

In *Bachman* v. *Bachman* (*j*) the testator directed his trustees and executors to sell his estate and divide the proceeds between the legatees in certain proportions, but that if any legatee should die in his lifetime or before the division leaving lawful issue, such issue should be entitled to the share his deceased parent would have taken. One legatee died five months after the testator but before the division had been made, leaving lawful issue. The Court held that this legatee took a vested interest which was divested by his death before the division, and the gift over to the legatee's issue took effect. The Court followed the decision in *Johnson* v. *Crook* (*k*). But the authority of *Johnson*'s case is very doubtful, for the House of Lords in *Minors* v. *Battison* (*l*) seem to have held that a divesting condition which depends upon the dilatoriness or caprice of a trustee is void. The subject is discussed in Jarman on Wills 7th Ed. at pp. 2124 to 2128.

In a Madras case (*m*) there was a curious proviso which was held not to operate as a condition of defeasance. The bequest was to a daughter for life and then to her children, and if the daughter should die "leaving no child living at her death" such property "as shall *not* have become *vested*" was to go to the testator's son. The daughter had only one child, a son who predeceased her. The son's interest was vested, but it was not divested because the condition subsequent did not on the terms of the will apply to an interest which was vested.

(4) Repugnancy.—A conditional limitation is a condition of defeasance, which terminates the interest of one person and invests another person with it. But if an estate is given to a named donee in terms which confer an absolute estate, and then a further interest is given merely after or on termination of that donee's interest, *and not in defeasance of it*, the further interest will be void for repugnancy. Thus when a testator gave an absolute estate to his wife with power of alienation, and then added a clause that "if, at the time of the death of my widow, there be no adopted son or if no son or wife of the adopted son be alive, then, my heir according to the Hindu shastras who shall be alive at the time shall get the properties which shall remain after disposal by my wife by way of gift or sale of the same"—the gift over was invalid (*n*). Similarly in *Anandrao Vinayak* v. *Administrator General of Bombay* (*o*), the testator made an absolute gift to his son *G* and then added "and when the sons of my son *G* shall attain the age of twenty-one years, the same shall be divided and duly received by *G* and his sons in equal shares." The gift to the grandsons was void for repugnancy and the absolute estate of *G* was not divested. In a Bombay case (*p*), however, where the testator gave an absolute estate to *R* and then added "should *R* die and should he then leave a son, such his son shall

(*g*) *Soorjeemoney Dossey* v. *Dinbundoo Mullick* (1862) 9 M.I.A. 123; *Ram Lal Mukerjee* v. *Secretary of State* (1881) 7 Cal. 304, 8 I.A. 46; *Tarokessur Roy* v. *Soshi Shikhuressur* (1883) 9 Cal. 952, 10 I.A. 51; *Raikishori Dasi* v. *Debendranath* (1888) 15 Cal. 409, 15 I.A. 37; *Chunilal* v. *Bai Samrath* (1914) 38 Bom. 399, 23 I. C. 645, ('14) A.PC. 60; *Bhupendra* v. *Amarendra* (1915) 43 Cal. 432, 43 I.A. 12, 34 I.C. 892.

(*h*) *Ganendro Mohun Tagore* v. *Rajah Juttendro Mohun Tagore* (1874) 1 I. A. 387, 22 W.R. 377; *Tin Cowri Dassee* v. *Krishna* (1893) 20 Cal. 15; *Shyma Charan* v. *Naba Charan* (1912) 17 Cal. W. N. 39, 14 I. C. 708.

(*i*) (1902) 29 Cal. 699.

(*j*) (1884) 6 All. 583.

(*k*) (1879) 12 Ch. D. 639.

(*l*) (1876) 1 App. Cas. 428.

(*m*) *Ernest William Adams* v. *Gray* (1925) 48 Mad. L.J. 707, 90 I.C. 5, ('25) A.M. 599.

(*n*) *Sures Chandra* v. *Lalit Mohan* (1916) 20 Cal. W.N. 463, 465, 31 I.C. 405; *Thakur Jagmohun Singh* v. *Mst. Sheoraj Kuar* (19[illegible]) 3 Luck. 19, 106 I.C. 593, ('28) A.O. [illegible].; *Karam Singh* v. *Mst. Rupwanti* (1924) 6 Lah. L.J. 412, 85 I.C. 296, ('25) A. L. 122: *Mohan Lal* v. *Niranjan Das* (1921) 2 Lah. 175, 60 I.C. 619, ('21) A.L. 11.

(*o*) (1896) 20 Bom. 450, 453.

(*p*) *Gulbaji & Co.* v. *Rustomji* (1925) 49 Bom. 478, 483, 95 I.C. 229, ('25) A.B. 282.

afterwards be the owner"—it was held that *B* took only a life-estate. In a Madras case (*q*) there was a gift to a wife in terms absolute with a clause that "if there is no issue, after your death, your brothers should take the properties." This was construed as a valid condition in defeasance of the gift.

Hindu Law.—The section applies to Hindus and conditional limitations or grants subject to defeasance with a gift over have always been recognized in Hindu law. See Mulla's Hindu Law, 7th Ed., s. 389.

Mahomedan Law.—A gift cannot be made so as to take effect on the happening of a contingency. See Mulla's Mahomedan Law, 10th Ed., s. 137. It follows that, conditional limitations are not recognized in Mahomedan law.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that, if *B* dies a minor or marries without *C*'s consent, the Rs. 500 shall go to *D*. *B* marries when only 17 years of age, without *C*'s consent. The transfer to *D* takes effect.

(1) Performance of a condition subsequent.—It follows from the principle that the law favours the vesting of estates, that a condition subsequent, which has the effect of divesting an estate is subject to the rule of strict construction, and that a condition precedent to an estate vesting is deemed to have been fulfilled if it is substantially complied with. This has been explained in note (1) under sec. 26 where illustration (a) to sec. 26 has been contrasted with illustration (i) to sec. 132 of the Indian Succession Act, 1925.

If the interest has become vested, it is not to be taken away except by clear words (*r*). In a case where a Hindu widow was authorised to adopt a son, with a direction that if the first adopted son died before the age of 20, she was to adopt another son to take the place of the deceased adopted son, the Calcutta High Court said that a clause of defeasance in order to be operative, must contain express words or words of necessary implication of a gift over to a definite person or persons. The implication of a gift over to the second adopted son was not sufficient to prevent the widow of the first adopted son from inheriting her husband's share (*s*).

If the words of the condition are clear, they must be clearly fulfilled. If there is any ambiguity in the condition subsequent, it will be read in the sense most favourable to the vested interest. Accordingly a gift to *A* for life and then to his children with a gift over in the event of *A*'s death without *leaving* children is construed as a gift over in the event of *A*'s death without *having had* a child (*t*). This is known to English lawyers as the rule in *Maitland* v. *Chalie* (*u*). But the rule does not apply when the

(*q*) *Govindraju* v. *Mangalam Pillai* (1933) 63 Mad. L.J. 911, 139 I.C. 867, ('33) A.M. 80, 81.

(*r*) *Re Cobbold, Cobbold* v. *Lawton* (1903) 2 Ch. 299; *Mussoorie Bank* v. *Raynor* (1882) 4 All. 500, 9 I.A. 70, 80; *Tripurari Pal* v. *Jagat Tarini* (1913) 40 Cal. 274, 40 I.A. 37, 17 I.C. 696; *Amulya* v. *Kalidas* (1905) 32 Cal. 861; *Suree Chandra* v. *Lalit Mohan* (1916) 20 Cal. W.N. 463, 31 I.C. 466; *DeSouza* v. *Vas* (1887) 12 Bom. 187, 147.

(*s*) *Amulya* v. *Kalidas*, *supra*.

(*t*) *Maitland* v. *Chalie* (1822) Madd. & G. 243.

(*u*) (1822) Madd. & G. 243.

Ss. 29, 30

condition was "leaving no children living at her death", for these express and unambiguous words exclude the rule (*v*).

Ignorance of a condition is no excuse for non-compliance (*w*), for a person who takes under an instrument cannot plead want of knowledge of its contents (*x*). In the case of *In re Hodges Legacy* (*y*), Wickens, V.C., said that "neither ignorance, illness, nor neglect on the part of the executor to inform the legatee can excuse him for not complying with the direction so as to entitle him to the gift." In another case (*z*), the condition of defeasance was "in case the person entitled *neglected* within three months to adopt the surname and arms of the testator" and this condition was held not to apply when the person entitled was absent in Canada and had never heard of the will, for the word "neglected" implies a conscious act of volition. This is an application of the principle already referred to, that clear words must be clearly fulfilled. Similarly a condition violated under duress will not forfeit the bequest, and a condition requiring residence in a holy place is not broken when the devisee was forcibly removed to another place (*a*). See in this connection sec. 34 below.

(2) Indian Succession Act.—The corresponding section of the Indian Succession Act, 1925, is sec. 132 (sec. 119 of the Indian Succession Act, 1865). The third illustration to that section is the same as that to sec. 29 of the Transfer of Property Act.

The other illustrations are as follows:—

(i) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, *C* and *D*, the legacy will go to *E*. *D* dies. Even if *A* marries without the consent of *B* and *C*, the gift to *E* does not take effect.

(ii) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, the legacy shall go to *C*. *A* marries with the consent of *B*. He afterwards becomes a widower and marries again without the consent of *B*. The bequest to *C* does not take effect.

Illustration (i) imports the same condition as illustration (a) to sec. 26 of the Transfer of Property Act, or illustration (ii) to sec. 128 of the Indian Succession Act, 1925, but as it is here a condition subsequent it is subject to strict construction, and is discharged by the death of one of the parties whose consent is required. In the second illustration the condition once fulfilled is discharged.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to *B* for her life, and, if she do not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

(1) Subsequent interest invalid.—When a prior interest is invalid either as offending against the rule against perpetuity, or as being illegal or impossible under sec. 25, the subsequent interest also fails. This has been explained in the note (1A) under sec. 16. But if the subsequent interest is invalid the prior interest is not affected.

(*v*) *Ernest William Adams* v. *Gray* (1925) 48 Mad. L.J. 707, 90 I.C. 5, ('25) A.M. 599.

(*w*) *In re Hodges, Legacy* (1873) 16 Eq. 92, 96; *Astley* v. *Essex (Earl)* (1874) 18 Eq. 290.

(*x*) *Dorier* v. *Fry* (1868) 1 Vent 199.

(*y*) *Supra.*

(*z*) *Re Quinton Dick, Lord Cloncurry* v. *Fenton* (1926) 1 Ch. 992, 999.

(*a*) *Tin Cowri Dassee* v. *Krishna* (1892) 20 Cal. 15.

Illustrations.

(1) *A* transfers his field to *B* with a proviso that on the death of *B*'s last lineal male descendant the field shall belong to the lineal descendant of *C*. The ulterior disposition to *C* is invalid under the rule against perpetuity, but the estate of *B* is not affected.

(2) *A* transfers his field to *B* with a proviso that if *B* does not within a year set fire to *C*'s haystack, the field shall belong to *D*. The ulterior disposition to *D* is invalid under sec. 25, but the interest of *B* is not affected.

In *Ring* v. *Hardwick* (*b*), Lord Langdale held that a gift which is absolute will not be affected by a gift over which is void for remoteness. In *Saraju Bala* v. *Jyotirmoyee* (*c*) there was a gift of an absolute estate to a daughter, with a defeasance clause whereby the property was to revert to the heirs of the grantor in case of the failure of her descendants. The Privy Council held that as the defeasance clause was void the daughter was entitled to dispose of the property by will. In *re Beard, Reversionary & General Securities Ltd.* v. *Hall* (*d*), there was a devise with a condition of defeasance in case the devisee entered the naval or military forces of the Crown, but as the condition was void as opposed to public policy the devisee took an absolute interest.

(2) **Indian Succession Act.**—The same rule is enacted in sec. 133 of the Indian Succession Act, 1925 (sec. 120, Indian Succession Act, 1865). Three illustrations are annexed to the section of which the second is the same as that in this section. The other two illustrations are as follows :—

(i) An estate is bequeathed to *A* for his life with condition superadded that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to *B*. The condition being void, *A* retains his estate as if no condition had been inserted in the will.

(iii) An estate is bequeathed to *A* for life and, if he marries, to the eldest son of *B* for life. *B*, at the date of the testator's death, had not had a son. The bequest over is void under sec. 105, and *A* is entitled to the estate during his life.

In *Bai Dhanlaxmi* v. *Hari Prasad* (*e*), there was an absolute bequest to the eldest son with a superadded condition of defeasance in case of failure of male issue and an attempt to create an estate of inheritance not known to Hindu law. The Court held that the original bequest to the son was not affected by the failure of the gift over. In *Narsingh Rao* v. *Mahalakshmi* (*f*) the settlor, whose son was in prison, made a gift in 1875 of his property to his widow with a condition of defeasance in case his son should have a son within 16 years, in which case the property was to go to the grandson. The condition was void under Hindu law as it then was, being in favour of an unborn person, and the widow took an absolute and indefeasible estate. The Privy Council said that "it is a well settled principle of law, which has now been embodied in secs. 28 and 30 of the Transfer of Property Act, 1882, that in such a case if the ulterior disposition is not valid the prior disposition is not affected by it."

(3) **Hindu Law.**—The section now applies to Hindus, and the section of the Indian Succession Act applies to wills governed by the Hindu Wills Act. But the principle of the sections has always been applied to Hindus. Thus in *Tagore* v. *Tagore* (*g*), where there was a gift to *A* for life, and after him to his heirs in tail male, the subsequent

(*b*) (1840) 2 Beav. 352.

(*c*) (1931) 58 I.A. 270, 35 Cal. W. N. 968, 134 I.C. 648, ('31) A.P.C. 179.

(*d*) (1908) 1 Ch. 383.

(*e*) (1921) 45 Bom. 1086, 62 I. C. 37, ('21) A.B. 302.

(*f*) (1928) 50 All. 375, 392, 55 I.A. 180, 109 I.C. 703, ('28) A.P.C. 136.

(*g*) (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47; *Kristoromoni* v. *Narendro* (1888) 16 Cal. 383, 16 I.A. 29; *Tarokessur* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51.

disposition was invalid, but *A*'s life-estate was not affected. Similarly in *Khetter Mohan Mullick* v. *Gunga Narain* (*h*), it was held that specific trusts of specific estates good in themselves were not invalidated by a subsequent illegal disposition of the remainder. The case of *Saraju Bala* v. *Jyotirmoyee* (*i*) referred to in note (1) was decided under Hindu law.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(a) *A* transfers a farm to *B* for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

(b) *A* transfers a farm to *B*, provided that, if *B* shall not go to England within three years after the date of transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

(1) **Condition subsequent.**—The condition referred to in this section is a condition subsequent which terminates an interest and revests it in the grantor. It is not a conditional limitation, which creates an interest in a third person. The next section requires that the condition subsequent should be valid, otherwise it will not have the effect of terminating the interest to which it is attached. As the section is subject to sec. 12 it follows that a condition subsequent divesting an estate on the ground of insolvency or of attempted alienation would be void.

Illustrations.

(1) *A* is under sentence of transportation for life and transfers his field to *B* with a proviso that in case he returns from Port Blair *B*'s interest shall cease. *A* returns from Port Blair. *B*'s interest in the field ceases: *Venkatarama* v. *Aiyasami* (1922) 43 Mad. L.J. 340, 69 I.C. 673, ('23) A.M. 67.

(2) *A* transfers his field to *B* with a proviso that if *B* becomes insolvent, *B*'s interest in the field shall cease. *B* is adjudged insolvent. The field vests in the Official Receiver or the Official Assignee as the case may be.

A condition subsequent requiring residence in a particular house has been held to be valid (*j*). A condition requiring residence in a holy place was not broken when the devisee was forcibly detained in another place (*k*). A gift which is revocable under sec. 126 is an instance of a transfer subject to a condition subsequent (*l*).

This section applies only to a completed transfer of property creating an interest therein with a condition superadded for its cessor on certain contingency but has no application to a contract for transfer with a condition superadded thereto. Thus where in a sale deed it was provided that if the vendee did not pay the amount of the price retained by him to the

(*h*) (1899) 4 Cal. W.N. 671n.

(*i*) (1931) 58 I.A. 270, 35 Cal. 903, 134 I.C. 648, ('31) A. PC. 179.

(*j*) *Ambika Charan* v. *Sasitara* (1915) 22 Cal. L.J. 61, 29 I.C. 868; *Bhoba* v. *Peary Lal* (1897) 24 Cal. 646; Cf. *Sirish Chandra* v. *Kadambini* (1926) 44 Cal. L. J. 18, 97 I.C. 685, 26 A.C. 1175.

(*k*) *Tin Cowri Dassee* v. *Krishna* (1893) 20 Cal. 15; *In re Hewitt* (1918) 1 Ch. 458; *In re Whitfield* (1911) 1 Ch. 310.

(*l*) *Venkatarama* v. *Aiyasami* (1922) 43 Mad. L. J. 340, 69 I.C. 673, ('23) A. M. 67.

creditor of the vendor within a certain time the sale deed would be deemed to have been cancelled and the vendee failed to pay the price to the creditor within time and the court gave him further time to pay it was held that the contract of sale and the act of transfer were embodied in the same deed and the condition was to be regarded as an integral condition of the contract for sale providing the date for completion of the contract by satisfaction of the balance of the contract price and not as a condition superadded to the transfer itself and therefore the transfer was not defeated. It was held that there was nothing in sec. 31, which merely declared that a limitation upon a condition subsequent is a lawful method of grant, to exclude the right of the court to give relief to the vendee who failed to make payment of the price by the date agreed upon in the contract of sale (m).

(1A) Condition subsequent a penalty.—It has been held that if a condition subsequent involving forfeiture of an estate is in the nature of a penalty it may be relieved against and pecuniary compensation may be awarded for non-performance (n).

(2) Indian Succession Act.—This section corresponds to sec. 134 of the Indian Succession Act, 1925, which replaces sec. 121 of the Indian Succession Act, 1865. Five illustrations are annexed to the section in the Indian Succession Act, of which the first and third are the same as those in this section. The others are :-

(ii) An estate is bequeathed to *A*, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. *A* marries under 25 without the consent of the executors. The estate ceases to belong to him.

(iv) An estate is bequeathed to *A*, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. *A* becomes a nun. She loses her interest under the will.

(v) A fund is bequeathed to *A* for life, and, after his death, to *B*, if *B* shall then be living, with a proviso that, if *B* shall become a nun, the bequest to her shall cease to have any effect. *B* becomes a nun in the life-time of *A*. She thereby loses her contingent interest in the fund.

The fourth illustration recalls the facts in the case of *Wainwright* v. *Miller* (o).

Partial restraint of marriage.—Illustration (ii) shows that a condition subsequent in partial restraint of marriage is valid. Such a condition in England is valid in the case of land, if it is reasonable (p) but not in the case of personality, unless there is a gift over (q). For a further discussion of the subject see Jarman 7th Ed., page 1496.

Such condition must not be invalid.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary, that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

(1) Invalid condition subsequent.—This section is analogous to sec. 30. Under sec. 30 an invalid ulterior disposition will not affect a prior interest; and so under this section an invalid condition subsequent will not divest the interest to which it is attached. A condition which is void as a condition precedent is also void as a condition subsequent.

(m) *Devendra Prasad Sukul* v. *Surendra Prasad Sukul* (1936) A.PC. 24, 63 I.A. 38.

(n) *Munshi Lal* v. *Ahmad Mirza Beg* (1933) 8 Luck. 707, 144 I.C. 786, ('33) A.O. 291.

(o) (1897) 2 Ch. 255.

(p) *Fry* v. *Porter* (1670) 1 Mod. Rep. 300.

(q) *Re Whiting's Settlement* (1905) 1 Ch. 96.

Illustration.

A transfers his field to *B* with a proviso that if *B* does not within a year set fire to *C*'s haystack his interest shall cease. The condition subsequent is invalid and *B*'s interest is not affected.

Instances of conditions subsequent void as contrary to public policy, are a condition divesting the interest of a devisee if he enters the naval or military forces of his country (*r*); or a condition requiring the donee to obtain a title (*s*).

A condition that a person shall not become a Christian is valid (*t*).

(2) Indian Succession Act.—The corresponding section of the Indian Succession Act is sec. 135 of the Indian Succession Act, 1925 (sec. 122, I.S.A., 1865). If the condition is invalid, failure to comply with it does not involve forfeiture. When a testator bequeathed an annuity to his wife which would, according to the terms of the will, be forfeited if she did not live in the family house which he intended to build, but died without building, the condition was void for impossibility and the widow was held to be entitled to the annuity, although she lived in her father's house (*u*).

Transfer conditional on performance of act, no time being specified for performance.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

(1) Time for performance.—When no time is fixed for the performance of a condition subsequent, it is broken not only when the person does an act which renders performance impossible, but also when he does an act by which performance is indefinitely postponed. This is explained by the second illustration to sec. 136 of the Indian Succession Act, 1925, set forth in the next paragraph.

(2) Indian Succession Act.—The corresponding provision is sec. 136 of the Indian Succession Act, 1925 (sec. 123, I.S.A. 1865). The following illustrations are annexed to the section :

(i) A bequest is made to *A*, with a proviso that, unless he enters the Army, the legacy shall go over to *B*. *A* takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. *B* is entitled to receive the legacy.

(ii) A bequest is made to *A*, with a proviso that it shall cease to have any effect if he does not marry *B*'s daughter. *A* marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect.

The second illustration corresponds to the illustration to sec. 34 of the Indian Contract Act. These are evidently a deliberate departure from *Randal* v. *Payne* (*v*). Where it was held that a gift in case *J* and *M* did not marry into certain families did

(*r*) *In re Beard, Reversionary & General Securities Ltd.* v. *Hall* (1908) 1 Ch. 383.

(*s*) *Egerton* v. *Brownlow* (*Earl*) (1854) 4 H.L. Cas. 1.

(*t*) *Hodgson* v. *Halford* (1879) 11 Ch. D. 959.

(*u*) *Satish Chandra* v. *Sarat Subdari* (1917) 38 I.C. 103.

(*v*) (1779) 1 Bro. C.C. 55 Cf. *Lowe* v. *Manners* (1822) 5 B. & Ald. 917, where however there were circumstances showing that the condition applied to the first marriage.

not divest on their marrying into other families, as they had their whole life to perform the condition. Ss. 33, 34

A testator bequeathed his property to his daughter's son, in the event of his widow dying without adopting a son, but the interest was conditional on the daughter's son residing in the family house. The daughter's son joined the widow in selling the house. This was a breach of the condition, and he was deprived of the interest given by the will (*w*).

Transfer conditional on performance of act, time being specified.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

(1) **Principle.**— The principle underlying this section is that no party can take advantage of his own fraud. If performance of a condition whether subsequent or precedent is prevented by a person interested in its non-fulfilment, the delay is excused and the condition is discharged.

In *Brooke* v. *Garrod* (*x*) a right of pre-emption was given, on condition that the option was notified to the trustees within one month, and the purchase money paid within two months of the testator's death. The donee of the right of pre-emption notified his intention within one month, and called for an abstract of title, but failed to pay the purchase money within the prescribed time. Lord Cranworth held that the right of pre-emption was lost, but observed that if there had been such fraud or laches on the part of the trustees as the Court would consider to be the sole cause of the donee not complying *modo et forma* with the condition imposed by the will, he might have been entitled to relief.

(2) **Indian Succession Act.**—The corresponding section is sec. 137 of the Indian Succession Act, 1925 (sec. 124, I.S.A., 1865).

In a Calcutta case (*y*) the testator directed that if any of the female members of his family lived for more than three months at any other than a holy place they would forfeit their interest under his will. The forfeiture was not incurred when they were forcibly removed by their relations.

(*w*) *Shama Charan* v. *Naba Chandra* (1912) 17 Cal. W.N. [illegible], 14 I.C. 703.

(*x*) (1857) 2 DeG. & J. 62.

(*y*) *Tin Cowri Dassee* v. *Krishna* ([illegible]) 20 Cal. 15.

S. 35

Election.

35. [*1*] Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

Election when necessary.

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him (*pp. 165-169*).

Illustrations.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to *B*.

[*2*] The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own (*pp. 169-170*).

[*3*] A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect (*p. 170*).

[*4*] A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom (*p. 170*).

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction (*pp. 170-171*).

[5] Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances (*p. 171*). S. 35

[6] Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent (*p. 172*).

[7] Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done (*p. 172*).

Illustration.

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to *B*.

[8] If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer (*p. 172*).

[9] In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority (*p. 172*).

Paragraph numbers.—The paragraphs of this section are not numbered in the Act. They are numbered here for the sake of convenience of reference.

(1) Election.—The foundation of the doctrine of election is that a person taking the benefit of an instrument must also bear the burden (*z*), and that he cannot take under and against the same instrument (*a*). It is therefore a branch of the general rule that no one may approbate and reprobate (*b*). But there must be a will or a deed which conveys title to a person in properties other than those belonging to himself, before he can be put to election. A surrender by a Hindu widow to her immediate reversioner

(*z*) *Codrington* v. *Lindsay* (1873) 8 Ch. 578; *Pickersgill* v. *Rodger* (1876) 5 Ch. D. 163.

(*a*) *Dillon* v. *Parker* (1818) 1 Swan. 359, 394.

(*b*) *Codrington* v. *Codrington* (1875) 7 H.L. 854, 861; *Birmingham* v. *Kirwan* ([illegible]) 2 Sch. & Lef. 444, 449.

S. 35

does not amount to such conveyance, for on a surrender taking place the widow, by a legal fiction, is assumed as dead and the reversioner takes the estate as the heir of the last full owner and not as a transferee from the widow (*c*).

The doctrine is based on intention to this extent that the law presumes that the author of an instrument intended to give effect to every part of it (*d*). This presumption Lord Hatherley in *Cooper* v. *Cooper* (*e*) described as "the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed." It has been said that "this general and presumed intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument, but in principle it is evident that it may be repelled by a declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention (*f*)." There is no provision in the section for such a case, but it is submitted that the operation of the section can in India similarly be excluded by express words (*g*). It has been held that when a settlor imposes a restraint on anticipation on a married woman he manifests an intention that she shall not be put to an election, for she cannot give up property which she is restrained from anticipating (*h*).

The doctrine was first applied in the case of wills. In *Ker* v. *Wauchope* (*i*) Lord Eldon said—"If a testator gives his estate to *A* and gives *A*'s estate to *B*; Courts of Equity hold it to be against conscience, that *A* should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator." The doctrine was extended in England from wills to conveyances and settlements (*j*), yet to quote the words of Lord Redesdale it arises more frequently in the case of wills because "deeds, being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires" (*k*).

The principle of election is stated by Lord Hatherley in *Cooper* v. *Cooper* (*l*) as follows:—

> "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives the benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."

If an instrument is invalid in part, what remains is sufficient to put a person to his election if he claims a benefit under it (*m*).

(2) Indian Succession Act.—The rule of election as applied to wills is enacted in secs. 180 to 190 of the Indian Succession Act, 1925, (secs. 167 to 177, Indian Succession Act, 1865). The following illustrations under sec. 182 are instances of election:—

(i) The farm of Sultanpur was the property of *C*. *A* bequeathed it to *B*, giving a legacy of 1,000 rupees to *C*. *C* has elected to retain his farm of Sultanpur,

---

(*c*) *Venkataramayudu* v. *Narayana* (1941) A.M. 480 (1941) Mad. 551, (1941) M. L. J. 309, 53 M. L. W. 264 (1941) M.W.N. 208.
(*d*) *In re Vardon's Trust* (1886) 31 Ch. D. 275.
(*e*) (1874) 7 H.L. 53, 71.
(*f*) *In re Vardon's Trusts* (1885) 31 Ch. D. 275, 279 C.A.
(*g*) See Shepherd and Brown's note on s. 35.
(*h*) *In re Wheatley, Smith* v. *Spence* (1884) 27 Ch.D. 606, 613; *In re Vardon's Trusts*, *supra*.
(*i*) (1819) 1 Bli. 1, 21.
(*j*) *Codrington* v. *Lindsay* (1873) 8 Ch. 578, 587.
(*k*) *Birmingham* v. *Kirwan* (1805) 2 Sch. & Lef. 444, 449.
(*l*) (1874) H.L. 53, 60; *Re Williams, Cunliffe* v. *Williams* (1915) 1 Ch. 450; *Streatfield* v. *Streatfield* (1735) 1 White & Tud. L. C., 9th Ed., p. 388.
(*m*) *Newman* v. *Newman* (1783) 1 Bro. C.C. 186.

which is worth 800 rupees. *C* forfeits his legacy of 1,000 rupees, of which 800 rupees goes to *B*, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(ii) *A* bequeaths an estate to *B* in case *B*'s elder brother (who is married and has children) shall leave no issue living at his death. *A* also bequeaths to *C* a jewel, which belongs to *B*. *B* must elect to give up the jewel or to lose the estate.

(iii) *A* bequeaths to *B* 1,000 rupees, and to *C* an estate which will, under a settlement, belong to *B* if his elder brother (who is married and has children) shall leave no issue living at his death. *B* must elect to give up the estate or to lose the legacy.

(iv) *A*, a person of the age of 18, domiciled in British India but owning real property in England, to which *C* is heir at law, bequeaths a legacy to *C* and, subject thereto, devises and bequeaths to *B* "all my property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. *C* may claim his legacy without giving up the real property in England.

The first illustration is almost identical with a Madras case (*n*), in which the testator bequeathed a field which belonged to his niece, to his grandson, and at the same time left his niece a legacy of Rs. 800. The Court held that she must elect between the land or the legacy. The second and third illustrations show that the principle applies to all interests whether vested or contingent, immediate or remote (*o*). Illustration (iv) seems to be based on the old English case of *Hearle* v. *Greenbank* (*p*). See note *infra*—"*Doctrine of election not available to cure an illegality.*"

(3) Proprietary interest.—A person is not put to his election, unless he has a proprietary interest in the property disposed of in derogation of his rights (*q*). A creditor is not put to his election, for he has only a personal claim for payment by his debtor (*r*). A bequest in the will of a Hindu that "my elder brother *V*'s self-acquisition to the extent of Rs. 10,000 is with meso, that money should be given to him" was treated as a legacy in satisfaction of the debt, and *V* was not estopped from claiming it by the fact that he had tried and failed to recover the money as a debt (*s*). In another case the testator disposed of his property in favour of his wife and daughter, and then gave away "my own and my wife's ornaments," but the Court held that this did not raise a question of election as the stridhan ornaments in which his wife had a proprietary interest were not included in the bequest (*t*). If the property which the testator professes to dispose of does not belong to the other legatee, no question of election can arise (*u*).

(4) Same transaction.—The equity of election does not apply unless the two donations are part of the same transaction, for if the two are independent, the one which is in the power of the transferor will stand, while the other will fail. In *Muhammad Afzal* v. *Ghulam Kasim* (*v*), Government on the death of the Nawab of Tank, when transferring the chiefship to the eldest son, transferred a portion of the cash allowance of the late Nawab to the second son on whom the late Nawab had already made a grant of two

(*n*) *Annamalai Achi* v. *Ponnammal* (1919) M. W.N. 144, 36 Mad. L. J. 507, 49 I.C. 527.

(*o*) *Wilson* v. *Townshend* (*Lord*) (1794) 2 Ves. 693, 697; *Cooper* v. *Cooper* (1871) 6 Ch. 15, 21.

(*p*) (1749) 1 Ves. Sen. 298.

(*q*) Ashburner's Equity, p. 672; *Mahomed Ali* v. *Nisar Ali* (1927) 100 I. C. 835, ('28) A.O. 67, 82.

(*r*) *Cooper* v. *Cooper* (1874) 7 H. L. 53, 66, 72.

(*s*) *Rajamannar* v. *Venkata Krishnayya* (1902) 25 Mad. 361, 363.

(*t*) *Mamubai* v. *Dossa Morarji* (1891) 15 Bom. 443.

(*u*) *Kamal Kumari* v. *Narendra* [illegible] (1909) 9 Cal. L. J. 19, 1 I.C. 578.

(*v*) (1903) 30 Cal. 843, 30 I.A. 190

S. 35

villages for maintenance. The Privy Council said that the second son was not put to his election, as the two grants came from independent sources. In another case a Hindu widow made a gift in excess of her powers and subsequently left a will in the following terms: "Excluding the properties which I have already given away, I will make the following dispositions." The Madras High Court held that the plaintiff taking under the will was not precluded by the doctrine of election from disputing the prior gift which was not the subject of the will at all (*w*).

Election may arise when the two donations are conferred by two different instruments, if the two instruments are used to carry out one transaction (*x*).

(4A) Doctrine of election not available to cure an illegality.—The doctrine of election cannot be resorted to in order to cure an illegality, and a gift which infringes the rule against perpetuities cannot be used to raise a case for election. In *Wollaston* v. *King* (*y*) a testatrix under her marriage settlement had power to appoint a fund to her children. She appointed a part of the fund to her son *C* for life, with remainder to such persons as *C* might by will appoint. *C* was not *in esse* at the time when the power was created and therefore the remainder after *C*'s life estate was void as contravening the rule against perpetuities. By the same will she made a general residuary appointment of the settled fund to her daughters to whom she bequeathed other benefits. As the gift of the remainder to *C*'s testamentary appointees was void the daughters were not put to their election. In a later case (*z*) Farwell, J., said: "the Court will refuse to aid a testator to commit any breach of the law". Illustration (iv) to sec. 182 of the Indian Succession Act, 1925 (cited in note (2) above) appears to be based on the supposition that a devise by an infant would in English law be a breach of the law, but it may be doubted whether in English law it would be considered as more than a case of incapacity to dispose of the land, in which case the heir would be put to his election. See *In re Macartney, Macfarlane* v. *Macartney* (*a*). Possibly the illustration is based on *Hearle* v. *Greenbank* (*b*), but that case turned upon a special rule favouring the heir at law of English real estate which applies only when the testator is domiciled in England (*c*).

Not only will the doctrine of election not cure an illegality, but as election is a doctrine of equity it will not be applied so as to lead to inequitable results (*d*).

(4B) Election by heir.—If there is a devise by an English will of land in Scotland which is ineffectual under the local law, and the person taking under the local law is a beneficiary under the will, he is put to his election (*e*). The same rule applies to a foreign heir when the *lex situs* like the Scotch law merely imposes restrictions on the power of the testator to pass over his heirs, but does not make it impossible for the heir to comply with the provisions of the will. Thus in *Re Ogilvie, Ogilvie* v. *Ogilvie* (*f*) there was a testamentary disposition of land in Paraguay in trust for charity and a bequest to the heirs. Under the law of Paraguay the heirs succeeded automatically to four-fifths of the land in Paraguay, but the heirs were put to their election, for they could legally hand over the land to the purposes of the trust. But if the *lex situs* makes it impossible for the heir to carry out the provisions of the will there is no case for election. See note *infra*—"Impossibility of election" and the case of *Brown* v. *Gregson* (*g*).

(*w*) *Ramayyar* v. *Mahalaxmi* (1921) M. W. N. 434, 64 I.C. 481, ('22) A.M. 357, 358.
(*x*) *Bacon* v. *Cosby* (1851) 4 DeG. & Sm. 261.
(*y*) (1869) L. R. 8 Eq. 165 followed in *Re Oliver's Settlement, Evered* v. *Leigh* (1905) 1 Ch. 191 and in *Re Nash, Cook* v. *Frederick* (1910) Ch. 1, 10.
(*z*) *In re Oliver's Settlement, supra*, at p. 198.
(*a*) (1918) 1 Ch. 300, 304 distinguishing *Wollaston* v. *King* (1869) L. R. 8 Eq. 165.
(*b*) (1749) 3 Atk. 695.
(*c*) *In re Ogilvie* v. *Ogilvie* (1918) 1 Ch. 492; Dicey Conflict of Laws 5th Ed. 976.
(*d*) *Brown* v. *Gregson* (1920) A. C. 860: Dicey Conflict of Laws 5th Ed. 961.
(*e*) *Harrison* v. *Harrison* (1873) 8 Ch. App. 342.
(*f*) (1918) 1 Ch. 492.
(*g*) (1920) A.C. 860.

S. 35

(4C) Impossibility of election.—The doctrine does not apply when election is impossible as when a married woman is restrained from anticipating, for it is impossible for her to give up property which she is restrained on alienating (*h*). Again in the case of *In re Chesham (Lord), Cavendish* v. *Dacre* (*i*), a testator gave benefits to *A*, and by the same will gave to *B* chattels which were vested in trustees to be enjoyed with a mansion house of which *A* was tenant for life under a settlement. *A* was not put to his election, for it was impossible for him to assign the chattels to *B*. So in the case of a foreign heir if the *lex situs* makes it impossible for him to carry out the provisions of the will there is no case for election. This is illustrated by the case of *Brown* v. *Gregson* (*j*), the facts of which case when simplified are as follows. A testator left his property in trust in equal shares for his sons *A* and *B* and for his daughter *C* for her life and then to her children. The property was in Scotland and in the Argentine. Under Scotch law a testator's power of disposition is restricted and each of the children could claim a share, called *legitim*, irrespective of the will. The will provided that any child who claimed *legitim* should forfeit all benefits under the will. The daughter *C* claimed *legitim* and forfeited all benefits under the will. But as trusts are not recognized in the Argentine, she as well as *A* and *B* succeeded in equal shares to the lands in the Argentine. The trust of the land in favour of the children of *C* failed and they claimed that *A* and *B*, as a condition of taking their share of the Scotch property, should surrender to the trusts of the will shares of the lands that had passed to them as on an intestacy in the Argentine. The Court held that no case for election arose, for it was impossible for them to surrender their shares to the trusts of the will, since no scheme could be devised by which such trusts could be created without infringing the law of the Argentine. Moreover the application of the doctrine of election would have led to inequitable results. *C* had already got more than a third share, *i.e.*, *legitim* in Scotland, plus a share of the Argentine land, as on an intestacy, and it would have been inequitable to call upon *A* and *B* to give up part of their shares to *C*'s children.

(5) Revert to the transferor.—When the refractory donee, as he is called, elects against the instrument, the benefit which he has to surrender reverts to the transferor. In this respect the English law is different, for the refractory donee does not forfeit the benefit but takes it subject to a charge to compensate the disappointed donee (*k*). Lord Eldon described this as the equity of compensation which the Courts had engrafted upon the primary doctrine of election (*l*). Thus in the illustration to the section in the Transfer of Property Act, on *C*'s election to retain the farm, the gift of Rs. 1,000 would in English law not revert to *A*, but would be taken by *C* subject to a charge in favour of *B* for Rs.3,000. This is because the doctrine in England rests on compensation and not on forfeiture (*m*). The doctrine in India rests on forfeiture, and the disappointed donee looks to the transferor to compensate him by a charge on the property that has reverted to him. There is no occasion for a charge if the transferor survives and the transfer is gratuitous, for it is open to the transferor to make a substituted gift.

(6) Belief of the transferor.—The *second* paragraph corresponds to sec. 182 of the Indian Succession Act, 1925 (sec. 169, Indian Succession Act, 1865). As already stated the principle may be referred to the implied intention of the testator, but it is not necessary that he should have had in mind the equitable principle of election (*n*). It matters not whether the transferor thought he had the power to convey, or knowing the extent of his authority, intended by an arbitrary execution of power to exceed it (*o*). To quote the

(*h*) *Hamilton* v. *Hamilton* (1892) 1 Ch. 396, 405.
(*i*) (1886) 31 Ch. D. 466.
(*j*) (1920) A.C. 860.
(*k*) *Gretton* v. *Howard* (1819) 1 Swan. 409; *Pickersgill* v. *Rodger* (1876) 5 Ch. D. 163; *Re Macartney, Macfarlane* v. *Macartney* (1918) 1 Ch. 300.
(*l*) *Ker* v. *Wauchope* (1819) 1 Bli. 1, 25.
(*m*) *Streatfield* v. *Streatfield* (1735) 1 White & Tud. L.C., 9th Ed., p. 393; *Gretton* v. *Howard* (1819) 1 Swan. 409.
(*n*) *Cooper* v. *Cooper* (1874) 7 H. L. 53, 67.
(*o*) *Thellusson* v. *Woodford* (1806) 13 Ves. 209; *Parker* v. *Sowerby* (1854) 4 DeG. M. & G. 321.

S. 35 words of Lord Alvanley "nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another" (*p*). It is not therefore necessary that the author of the instrument should have known that the property did not belong to him or that he intended to put the donee to an election. But this intention may be expressed and then the condition is a condition precedent which must be literally performed. This is the case in the *Exception*. See note (9) below.

(7) Indirect benefit.—The *third* paragraph corresponds to sec. 184 of the Indian Succession Act, 1925 (sec. 171, I. S. A. 1865). The section is there explained by the following illustration :—

"The lands of Sultanpur are settled upon *C* for life, and after his death upon *D*, his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1,000 rupees to *C*. *C* dies intestate shortly after the testator, and without having made any election. *D* takes out administration to *C*, and as administrator elects on behalf of *C*'s estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to *B* for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultanpur in opposition to the will."

On the same principle it has been held in England that a man may be tenant by courtesy of an estate tail held by his wife in opposition to a will under which he accepts a legacy (*q*). The interest which the husband takes in such a case is an incident of the property of his wife and not a benefit conferred by the transferor so as to raise a case for election.

(8) Different capacity.—The *fourth* paragraph corresponds with the first part of sec. 185 of the Indian Succession Act, 1925 (sec. 172, I. S. A. 1865), which is explained by the following illustration :—

"The estate of Sultanpur is settled upon *A* for life, and after his death, upon *B*. *A* leaves the estate of Sultanpur to *D*, and 2,000 rupees to *B*, and 1,000 rupees to *C*, who is *B*'s only child. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. *C* may do this, and yet claim the legacy of 1,000 rupees under the will."

An administrator or trustee may take a benefit *qua administrator* for the benefit of the estate, or of the beneficiary, and take a benefit for himself without being put to an election. *Grissel* v. *Swinhoe* (*r*) is an instance of an administrator not being put to an election. No question of election can arise merely because owing to circumstances two capacities have merged in one person (*s*).

(9) Exception.—The Exception corresponds to the second part of sec. 186 of the Indian Succession Act, 1925 (sec. 172 of the Indian Succession Act, 1865), where it is explained by the following illustration :—

"Under *A*'s marriage settlement, his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. *A* by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his

(*p*) *Whistler* v. *Webster* (1794) 2 Ves. 367, 370.

(*q*) *Cavan* v. *Pulteny* (1795) 2 Ves. 544; *Grissel* v. *Swinhoe* (1869) 7 Eq. 291 explained in *Cooper* v. *Cooper* (1874) 7 H.L. 53

(*r*) (1869) 7 Eq. 291.

(*s*) *Deputy Commissioner of Partabgarh* v. *Ram Sarup* (1917) 20 O.C. 243, 42 I.C. 13.

wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees."

Section 172 of the Indian Succession Act, 1865, was referred to in a Calcutta case (t) in which a testator bequeathed to his nephew all his property including the share of his brother's widow and made a provision for the widow's maintenance. The widow recovered the maintenance allowance by suit, and it was held that a subsequent suit for her share of the property was barred by sec. 172 as she must have known that the allowance was given her in lieu of her share of the property. It is submitted, however, that the case did not fall under sec. 172 as the allowance was not expressed to be in lieu of her share and that the only issue was whether the first suit constituted a valid and final election to confirm the bequest.

(10) Acceptance.—The *fifth* paragraph corresponds to sec. 187 of the Indian Succession Act, 1925 (sec. 173 of the Indian Succession Act, 1865), which is explained by the following illustrations :—

(i) *A* is the owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son *B* will be absolutely entitled. The will of *A* gives the estate of Sultanpur Khurd to *B*, and the estate of Sultanpur Buzurg to *C*. *B*, in ignorance of his own right to the estate of Sultanpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultanpur Khurd. *B* has not confirmed the bequest of Sultanpur Buzurg to *C*.

(ii) *B*, the eldest son of *A*, is the possessor of an estate called Sultanpur. *A* bequeaths Sultanpur to *C*, and to *B* the residue of *A*'s property. *B* having been informed by *A*'s executors that the residue will amount to 5,000 rupees, allows *C* to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultanpur to *C*.

Acceptance of a benefit implies an election, but as in English law, there is no implied election except by a party who has full knowledge of the circumstances that would influence the judgment of a reasonable man making the election, and with that knowledge determines to elect (u). He waives the inquiry into the circumstances if he wilfully abstains from enquiring into them so that he is affected with constructive notice of them—sec. 2. An election made with full knowledge is final (v); but an election made without such knowledge may be revoked by the representatives of the electing party (w). Cases have arisen in India in connection with bequests to pardanashin women, and it has been held that it must be proved that they were fully aware of their rights when the acts were done which are said to constitute an election (x). In *Sadik Husain* v. *Hashim Ali* (y) a Mahomedan executed a voluntary trust deed settling property on his wife in satisfaction of her claim for dower and the Privy Council observed that "if she was never fully informed of its purport and contents, any election by her to accept the provision made for herself and her children by it in discharge of the unpaid balance of her dower would, of course, be of no avail."

(t) *Pramada Dasi* v. *Lakhi Narain Mitter* (1886) 12 Cal. 60.

(u) *Dillon* v. *Parker* (1818) 1 Swan. 359, 382; *Worthington* v. *Wiginton* (1855) 20 Beav. 67; *Wilson* v. *Thornbury* (1875) 10 Ch. 239.

(v) *Dewar* v. *Maitland* (1866) 2 Eq. 834.

(w) *Kidney* v. *Coussmaker* (1806) 12 Ves. 136.

(x) *Trigunа Sundari* v. *Radharani* (1923) 27 Cal. L. J. 20 F. B.; *Indubala* v. *Manmatha* (1925) 41 Cal. L. J. 256, 87 I. C. 404, ('25) A.C. 724.

(y) (1916) 43 I.A. 212, 230, 38 All. 627, 36 I.C. 104.

(11) Two years' enjoyment.—The *sixth* paragraph corresponds to sec. 188 (1) of the Indian Succession Act, 1925, (sec. 174 of the Indian Succession Act, 1865). The period of two years is taken from the case of *Crabtree* v. *Bramble* (z). The presumption may be rebutted. A widow who enjoyed a provision made for her under a will in ignorance of her right of dower was held entitled to elect after a lapse of 16 years (a). When the person who has to elect is in possession of both estates no persumption can be drawn (b).

(12) Status quo cannot be restored.—The *seventh* paragraph corresponds with sec. 188 (2) of the Indian Succession Act, 1925, (sec. 175 of the Indian Succession Act, 1865). It is sufficiently explained by the illustration to the Exception. The principle is that of *restitutio in integrum* recognized in sec. 36 of the Specific Relief Act. The section permits an inference of knowledge which may be rebutted by circumstances.

(13) Time for election.—The *eighth* paragraph corresponds with sec. 189 of the Indian Succession Act, 1925, (sec. 176 of the Indian Succession Act, 1865). There is no such provision in English law but in *Sopwith* v. *Maughan* (c) Romilly, M.R., said—"It is also perfectly clear, that the parties interested under the will might have called upon her categorically to elect, and the Court might not consider twelve months after testator's death an unreasonable time." If a time is fixed by the instrument, and the party makes default, he is deemed to have elected against the instrument (d).

(14) Disability.—The *ninth* paragraph corresponds with sec. 190 of the Indian Succession Act, 1925, (sec. 177 of the Indian Succession Act, 1865). A minor's election may be postponed until his majority, or his guardian may elect for him. In England the practice is for the Court to elect for the infant and to direct an enquiry for that purpose (e), unless the Court has sufficient materials before it (f).

(15) Ratification.—Cases of ratification must be distinguished from cases of election. For ratification properly speaking refers to acts done on behalf of the ratifier. If done without authority the principal may elect either to ratify or to disown them—sec. 196 of the Indian Contract Act. The doctrine of ratification rests, however, on the same principle that a man cannot both affirm and disaffirm the same transaction. Thus when a widow who had a life-estate for maintenance granted a permanent lease, the reversioner could elect either to ratify it or to set it aside; and it was held that he was not bound by the lease when he accepted rent for three years in ignorance of the circumstances under which the lease was granted or the terms on which it was held (g). A converse case is *Modhu Sudan* v. *Rooke* (h) where the reversioner accepted rent with full knowledge that the widow had granted a patni lease and he was held to have elected to ratify the lease.

(16) Hindu law.—The section now applies to Hindus but the principle has always applied. In *Rungama* v. *Atchama* (i) the Privy Council referred to the "principle not peculiar to English law, but common to all law which is based on the rules of justice, *viz.*, the principle that a party shall not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit and disaffirm it as far as it is to his prejudice." Again, in *Shah Mukhun Lal* v. *Sree Kishen Singh* (j) the Privy Council said that the principle that you cannot both approbate and reprobate the same

(z) (1747) 3 Atk. 679.
(a) *Sopwith* v. *Maughan* (1861) 30 Beav. 235.
(b) *Padbury* v. *Clark* (1850) 2 Mac. & G. 298.
(c) (1861) 30 Beav. 235, 240.
(d) *Dillon* v. *Parker* (1818) 1 Swan. 359, 385.
(e) *Re Montague, Faber* v. *Montague* (1896) 1 Ch. 549.
(f) *Blunt* v. *Lack* (1857) 26 L.J. Ch. 148.
(g) *Gopi Keori* v. *Mst. Raj Roop* (1925) 78 I.C. 191, ('25) A. A. 196.
(h) (1898) 25 Cal. 1, 24 I.A. 164.
(i) (1850) 4 M.I.A. 1, 103, 7 W. R. 57, 62 P.C.
(j) (1869) 12 M.I.A. 157, 186, 2 Beng. L. R. 44, 11 W. R. 19, 21 P.C.

transaction was a "maxim founded, not so much on any positive law, as on the broad and universally applicable principles of justice." The doctrine was directly applied in the case of *Mangaldas* v. *Runchhoddas* (*k*). A Hindu widow devised to *X* immoveable property of her husband and gave the plaintiff, a reversionary heir, a legacy of Rs. 2,000. The plaintiff claimed the legacy under the will and the immoveable property as heir. The Court said that the doctrine of election applied, and that he must elect to take the one or the other.

(17) Mahomedan law.—The doctrine of election was applied to Mahomedans by the Privy Council in the case of *Sadik Husain* v. *Hashim Ali* (*l*), to which reference has already been made; see note (10) above, "Acceptance."

[*Apportionment*] (*m*).

Apportionment of periodical payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

(1) Apportionment by time.—This section refers to apportionment by time, while sec. 37 refers to apportionment by estate.

Illustrations.

(1) *A* has let his house at a rent of Rs. 100 payable on the last day of each month. *A* sells the house to *B* on the 15th of June. On the 30th June *A* is entitled to Rs. 50 rent from the 1st to the 15th, and *B* is entitled to Rs. 50 rent from the 15th to the 30th. This is apportionment by time.

(2) *A* has let his house at a rent of Rs. 100. *A* sells half the house to *B*. The tenant having notice of the sale must pay from the date of the sale rent at the rate of Rs. 50 to *A* and Rs. 50 to *B*. This is apportionment by estate.

On a transfer of property yielding income, sec. 8 provides that the transferee is entitled to the interest or income accruing after the transfer takes effect. The interest has in such cases to be divided between the transferor and the transferee. There is no difficulty in respect of interest, for that accrues from day to day. But as to income which does not accrue *de die in diem* the rule in sec. 8 might lead to anomalous results. For instance, rents do not accrue from day to day but at stated periods (*n*), and if the rent for the year was payable the day after the transfer, the transferee would be entitled to the whole year's rent. To remove this anomaly the section enacts that all periodical payments in the nature of rent, annuities, dividends and pensions shall be *deemed* to accrue from day to day, and be apportioned between the transferor and transferee on that basis.

(*k*) (1890) 14 Bom. 438.

(*l*) (1916) 38 All. 627, 43 I.A. 212, 36 I.C. 104.

(*m*) This heading does not appear in the official copy of the Act.

(*n*) *Satyendra Nath* v. *Nilkantha* (1894) 21 Cal. 383.

S. 36

(2) English rule.—The common law of England did not recognize apportionment except in the case of interest which accrued from day to day. As to other periodical payments such as rent, the contract for each portion of rent was regarded as distinct and entire. This common law rule is stated in the judgment of Lord Eldon in *Ex parte Smyth* (o), and is explained in Swanston's note on that case. The rule was altered by the Apportionment Act, 1870 (p), sec. 2 of which is as follows:—

"(2) From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

It will be observed that the English section is not limited to transfers, but lays down a general rule, apportioning in respect of time both liabilities as well as rights (q).

(3) Scope of the Indian rule.—The Indian rule is much more limited, for it is restricted to transfers *inter vivos*, and does not apply to liabilities. The apportionment which the section contemplates is one following the transfer of the interest of the person entitled to receive the rent, and not the transfer of the interest of the person bound to pay it (r). A lessor transferring his interest to the assignee of the lessee is entitled to an apportionment of rent up to the date of the merger (s). When a decree is passed for the redemption of a mortgage, the apportionment of the rents of the mortgaged property is made as from the date when money is paid for redemption, and not from the date of the decree (t).

The section does not apply to transfers by operation of law as these are excluded by sec. 2 (d). A purchaser at an execution sale acquires title by operation of law and the rule of apportionment does not apply to execution sales (u).

Illustrations.

(1) *A* has let his house at a rent of Rs. 100 payable on the last day of each month. In execution of a decree against *A* the house is sold by the Court and purchased by *B* on the 15th June. On the 30th June *B* is entitled to the whole of the rent, *i.e.*, Rs. 100.

(2) A mortgagee brought the mortgaged property to sale and bought the property himself at the Court sale in November 1922. The rent for the year was payable on the 1st April 1923. The mortgagor claimed that the rent should be apportioned and that he should receive the rent from 1st April 1922 till November 1922. But as it was an execution sale sec. 36 did not apply, and the mortgagee was held to be entitled to the whole year's rent payable on the 1st April 1923 (v).

Prepaid rent is not rent, but a loan (w). See note under sec. 50, "Rent paid in advance."

No rule of apportionment in the Act apart from section.—These limitations on the section have not always been observed. In one case (x) the lessor had only a life interest and died a month before the rent for the half year

(o) (1819) 1 Swan. 337.
(p) 33 & 34 Vict. c. 35—Chitty's Statutes Vol. I, p. 393.
(q) *Bishop of Rochester* v. *Le Fanu* (1906) 2 Ch. 513, 521.
(r) *Satyendra Nath* v. *Nilkantha* (1894) 21 Cal. 383.
(s) *Mikram Mumaf* v. *Mohit Krishna* (1921) 64 I.C. 178.
(t) *Lala Ganga Ram* v. *Mewa Ram* ('22) A.A. 275.
(u) *Subbaraju* v. *Seetharamaraju* (1916) 39 Mad. 283, 28 I.C. 232; *Satyendra Nath* v. *Nilkantha*, *supra*.
(v) *U Kyaw Zan* v. *Ah Doe* (1924) 84 I. C. 77, ('24) A.R. 365; *Subbaraju* v. *Seetharamaraju*, *supra*.
(w) *De Nicholls* v. *Saunders* (1870) L.R. 5 C.P. 589.
(x) *Lakshminarasappa* v. *Malathamma* (1903) 26 Mad. 540.

S. 36

was payable. Here there was no question of a transfer, and yet the assignee of the lessor was held to be entitled to an apportionment of rent for the period up to the death of the lessor. Again, in another case (*y*) the liability to pay rent was apportioned between the lessee and his assignee, and in a third Madras case (*z*) the rule of apportionment was applied between a lessor and the purchaser of his interest at an execution sale. This decision has recently been followed in subsequent cases by the Madras High Court (*a*). The rule has also been applied in the case of devolution of interest on succession (*b*). In all these cases the rule was applied as an equity. It is submitted, however, that this is erroneous, and that there is no such equity. Apportionment by time was not recognised by the English common law. A general rule of apportionment by time was then introduced by statute. The Indian rule is limited to transfers *inter vivos*. For cases outside the Indian rule, justice, equity and good conscience would necessitate the application of the English common law. This view is supported by a recent decision of the Privy Council (*c*). In that case successive estates had been created by a deed of settlement, and the income from investments and other settled property had to be allotted to the successive estates. The Privy Council held that in the absence of any rule in India the English common law rule of no apportionment of discontinuous payments applied. The income, of course, would have been apportionable, had there been clear and unambiguous intention to that effect. In *Phiroshaw Bomanji* v. *Bai Goolbai* (*d*), the Privy Council held that none of the English Apportionment Acts applied in India, and that as to cases outside the section the law applicable was the English Common Law rule as ampified in Swanston's note to Lord Eldon's judgment in *Ex parte Smith* (*e*). As to this their Lordships said—"The latter (*i.e.*, Mr. Swanston) traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument as, for instance a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entire. The rule, however, while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing *de die in diem*. It did not, for example, apply to annuities or to debts." As noted above, however, the Courts in India have applied the principle of this section to cases outside the section as a rule of justice and equity.

(3A) Maintenance.—A Hindu widow's right to maintenance accrues from day to day. Therefore, on the death of a Hindu widow her heirs are entitled to recover the maintenance allowance up to the day of her death, although the allowance has, for the convenience of the parties, been expressed to be payable on a fixed date (*f*).

(4) Dividends.—"Dividends" in the English Apportionment Act has been held to include payments by way of occasional bonus or surplus profits to the shareholders (*g*). But the payment must be made or declared in respect of a definite period (*h*).

(4A) "Other periodical payment."—The same expression is used in the English Act (the Apportionment Act, 1870) and as to it Lord Selbourne said—"They must be payments which are made periodically, recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and, further, they must be in the nature of income; that is, coming in from

(*y*) *Kunhi Sou* v. *Mulloli Chathu* (1915) 38 Mad. 86, 17 I.C. 933.

(*z*) *Rangiah Chetty* v. *Vajravelu* (1918) 41 Mad. 370, 43 I.C. 78.

(*a*) *Sondattikulai Pandia* v. *Sanjiki Veerappa* (1937) Mad. 580; *Y.S. David* v. *Rangarth Rangaraju* (1944) A.M. 568.

(*b*) *Aparna Debi* v. *Sree Sree Shiba Prasad* (1924) 3 Pat. 367, 83 I.C. 682, ('24) A.P. 451; *Mahomed Askhar* v. *Mahomed Abdul* (1927) 101 I.C. 91, ('27) A.O. 605 *Shiuprasad* v. *Prayag Kumari* (1934) 61 Cal. 711, 154 I.C. 479, ('35) A.C. 39.

(*c*) *Phiroshaw Bomanjee* v. *Bai Goolbai* (1923) 47 Bom. 790, 50 I.A. 276, 280, 76 I.C. 955 ('23) A.PC. 171.

(*d*) 50 I.A. 276, *supra*.

(*e*) (1819) 1 Swan. 337.

(*f*) *Rangappa* v. *Sikka* (1933) 64 Mad. L.J. 410, 145 I.C. 961, ('33) A.M. 605.

(*g*) *Re Griffith Carr* v. *Griffith* (1879) 12 Ch. D. 655.

(*h*) *Re Jowitt Jowitt* v. *Keeling* (1922) 2 Ch. 442.

Ss. 36, 37

some kind of investment (i)." The expression does not therefore include the profits of a partnership which accrue only after the adjustment of accounts (j), nor the profits in a share of a village (k).

Whenever there are periodical payments accruing, and the event which calls for apportionment occurs, the Act is at once brought into operation and must be applied and when subsequently the accruing payments become due and payable, they must be distributed in accordance with the Act (l).

(4B) Sums due before the event.—Sums due in advance and due before the event which calls for apportionment are not apportioned. So where rent was payable quarterly in advance, and the landlord re-entered for non-payment of rent during the quarter he was entitled to recover the whole rent (m).

(5) Payable.—The section makes it clear that the apportionment does not affect the date when the payment is to be made by the person liable. Thus if under a lease rent is payable at the end of the year, an assignment by the lessor of his interest in the middle of the year will result in the transferor and the transferee being each entitled to half the rent, but the lessee still remains liable to pay only at the end of the year (n).

(6) Contract or local usage.—The rule may be excluded by contract or local usage. With reference to the English Act it was held that a bequest of shares in a company with a direction that they should carry the dividends accruing at the testator's death excluded the rule (o).

In the case of agricultural rents, the Allahabad High Court makes the apportionment with reference not to the rent of the whole year but with reference to the rent of the season in which the crop was reaped (p). In a Rangoon case (q) the Court observed that agricultural rents are not apportionable as they accrue once and for all when the crops are reaped and do not accrue from day to day. This, it would appear, is not correct, for it is precisely because rents do not accrue from day to day that the rule of apportionment has been applied to them by this section. A similar observation as to agricultural rents occurs in a Calcutta case (r), but there the apportionment was by estate and the reference to section 36 seems to have been a mistake for section 37. Agricultural rents are excepted from the operation of section 37, but are subject to apportionment by time under section 36.

Under sec. 225 of the Agra Tenancy Act (U.P. Act 3 of 1926) agricultural profits are divisible on fixed dates between the co-sharers. But on the principle of this section it has been held that the co-sharer's right accrues from day to day. Therefore his suit for a share of the profits is not premature if filed before the fixed date and the amount due at the date of suit can be ascertained by apportionment (s).

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding

(i) *Jones* v. *Ogle* (1872) 8 Ch. App. 192, 198.
(j) *Jones* v. *Ogle*, *supra*: *In re Cox's Trusts* (1878) 9 Ch. D. 159.
(k) *Gobind Rao* v. *Bhagirathi* (1901) 14 C.P. L.R. 84.
(l) *Re Muirhead, Muirhead* v. *Hill* (1916) 2 Ch. 181.
(m) *Ellis* v. *Rowbotham* (1900) 1 Q.B. 740.
(n) *Lala Ganga Ram* v. *Mewa Ram* ('22) A.A. 275.
(o) *Lysaght* v. *Lysaght* (1898) 1 Ch. 115.
(p) *Nand Kishore* v. *Ram Sarup* (1928) 50 All. 18, 102 I.C. 144, ('27) A.A. 569.
(q) *Ma Hawa Bi* v. *Sein Kho* (1927) 5 Rang. 808, 109 I.C. 151, ('28) A.R. 67.
(r) *Satya Bhupal* v. *Rajnandini* (1924) 28 Cal. W.N. 1089, 83 I.C. 144, ('24) A.C. 1089.
(s) *Mahommad Abdul Jalil Khan* v. *Mahommed Abdus Salem Khan* (1932) A.L.J. 93, 137 I.C. 166, ('32) A.A. 173.

duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose: S. 37

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and untill the Provincial Government by notification in the official Gazette so directs.

Illustrations.

(a) *A* sells to *B*, *C* and *D* a house situate in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep *B* having provided half the purchase money, and *C* and *D* one quarter each. *E*, having notice of this, must pay Rs. 15 to *B*, Rs. 7½ to *C*, and Rs. 7½ to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than ten days' work in all, according to such direction as *B*, *C* and *D* may join in giving.

(1) Apportionment by estate.—This section refers to apportionment by estate while the last section dealt with apportionment by time.

Before the transfer of Property Act when a tenure was severed by the sale of shares in the reversion, the tenant was still obliged to pay the rent to all the sharers jointly, unless an apportionment had been agreed to by all the parties, or had been ordered in a suit to which all concerned were parties (*t*). If such an agreement had been arrived at, it was binding on the tenant (*u*).

But under the present section notice to the tenant is sufficient to convert the single obligation to pay rent to all into a several obligation to pay rent to each co-sharer. On receipt of the notice the tenant is under an obligation to pay each sharer his proportionate part of the rent (*v*): but if a suit is necessary to enforce this obligation, it is still necessary to join all the sharers as parties (*w*). If no apportionment is made, the obligation

(*t*) *Ishwar Chunder* v. *Ram Krishna Dass* (1880) 5 Cal. 902; *Gani Mahomed* v. *Moran* (1879) 4 Cal. 96; *Brojonath* v. *Mohesh* (1878) 1 Cal. L.R. 483.

(*u*) *Lootfulhuck* v. *Gopee Chunder* (1880) 5 Cal. 941.

(*v*) *Sri Raja Simhadri* v. *Prattipati Ramayya* (1905) 29 Mad. 29.

(*w*) *Prem Chand* v. *Mokshoda Debi* (1887) 14 Cal. 201; *Porgash Lal* v. *Akhoy* (1892) 19 Cal. 785; *Rajmohun* v. [illegible] (1900) 27 Cal. 479.

S. 37 remains single, and the lessor will not be allowed to split the tenancy by recovering the rent of a part only (*x*), nor can a purchaser of a part insist on payment of rent of his part only (*y*).

If a putnidar pays the land revenue payable to the zemindar direct to the Treasury, that is a payment which can be apportioned between the co-sharers in the zemindari (*z*). If an estate consisting of several villages is apportioned, the division should be made according to the existing rents and not those at the creation of the original tenure (*a*). Provision is also made in sec. 109 for apportionment of rent by agreement between all parties. Payment of rent by a tenant in good faith and without notice of a transfer is protected by sec. 50.

(2) Benefit of any obligation.—Rent is not the only instance of the benefit of an obligation attached to property, which is capable of being apportioned. When the lessor sells portions of the property leased, the covenants which run with the land run with the severed portions. The lessee is bound to perform the various obligations imposed upon him in favour of each sharer in the reversion, so far as such obligations are capable of severance, and such performance will not be to his prejudice (*b*). There is express provision as to the severance of such obligations in sec. 140 of the Law of Property Act, 1925. A similar provision as to easements on severance of the dominant heritage is enacted in sec. 30 of the Easements Act, 1882.

(3) Does not substantially increase the burden.—This condition is the subject of the second illustration. There is a similar provision in sec. 30 of the Easements Act, 1882, that the severance into shares of the dominant heritage shall not increase the burden on the servient heritage. The principle may be illustrated by a case which is not, however, within the section. An agricultural holding fell to be divided so that the fields were allotted to one co-owner and the appurtenant farmhouse in the abadi to another. The tenant was still entitled to continue to occupy the farmhouse rent free (*c*).

(4) Provided that the duty can be severed.—It must of course be possible to perform the duty separately, otherwise it must be performed jointly. This is explained in the first illustration where the duty to deliver a sheep cannot be severed.

(5) Notice.—Notice may be given by the assignor or by the assignee (*d*). The notice has of course no bearing on the title of the assignee.

(6) Section not applicable.—The section is subject to sec. 2 (d) and is therefore not applicable to involuntary transfers or to cases of succession. The heirs of a deceased creditor are only jointly entitled to enforce the right which the deceased if alive could singly enforce (*e*).

(7) Agricultural tenancies.—These tenancies have been exempted, as the severance of the obligation to pay rent would cause much harassment to agriculturists (*f*).

(*x*) *Satyesh* v. *Jillar Rahman* (1918) 27 Cal. L.J. 438, 45 I.C. 721.

(*y*) *Maharaja Keshava Prasad* v. *Mathura Kuar* (1922) 69 I.C. 704, ('22) A.P. 608.

(*z*) *Gour Gopal* v. *Gosta Behari* (1917) 21 Cal. W.N. 214, 34 I.C. 409.

(*a*) *Hari Kishun* v. *Tilukdhari* (1903) 7 Cal. W.N. 453.

(*b*) *Sri Raja Simhadri* v. *Prattipatti Ramayya* (1905) 29 Mad. 29, 36; *Godai Mahto* v. *Debu* (1933) 145 I.C. 287, ('33) A.P. 248.

(*c*) *Saddu* v. *Bihari* (1908) 30 All. 282.

(*d*) *Peary Lal* v. *Madhoji Jiban* (1913) 17 Cal. L.J. 372, 19 I.C. 865.

(*e*) *Kandhiya Lal* v. *Chandar* (1885) 7 All. 313; *Ahinsa* v. *Abdul Kader* (1902) 25 Mad. 26, 34.

(*f*) *Alimuddin* v. *Hira Lall* (1896) 23 Cal. 87.

B.—Transfer of Immoveable Property.

S. 38

Transfer by person authorised only under certain circumstances to transfer.

38. Where any person, authorised only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance, and that the sale of the field is necessary, and acting, in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

(1) Rest of Chapter II applies to immoveable property only.—This group of sections, *i.e.*, secs. 38 to 53, applies to immoveable property only. The preceding group, *i.e.*, secs. 33 to 37, applies both to immoveable and moveable property.

(2) Limited power of transfer.—The scope of this section is very restricted. It does not apply to cases falling under sec. 41 of benamidars or ostensible owners who can give no title except by estoppel; nor to cases under sec. 64 of the Trusts Act, 1882, of persons purchasing in good faith for consideration without notice of a trust. But it refers to cases such as those arising under Hindu law where the power of transfer of the person representing the estate depends upon circumstances in their nature variable. Thus a Hindu widow has no power to dispose of immoveable property except for purposes which the Hindu law recognizes as constituting legal necessity. The manager of a joint Hindu family has power to sell or mortgage joint family property only for purposes of legal necessity, or for debts incurred in the family business, or for the benefit of the estate. The father of a joint Hindu family may sell or mortgage joint family property to discharge his own antecedent debt if not incurred for an immoral or an illegal purpose. So also the natural guardian of a Hindu minor has power to sell or mortgage any part of the minor's estate in case of necessity or for the benefit of the estate. A transfer in excess of such limited power is voidable, but the transferee is protected if he has made inquiries with reasonable care and has acted honestly in the real belief that there were justifying circumstances.

The section would appear to be based on the leading case of *Hunooman Persaud* v. *Mst. Baboos* (g), and particularly the following passage :—

"The power of a manager for an infant heir to charge an estate not his own, is under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate. . . . . . The actual pressure on the estate, the danger to be averted, or the benefit to be

(g) (1856) 6 M.I.A. 393, 423.

S. 38

conferred upon it, in the particular instance, is the thing to be regarded. . . . Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances, he is bound to see to the application of the money."

This principle applies not only to the case of a manager for an infant, but also to alienations by a Hindu widow, or other limited heir (*h*), and to transactions in which a father in derogation of the rights of his son under Mitakshara law has made an alienation of ancestral family estate (*i*). It also applies to alienations by a mohunt or shebait of debutter property (*j*). An executor under pure Hindu law has no greater powers than the manager of a minor's estate (*k*).

(3) Circumstances in their nature variable.—This expression refers, in cases of Hindu alienations, to the facts that constitute legal necessity in Hindu law. These vary according to the facts of each case and the status of the transferor. A step-mother purporting to act on behalf of a minor step-son is a person authorized "only under circumstances in their nature variable to dispose of immoveable property" (*l*).

(4) Before transfer.—The section has no application before transfer where the transaction is still incomplete (*m*).

(5) Onus of proof.—The onus of proving justifying circumstances is on the transferee. When a mortgagee from a Hindu widow seeks to enforce his mortgage, the onus is on him to prove that the money was borrowed for a legitimate purpose (*n*). One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to proving not only the genuineness of his conveyance, but the full comprehension by the limited owners of the nature of the alienation she was making, and also that the alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity (*o*). Actual proof of the necessity which justified the deed is not essential to its validity; it is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper inquiry to satisfy himself of its truth (*p*). If the alienation is by a father for payment of antecedent debts, the burden is on the transferee to prove that the debt existed or that after proper inquiry he honestly believed that it

(*h*) *Debi Prasad* v. *Golap Bhagat* (1913) 40 Cal. 721 F.B., 19 I.C. 273; *Rangaswami* v. *Nachiappa* (1919) 42 Mad. 523, 46 I.A. 72, 50 I.C. 498.

(*i*) *Kameshwar Pershad* v. *Run Bahadoor* (1881) 6 Cal. 843, 8 I.A. 8; *Sahu Ram* v. *Bhup Singh* (1917) 39 All. 437, 443, 44 I.A. 126, 130, 39 I.C. 280.

(*j*) *Prosunno Kumari Debia* v. *Golab Chand* (1875) 14 B.L.R. 450, 2 I.A. 145; *Kunwar Doorganath* v. *Ram Chunder Sen* (1876) 2 Cal. 341, 4 I.A. 52; *Niladri Sahu* v. *Mahant Chaturbhuj Das* (1926) 6 Pat. 139, 53 I.A. 253, 98 I.C. 576, ('26) A.PC. 112.

(*k*) *Jugmohandas* v. *Pallonjee* (1898) 22 Bom. 1; *Kherodemoney* v. *Doorgamoney* (1879) 4 Cal. 455, 468; *Sarat Chandra* v. *Bhupendra Nath* (1898) 25 Cal. 103; *Amulya* v. *Kalidas* (1905) 32 Cal. 861.

(*l*) *Baleppa* v. *Chenvasappa* (1915) 17 Bom. L.R. 1134, 1136, 33 I.C. 444.

(*m*) *Jamsetji* v. *Kashinath* (1901) 26 Bom. 326, 336.

(*n*) *Maheshar* v. *Ratan Singh* (1896) 23 Cal. 766, 23 I.A. 57.

(*o*) *Bhagwat Dayal* v. *Devi Dayal* (1908) 35 Cal. 420, 35 I.A. 48; *Rameshwar* v. *Chandi Prasad* (1911) 38 Cal. 721, 12 I.C. 931 on app. (1915) 43 Cal. 417, 36 I.C. 499 P.C.

(*p*) *Banga Chandra* v. *Jagat Kishore* (1916) 44 Cal. 186, 43 I.A. 249, 36 I.C. 420; *Maharaj Singh* v. *Balwant Singh* (1906) 28 All. 508.

existed (q). The burden is then shifted on the son to shew that the debt was contracted for an immoral purpose and that the transferee had notice actual or constructive of the nature of the debt (r).

Recitals by the transferor are not generally sufficient proof of necessity (s), for they may only have been inserted at the instance of the transferee (t). They must therefore be supplemented by evidence *aliunde* (u). A sale deed executed by a Hindu widow recited the payment of family debts as the necessity justifying the sale. But the purchaser made no inquiry of the creditors named in the deed and was therefore not protected by this section (v). But as time goes by and the original parties to the transaction and all those who could have given evidence have passed away, recitals assume greater importance, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed their truth, they would be sufficient to support the deed (w). In such cases presumptions are admissible to fill in details which have been obliterated by time (x).

The lender is not bound to see to the application of the money (y). In the judgment in *Hunooman Persaud*'s case Knight Bruce, L. J., said: "The purposes for which a loan is wanted are often future, as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." Accordingly a sale or mortgage may be justified by legal necessity although as to part of the consideration such necessity has not been established (z). The Allahabad High Court has held that this was so only when the unaccounted part was small, but not if it was considerable (a). But this view was disapproved by the Privy Council, and it was held that if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been *applied* to purposes of necessity does not invalidate the sale, and the sale should be upheld unconditionally whether the part proved to have been applied to purposes of necessity is considerable or small (b).

Transfer where third person is entitled to maintenance.

39. Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred. . . the right may be enforced against the

(q) *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 196, 1 I.C. 479; *Sahib Singh* v. *Girdhari Lal* (1923) 45 All. 576, 73 I.C. 1024, ('24) A.A. 24; *Jamna* v. *Nain Sukh* (1887) 9 All. 493; *Subramanya* v. *Sadasiva* (1884) 8 Mad. 75.

(r) *Girdhari Lall* v. *Kantoo Lall* (1874) 14 Beng. L. R. 187, 1 I.A. 321; *Suraj Bunsi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 6 I.A. 88; *Johurmal* v. *Eknath* (1899) 24 Bom. 343.

(s) *Maharaja of Bobbili* v. *Zamindar of Chundi* (1912) 35 Mad. 108, 8 I.C. 860.

(t) *Muhammad* v. *Brij Bihari* (1924) 46 All. 656, 82 I.C. 5, ('24) A.A. 929.

(u) *Brij Lal* v. *Inda Kunwar* (1914) 36 All. 187, 23 I.C. 715 P.C.

(v) *Jankabi* b. *Balbhadra* (1910) 15 Cal. W.N. 793, 10 I.C. 350.

(w) *Banga Chandra* v. *Jagat Kishore* (1916) 44 Cal. 186, 36 I.C. 420, 43 I.A. 249.

(x) *Chintamanibhatala* v. *Rani of Wadhwan* (1920) 43 Mad. 541, 55 I.C. 536, 47 I.A. 6; *Raoneshwar* v. *Chandi Prasad* (1911) 38 Cal. 721, 12 I.C. 931 on app. (1916) 43 Cal. 417, 36 I.C. 499, ('15) A.P.C. 57.

(y) *Hunooman Persaud* v. *Mst. Babooe* (1856) 6 M.I.A. 393, 424; *Uday Chunder* v. *Asutosh* (1894) 21 Cal. 190; *Dalibai* v. *Gopibai* (1901) 26 Bom. 433.

(z) *Krishn Das* v. *Nathu Ram* (1927) 49 All. 149, 54 I.A. 79, 100 I.C. 130, ('27) A.P.C. 37 overruling *Gobind Singh* v. *Baldeo Singh* (1903) 25 All. 330 and *Ram Dei* v. *Abu Jafar* (1905) 27 All. 494 and *Dwarka Ram* v. *Jhalai* (1923) 45 All. 429, 72 I.C. 134, ('23) A.A. 248.

(a) *Lal Bahadur* v. *Kamleshar* (1926) 48 All. 183, 90 I.C. 963, ('25) A.A. 624 F.B.; *Daulat* v. *Sanbhkta* (1925) 47 All. 355, 86 I.C. 91, ('25) A.A. 384; *Ghansham* v. *Badiya* (1902) 24 All. 547.

(b) *Niamat Rai* v. *Din Dayal* (1927) 8 Lah. 597, 54 I.A. 211, 101 I.C. 373, ('27) A.P.C. 121.

S. 39 **transferee, if he has notice *thereof* or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.**

(1) **Amendment.**—The above section has been amended by the Amending Act 20 of 1929. Before the amendment it was as follows:—

"Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred *with the intention of defeating such right*, the right may be enforced against the transferee if he has notice of *such intention* or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

The following amendments have been made by the Amending Act of 1929: The words "with the intention of defeating such right," occurring after the word "transferred" have been omitted. For the words "of such intention" occurring after the word "notice," the word "thereof" has been substituted. There was an illustration appended to the old section. That illustration has also been omitted. The effect of the amendment is stated in note (3) below. The amendment has retrospective effect (*c*).

(2) **Maintenance not a charge.**—The right of maintenance, even of a Hindu widow, is an indefinite right which falls short of a charge (*d*). It is not a charge unless it has been made a charge by decree or agreement (*e*), or unless the widow is in possession of specific property allotted for her maintenance (*f*). In such cases notice of the charge is sufficient to bind the transferee. But in some cases it had been held that a charge for maintenance created by a decree was binding on a transferee whether he had notice of the charge or not (*g*). Those decisions proceeded on the view that the effect of a charge was similar to that of a mortgage in that it placed a limitation on the ownership of the property (*h*). Those decisions, however, were not correct, for even before the Amending Act of 1929 it was clear that a charge did not, like a mortgage, create an interest in property (*i*), and the amended sec. 100 expressly enacts that a charge cannot be enforced against a transferee for consideration without notice. This section purports to deal with a right of maintenance or the like which not having been made a charge by decree or agreement falls short of a charge (*j*).

(3) **Right of maintenance and subsequent transferees.**—The old section represented the Hindu law rule as to the effect of a transfer upon a Hindu widow's right

(*c*) *Malkarjun* v. *Sarubai* (1943) A.B. 187.

(*d*) *Lakshman* v. *Satyabhamabai* (1877) 2 Bom. 494; *Bharatpur State* v. *Gopal* (1901) 24 All. 160; *Ram Kunwar* v. *Ram Dai* (1900) 22 All. 326; *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 59 I.C. 398; *Ramanandan* v. *Rangammal* (1889) 12 Mad. 260; *Sorolah* v. *Bhoobun* (1888) 15 Cal. 292, 307.

(*e*) *Ram Kunwar* v. *Ram Dai* (1900) 22 All. 326; *Jamnabhai* v. *Balakrishna* (1927) 53 Mad. L.J. 176, 102 I.C. 101, ('27) A.M. 1092; *Prasanna* v. *Barbosa* (1866) 6 W.R. 253 (charge created by will); *Gajadhar* v. *Khula Kunwar* (1908) 12 O.C. 37, 1 I.C. 690; *Soubagia* v. *Manicka* (1918) 33 Mad. L.J. 601, 42 I.C. 975; *Bharatpur State* v. *Gopal* (1901) 24 All. 160, 163.

(*f*) *Rachawa* v. *Shivayogapa* (1893) 18 Bom. 679; *Imam* v. *Balamma* (1889) 12 Mad. 334; *Ram Kunwar* v. *Amar Nath* (1932) 54 All. 472, 1932 A.L.J. 267, 138 I.C. 363, ('32) A.A. 361.

(*g*) *Maina* v. *Bachchi* (1906) 28 All. 655; *Bhoja Mahadev* v. *Ganga Bai* (1913) 37 Bom. 621, 21 I.C. 54; *Kallapa* v. *Balwant* (1925) 27 Bom. L.R. 434, 87 I.C. 951, ('25) A.B. 343; *Mahadeo Prasad* v. *Anandi Lal* (1925) 47 All. 90, 92 I.C. 348, ('25) A.A. 60; *Chaudri* v. *Gobardhan* (1930) 5 Luck. 172, 117 I.C. 405, ('29) A.O. 316; *Kulada Prasad* v. *Jogeshwar* (1900) 27 Cal. 194; *Hunter, Liquidator of Bank of Upper India* v. *Nisar Ahmed Chaudhari* (1932) 8 Luck. 168, 143 I.C. 692, ('32) A.O. 336.

(*h*) *Kallapa* v. *Balwant* (1925) 26 Bom. L.R. 434, 87 I.C. 951, ('25) A.B. 343.

(*i*) *Royzuddi* v. *Kalinath* (1906) 33 Cal. 985; *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (1908) 35 Cal. 837; *Jawahir Mal* v. *Indomati* (1914) 36 All. 201, 22 I.C. 978; *Akhoykumar* v. *Corporation of Calcutta* (1915) 42 Cal. 625, 27 I.C. 621.

(*j*) *Ghasiram* v. *Kundanbai* (1940) A.N. 162.

of maintenance. The leading case on the point is *Lakshman* v. *Satyabhamabai* (*k*) where a surviving brother sold ancestral property intending to defeat the right of maintenance of the deceased brother's widow. West, J., said—"If the heir sought to defraud her, he could not indeed, by any device in the way of parting with the estate, or changing its form, get rid of the liability which had come to him along with the advantage derived from his survivorship; and the purchaser—taking from him with reason to suppose that the transaction was one originating not in an honest desire to pay off debts, or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a design to shuffle off a moral and legal liability—would, as sharing in the proposed fraud, be prevented from gaining by it; but if, though he knew of the widow's existence and her claim, he bought upon a rational and honest opinion that the sale was one which could be effected without any furtherance of wrong he has, as against the plaintiff, acquired a title free from the claim which still subsists in full force as against the recipient of the purchase money." It was therefore immaterial that the transferee had notice of the claim to maintenance (*l*); the right was saved only if the transferor intended to defeat it and the transferee had notice of that intention (*m*).

The old section did not give sufficient protection to the Hindu widow, for it was difficult to prove that an improvident alienation was effected with the intention of defeating her right; and even if the transfer was in fraud of her right, it was difficult to prove that the transferee was a party to the fraud. A later Bombay case (*n*) somewhat exaggerated the difficulties of the section. But the difficulty was a real one, and Courts had to make presumptions. So it was held that if the transfer was of all the family property (*o*), or of all the property that was available for the payment of maintenance (*p*), and if the purchaser was aware of the circumstances of the family (*q*), the transfer was subject to the widow's right of maintenance.

Under the amended section no such presumptions are necessary, and the right of the widow is more effectively protected. It is not necessary that the transferee should be aware of an intention to defraud the widow or to defeat her right to maintenance (*r*). If he is a transferee for consideration, he takes subject to the right if he has notice of it. If he is a gratuitous transferee, he takes subject to the right, whether he has notice of it or not.

(4) Notice.—The provision as to notice marks the difference between the old section and the new. Under the old section the transferee was not bound unless he had notice of the intention to defeat the right of the widow. Under the new section notice of the existence of the right is sufficient to bind the transferee (*s*). If he is a *bona fide* transferee for valuable consideration without notice, he is not bound (*t*). Under sec. 3 the notice may be either express or constructive.

(*k*) (1877) 2 Bom. 494, 524.

(*l*) *Soorja Koer* v. *Nath Buksh* (1884) 11 Cal. 102; *Tulsidas* v. *Hanifa Bibi* (1932) 138 I.C. 655, ('32) A.S. 162; *Tayabali* v. *Lilabai* (1934) 149 I.C. 617, ('34) A.S. 14.

(*m*) *Ram Kunwar* v. *Ram Dai* (1900) 22 All. 326; *Beharilal* v. *Bai Rajbai* (1899) 23 Bom. 342 (even though there was other property to satisfy the widow's claim); *Bharatpur State* v. *Gopal* (1901) 24 All. 160; *Digambari Debi* v. *Dhan Kumari* (1905) 10 Cal. W.N. 1074; *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 59 I.C. 396; *Mohini Debi* v. *Purna Sashi Gupta* (1932) 36 Cal. W.N. 153, 55 C.L.J. 196, 138 I.C. 24, ('32) A.C. 451; *Ponnayyammal* v. *Samiappa Goundan* (1947) A.M. 376.

(*n*) *Yamnabai* v. *Nanabhai* (1910) 12 Bom. L.R. 1075, 8 I.C. 1057.

(*o*) *Becha* v. *Mothina* (1900) 23 All. 86.

(*p*) *Abu Mahomed* v. *Saraswati* (1926) 43 Cal. L.J. 604, 97 I.C. 194, ('26) A.C. 1066; *Moolchand* v. *Thakurbai* (1926) 96 I.C. 997, ('26) A.S. 18.

(*q*) *Bhagat Ram* v. *Mst. Sahib Devi* (1922) 3 Lah. 55, 67 I.C. 848, ('22) A.L. 273; *Das Kuar* v. *Saria Debi* (1947) A.PC. 8.

(*r*) *Dattatreya* v. *Julgabai* (1946) A.B. 412; *Premlal* v. *Chagsey* (1949) A.B. 24.

(*s*) *Radhabai* v. *Gopal* (1944) A.B. 30.

(*t*) *Kesho Prasad* v. *Upper India Bank Ltd.* (1933) 141 I.C. 475, ('33) A.O. 76.

Sec. 39, 40

(5) Family debts.—Under Hindu law debts contracted for the benefit of the family take precedence over a widow's claim for maintenance (*u*), and if family property is alienated for the discharge of debts binding on the family, the right of the alienee overrides the right of the widow, even if he had notice of her claim for maintenance (*v*). But when maintenance has been expressly charged on the property it takes precedence of the right of an execution purchaser even though the decree was for a debt binding on the family (*w*). Although the husband's debts may override the widow's claim for maintenance, she has a right to challenge debts incurred by a coparcener, such as a son or a brother of her deceased husband and to enforce her rights against the property sold to pay off those debts, unless it be proved that they had been incurred for family necessity (*x*).

(6) Advancement.—Provisions for advancement are unknown among Indians (*y*). The rule of English law by which a child who has received an advancement must bring the amount into hotchpot in the case of the father's intestacy has been omitted in the Indian Succession Act; and has been held not to apply to Parsees (*z*). Among persons subject to English law a purchase by a father in the name of a daughter is presumed to be an advancement and not to be benami or colourable (*a*).

(7) Marriage.—Under Mitakshara law joint family property is liable for the legitimate marriage expenses of male members of the family (*b*) and their daughters (*c*). Under this section as amended, a transferee having notice of such liability at the time of the transfer would take subject to it.

Burden of obligation imposing restriction on use of land.

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property, of another or of any easement thereon, a right to restrain the enjoyment *in a particular manner of the latter property*, or

Or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

(*u*) *Lakshman* v. *Satyabhamabai* (1877) 2 Bom. 494; *Ramanandan* v. *Rangammal* (1889) 12 Mad. 260; *Johurra* v. *Sreegopal* (1876) 1 Cal. 470; *Jamnabai* v. *Balakrishna* (1927) 53 Mad. L.J. 176, 102 I.C. 101, ('27) A.M. 1092; *Gur Dayal* v. *Kaunsilla* (1882) 5 All. 367; *Soorja Koer* v. *Nath Baksh* (1884) 11 Cal. 102, 105; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45; *Brij Raj Kier* v. *Ram Dayal* (1932) 7 Luck. 411, 135 I.C. 369, ('32) A.O. 40.

(*v*) *Lakshman* v. *Satyabhamabai*, *supra*; *Ramanandan* v. *Rangammal*, *supra*; *Jamnabai* v. *Balakrishna*, *supra*.

(*w*) *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 59 I.C. 398.

(*x*) *Malbarjan* v. *S rubai* (1943) A.B. 187.

(*y*) *Kerwick* v. *Kerwick* (1921) 48 Cal. 260, 47 I.A. 275, 57 I.C. 834, ('21) A.P.C. 56; *Guran Ditta* v. *Ram Ditta* (1928) 55 Cal. 944, 55 I.A. 235, 109 I.C. 723, ('28) A.P.C. 172; *Dharwar Bank* v. *Mahomed Hayat* (1931) 33 Bom. L.R. 250, 133 I.C. 241, ('31) A.B. 269; *Paul* v. *Nathaniel* (1931) 29 All. L.J. 417. 132 I.C. 578, ('31) A.A. 596; *Sura Lakshmiah* v. *Kothendarama* (1925) 48 Mad. 605, 52 I.A. 286, 88 I.C. 327, ('25) A.P.C. 181; *Sahdeo Karan Singh* v. *Usman Ali Khan* (1939) 184 I.C. 119 (1939) A.P. 462.

(*z*) *Dhanjibhai* v. *Navajbai* (1878) 2 Bom. 75.

(*a*) *Kerwick* v. *Kerwick* (1921) 48 Cal. 260, 47 I.A. 275, 57 I.C. 834, ('21) A.P.C. 56; *Paschaud* v. *Paschaud Nixon* (1930) 128 I.C. 721, ('30) A.O. 441; *Gopee Krist Gossain* v. *Gunga Pershad* (1854-57) 6 M.I.A. 53; *Johnstone* v. *Gopal Singh* (1931) 12 Lah. 546, 133 I.C. 628, ('31) A.L. 419.

(*b*) *Sundrabai* v. *Shivnarayana* (1907) 32 Bom. 81; *Bhagirathi* v. *Jokhu Ram* (1910) 32 All. 575, 6 I.C. 5; *Gopal Krishna* v. *Venkataraos* (1914) 37 Mad. 273, 17 I.C. 308 F.B.; *Debi Lal* v. *Nand Kishore* (1922) 1 Pat. 266, 65 I.C. 315, ('22) A.P. 22.

(*c*) *Vaikuntam* v. *Kallapiran* (1900) 23 Mad. 512; *Ranganaiki* v. *Ramanuja* (1912), 35 Mad. 728; 11 I.C. 570; *Srinivasa* v. *Thiruvengadathaiyangar* (1915) 38 Mad. 556. 23 I.C. 284.

such right or obligation may be enforced against a trans- S. 40
feree with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to *B*. While the contract is still in force, he sells, Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

(1) Amendment.—The first paragraph of the old section was as follows :—

"Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property, or to compel its enjoyment in a particular manner."

Before the Amending Act of 1929 the right described in the first paragraph of this section was "a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner." The words "compel the enjoyment" have been omitted by the Amending Act. The reason for this amendment has been explained in note (7) under sec. 11.

(2) First paragraph.—Right of transferor against purchaser from transferee.—The second para. of sec. 11 relates to the right of the transferor as against the *transferee* (1) to enforce the performance of an affirmative covenant, and (2) to restrain the breach of a negative covenant.

The first paragraph of the present section relates to the right of the transferor as against a *purchaser* from a transferee to restrain the breach of a negative covenant. This paragraph before it was amended [see note (1) above] also recognized the right of the transferor to compel the performance of an affirmative covenant as against a purchaser from the transferee. It contained the words "to *compel* its enjoyment," but those words have now been omitted. The effect of the omission is that an affirmative covenant can no longer be enforced against a purchaser from a transferee. The reason for the amendment is explained in note (7) under sec. 11.

The "third person" spoken of in the first paragraph is either the original covenantee or his transferee. For instance, if *A* owns two properties X and Y, and sells X to *B*, he may impose a restriction on *B* that he shall, for the more beneficial enjoyment of Y, keep open a portion of X adjoining Y and not build on it. The "third person" may be *A* who has no longer any interest in X or any easement thereon, or he may be a purchaser of Y from *A* whom we shall call *C*. If *B* sells X to *D*, *and D has notice of the covenant*, and *D* threatens to build on the whole of X, *A* or *C* may restrain *D* from so doing. We proceed to consider this paragraph in greater detail.

(3) Restrictive covenants in English law.—A covenant may be something more than a mere agreement. A covenant may (1) amount to the grant or reservation on an equitable interest in land or in easement, or (2) it may be a personal contract. If the covenant creates or reserves a legal easement, the transferee takes subject to the easement; if it creates or reserves an equitable interest in land, the transferee takes subject to that interest, unless he acquires a legal estate without notice or is protected

S. 40

by want of registration. If the covenant is only a personal contract, the general rule of English common law is that all contracts are personal and the covenant does not bind the transferee.

To this general rule that contracts are personal there are two exceptions—(1) leases, and (2) covenants annexed to the land.

Leases.—Leases have always been an exception to the rule of common law that contracts are personal. At common law a lessor could enforce the covenant to pay rent against the assignee of the lessee, and the assignee of the lessee could enforce the covenant for quiet enjoyment against the lessor. The Statute 32 Hen. 8, c. 34 passed in 1540 extended the benefit of enforcing, and the burden of having enforced, such covenants from the lessor to the assignee of the lessor. The law as to the enforcement of the burden of covenants in leases was settled in *Spencer's* case (*d*). That case decided that covenants relating to the land demised, or something in existence on the land demised, bind assigns of the land whether the assigns are named in the covenant or not; covenants not relating to things in existence but to things which, when they come into existence, will be on the land, bind assigns of the land when such assigns are named in the covenant; covenants relating neither to the land nor to things in existence on it or to come into existence upon it, do not bind assigns of the land whether the assigns are mentioned or not. It will be observed that under this rule covenants as to land retained by the lessor will not bind the assigns of the lessee.

The rule in *Spencer's case* has been altered by the Law of Property Act, 1925. By section 70(1) of that Act a covenant to do an act relating to the land will bind the assigns, whether named or not, even though the subject-matter may not be in existence when the covenant is made.

Covenants annexed to the land.—A covenant which is annexed to the land is one which binds the land in its inception (*e*), or which affects the nature, quality or value of the land (*f*). The benefit of such a covenant runs with the land for the benefit of which it is expressed to be made (*g*). In *Rogers* v. *Hosegood* (*h*) the purchasers of a plot of building land covenanted with the vendors, with intent that the covenant should enure for the benefit of certain land of the vendors, not to erect more than one messuage or dwelling house on the plot and that such dwelling house should be adapted for, and used for private residence only. Farwell, J., held that the covenant ran with the land and could be enforced by the assigns of the covenantee. The learned Judge said: "Covenants which run with land must have the following characteristics: (1) they must be made with a covenantee who has an interest in the land to which they refer. (2) They must concern or touch the land." It was immaterial that the covenantee's assign was unaware of the covenant when he purchased, because "the plaintiff's right in such an action does not depend upon what he believes himself to have bought, but upon what he has in fact bought, and he has bought the land with the covenants annexed." This judgment was confirmed in a considered judgment by the Court of Appeal, and Collins, L.J., said—"The first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is capable of passing with the land to subsequent assignees......... In such cases it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought." In *Dyson* v. *Forster* (*i*) the covenant was that of a colliery company to pay compensation to the owners of the surface lands for all damage occasioned by the working of the coal. Lord Macnaghten said—"The question is

(*d*) (1583) 5 Co. Rep. 16a. See also *Motilal Daga* v. *Ishwar Lal Budha* (1936) A.C. 727.
(*e*) *Rogers* v. *Hosegood* (1900) 2 Ch. 388.
(*f*) *Dyson* v. *Forster* (1909) A.C. 98.
(*g*) *Miles* v. *Easter* (1933) Ch. 611.
(*h*) (1900) 2 Ch. 388, 395, 396.
(*i*) (1909) A.C. 98, 102.

Does this covenant affect the nature, quality, or value of the land, or is it a covenant simply collateral? It is not, I think, simply collateral, for one reason which is sometimes proposed as a test for the purpose of determining whether a covenant runs with the land or not. It is beneficial to the surface owner and beneficial to no one else: see *Vyvyan* v. *Arthur* (*j*). I think it affects the nature and also the value of the land. I think it affects the nature of the land because it tends to prevent disturbance of the surface, and so it tends to preserve the natural state and condition of the land. A person who has agreed to pay compensation to his neighbour for injuriously affecting his land is more likely to be careful to avoid mischief than one who is not answerable for the consequences of his act. I also think that the covenant affects the value of the land in respect of which it was given. Suppose the land, being properly drained, were to be left for agricultural purposes, a tenant, I should suppose, would be more likely to take it, and would probably give more for it if he were assured that compensation would be payable in the event of the drainage system being dislocated by subsidence. Similar considerations would apply if the land were let for building purposes." S. [illegible]

Statutory provision is made in the Law of Property Act, 1925, that certain covenants are annexed to the land and that the benefit of enforcing them passes to every person in whom the estate or interest of the covenantee is vested. Section 76(6) of the Law of Property Act, 1925, refers to a number of implied covenants, including the covenants for right to convey, quiet enjoyment, freedom from incumbrances, and further assurance, implied in a conveyance for valuable consideration, other than a mortgage, by a person who conveys and is expressed to convey "as beneficial owner," the further covenants as to the validity of the lease in a conveyance for valuable consideration of leasehold property by such a person, and the covenants implied in a conveyance by way of mortgage by such a person. Section 141 enacts that the rent and the benefit of the lessee's covenants shall run with the reversion. This section extends the operation of the Statute 32 Hen. 8, c. 34, sec. 1, which applied to leases by deed only (*k*).

It is therefore clear that the benefit of a covenant annexed to land passes readily from the covenantee to his assigns of any land clearly intended to be benefited by the covenant who can enforce it against the original covenantor. But different considerations apply to the burden of a covenant. At common law the burden of a covenant even though it be annexed to the land does not run with the land so as to bind the assignee of the covenantor. The leading case on this point is *Austerberry* v. *Corporation of Oldham* (*l*). The owner had conveyed a site of land adjoining his own, to trustees who had covenanted to maintain and repair a road on it. The owner sold his adjacent land to the plaintiff, and the trustees sold the road site to the defendants. It was held that the plaintiff could not enforce the covenant against the defendants. Lindley, L.J. said—"Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees, and they are bound by such covenants as run with the land. Now we come to face the difficulty: does a covenant to repair all this road run with the land—that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land." The burden of a covenant annexed to land could only be enforced against the assign of

(*j*) (1823) 1 B. & C. 417 per Best J.

(*k*) *Standen* v. *Christmas* (1847) 10 Q. B. 135.

(*l*) (1885) 29 Ch. D. 750. See also Smith's, L.C., 11th Ed., p. 55, and the cases there cited.

S. 40 the covenantor in the case of a lease; and the law remained as settled in *Spencer's* case (m) until the decision in *Tulk* v. *Moxhay* (n) [see note (7) under sec. 11]. That case decided that in equity a restrictive covenant imposed for the benefit of land *retained* by the lessor or grantor was binding on a purchaser with notice. In other words a covenant restricting the user of land runs with the land in equity. In *Haywood* v. *Brunswick Permanent Benefit Building Society* (o) [see note (7) under sec. 11], Cotton, L.J., explained that this equity was completely analogous to an equitable charge on land. Now an equitable charge cannot be enforced against a purchaser of the land from the borrower because between such purchaser and the lender there is no privity of contract. It can only be enforced against the land. In the same way an affirmative covenant to spend money in building or repairing cannot be enforced against a purchaser by making him put his hand in his pocket. The equity therefore is limited to restrictive covenants which are enforced against the land itself. This equity was described by Jessel, M.R., in *London & South-Western Rly.* v. *Gomm* (p) as being perhaps an extension in equity of the doctrine in *Spencer's* case to another line of cases.

Notice is no part of the cause of action of the covenantee seeking to enforce the covenant. But as the covenant creates an equity, notice is material as a defence. The purchaser of the property burdened by the equity might prove as a defence that he got in the legal estate without notice of the equity and in that case he would not be affected by it. It would be otherwise if the purchaser had only an equitable title. If the purchaser were in possession under the contract of sale, and the conveyance had not yet been executed, he would in English law have only an equitable interest. In such a case the fact that he had no notice of the burden of the restrictive covenant would be no defence, for the rule *qui prior est tempore potior est jure* would apply, and the equity of the restrictive covenant would take precedence over the equitable estate created by the contract of sale (q).

Jessel, M.R., in *London & South-Western Rly.* v. *Gomm* (r) also described the case of *Tulk* v. *Moxhay* (s) as "an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light." Later English decisions show that restrictive covenants are now approximated rather to easements than to covenants running with the land. This will appear from the case of *In re Nisbet and Potts' Contract* (t), a case which is also instructive on the question of notice. Potts agreed to purchase land from Nisbet and to accept a title commencing with a conveyance from *H*. This conveyance showed that the land formerly belonged to *K* and that *H* had acquired title by 12 years' adverse possession. No restrictive covenants were declared in the abstract of title, but Potts learnt *aliunde* that old deeds existed which contained restrictions on building imposed while the land was the property of *K*. Potts accordingly refused to complete. Nisbet contended that he had made out a good title to the land on the ground that the restrictive covenants did not affect *H* who had acquired title by adverse possession; and that he himself had purchased without notice of the restrictive covenants. But Farwell, J., who was affirmed by the Court of Appeal, held that the restrictive covenants were not incident to, but paramount to the title of the owner who was dispossessed by *H*; and that the real analogy was not to lessee's covenants, but to rights, of way and similar easements. If a person acquires a statutory title to land he cannot plead the statute of limitation against persons seeking to enforce easements, but must show that they have been abandoned. The equity of the covenantee under the restrictive covenants was therefore not extinguished by the statute of limitation.

(m) (1583) 5 Co. Rep. 16 a.
(n) (1848) 2 Ph. 774.
(o) (1881) 8 Q.B.D. 403.
(p) (1882) 20 Ch. D. 562, 583.
(q) *Rogers* v. *Hosegood* (1900) 2 Ch. 388.
(r) (1882) 20 Ch. D. 562, 583.
(s) (1848) 2 Ph. 774.
(t) (1905) 1 Ch. 391 affirmed, (1906) 1 Ch. 386.

Then as to the plea of purchaser for value without notice, Nisbet when he purchased had not enquired into title before the adverse possession of *H*, but had accepted a twenty years' title instead of the usual title which is forty years (u). As he had waived his right to the production of a full title he must be held to have had constructive notice of the covenants. This case approximates restrictive covenants to easements and they are sometimes described as equitable easements. S. 40

Covenants not annexed to the land.—A covenant restricting the user of land may be one imposed for the personal benefit of the vendor only. In that case it is a personal and collateral covenant not annexed to the land. A restrictive covenant entered into by a purchaser with a vendor who is selling the whole of his estate and has retained no land for the benefit of which the covenant should enure, is a covenant of this description. It is enforcible by the covenantee against the covenantor, but neither the covenantee nor his executors can enforce it against subsequent purchasers (v). Such covenants also occur in building schemes when thay are imposed not for the benefit of any particular plot but in order to enable the vendor to get a better price for the rest of the property (w). See note *infra* ' Building schemes.'

Where the covenant is with the covenantee and his assigns, though it is not expressed to be for the benefit of a defined area of land, the benefit of the covenant can be expressly assigned so as to be enforceable against an assignee of the covenantor taking with notice subject to the following conditions—(1) the benefit of the covenant must be assigned with some land capable of being benefited by the covenant, (2) the land to be benefited must have been certain or ascertainable at the date of the covenant, and (3) the covenant cannot be enforced against an assignee of the covenantor after the covenantee has parted with the whole of his land (x). In the recent case of *Marquess* of *Zetland* v. *Driver* (y) the Court of Appeal in England has summarised the position as follows: "Covenants restricting the use of land imposed by a vendor upon a sale fall into three classes: (i) covenants imposed by the vendor for his own benefit; (ii) covenants imposed by the vendor as owner of other land, of which that sold formed a part, and intended to protect or benefit the unsold land; and (iii) covenants imposed by a vendor upon a sale of land to various purchasers who are intended mutually to enjoy the benefit of and be bound by the covenants: *Osborne* v. *Bradley*.

Covenants of the first class are personal to the vendor and enforceable by him alone unless expressly assigned by him. Covenants of the second class are said to run with the land and are enforceable without express assignment by the owner for the time being of the land for the benefit of which they were imposed. Covenants of the third class are most usually found in sales under building schemes, although not strictly confined to such sales." It has also been held that where a restrictive covenant purports to have been annexed to land so as to run with it and does not in fact "concern or touch" the whole of the land, the annexation is ineffective and the covenant does not run with the land and cannot be enforced by any owner of the land other than the covenantee (z).

(4) Restrictive covenants in Indian law.—The law in India closely follows the law of England as to covenants. The benefit of a covenant for quiet enjoyment in a lease may be enforced by the assignee of the lessee under sec. 108 (c), while the rights and liabilities of the lessor's transferee are dealt with in sec. 109.

The principle that a covenant is annexed to the land, if it binds the land in its inception or affects the nature, quality or value of the land, was adopted by the Calcutta

(u) *In re Cox and Neve's Contract* (1891) 2 Ch. 109 (but from 1st January 1926 the usual title in England is 30 years) s. 44, L.P.A., (1925).

(v) *Formby* v. *Barker* (1903) 2 Ch. 539.

(w) *Chambers* v. *Randall* (1923) 1 Ch. 149.

(x) *Renals* v. *Cowlishaw* (1878) 9 Ch. D. 125; *In re Union of London and Smith's Bank, Miles* v. *Easter* (1933) Ch. 611, 631.

(y) (1939) 1 Ch. 1.

(z) *Re Ballard's Conveyance* (1937) 1 Ch. 473.

S. 40 High Court in *Matheson* v. *Ram Kanai Singh Deb* (*a*). Such covenants are referred to in secs. 55 (2) [sale], 65 [mortgage], and 108 (c) [lease], where it is expressly enacted that the benefit of such covenants runs with the interest of the covenantee.

The equitable rule that the burden of a covenant runs with the land is enacted in this section. The amendment of the section by Act 20 of 1929 represents the English rule which limits the doctrine to restrictive covenants, for a positive covenant never runs with the land either in law or equity (*b*). Even before the amendment, the Bombay High Court doubted if the section applied to affirmative covenants involving the expenditure of money. In *Chaturbhuj* v. *Mansukhram* (*c*) the owner of four houses and a chowk or courtyard sold three houses and the chowk to the plaintiff, and covenanted to close the window of the fourth house overlooking the chowk, and to slope its eaves so as to prevent rain water falling on to the chowk. The owner then sold the fourth house to the defendant, The plaintiff sued the defendant to enforce the covenants, but the suit was dismissed on the ground that even if the covenants were restrictive covenants (which the Court held they were not), the defendant had purchased *without* notice of the covenants. In this case the vendor was the covenantor, but the more usual case is for the vendor to be the covenantee as in *Tulk* v. *Moxhay*.

The case law in India as to restrictive covenants is meagre, and it has not yet been decided whether a restrictive covenant would be binding on a trespasser as in *In re Potts and Nisbets Contract* (*d*) or on a mere occupier as in *Mander* v. *Falcke* (*e*). The section expressly says that the right of the covenantee is not an interest in the land bound by the covenant, nor an easement. It is not an interest because the Transfer of Property Act does not recognize equitable estates and it cannot be said as Sir George Jessel said that if the covenant " binds the land it creates an equitable interest in the land (*f*)." But although the section says that the right is not an easement, it would probably be held that the covenantee had a paramount right analogous to an easement and therefore binding on an occupier or a trespasser.

(5) **Building schemes.**—A covenantor may sometimes be entitled to the benefit of a restrictive covenant as against other covenantors. This may occur when land is sold in plots under a building scheme. The conditions of sale prescribed restrictive covenants to be entered into by the purchasers of each lot, and the presumption is that the covenant is for their mutual benefit. This principle was recognized in *Renals* v. *Cowlishaw* (*g*), and again recently in *Drake* v. *Gray* (*h*) and is generally applied in the case of building schemes. In *Torquay Hotel* v. *Jenkins* (*i*) the Court said—"Where an owner of land deals with his land on the footing of imposing restrictive obligations on the use of the various portions of it and as when he alienates them for the common benefit of himself (so far as he retains any land) and of the various purchasers *inter se*, a Court of Equity will give effect to this common intention, notwithstanding the absence of mutual covenants, provided that the intention that there should be a mutual obligation is efficiently established." If no such intention is established, the benefit of the covenant will not pass, for it would be merely a personal covenant. This was the case in *Chambers* v. *Randall* (*j*) where the vendor sold plots for building purposes with covenants restrictive of the nature of the building to be erected, and Sargant, J., said that " the object of the covenant was to enable the vendor to protect his property while he retained it, and to make the most of it when he disposed of it." On the other hand, if the intention is established, each purchaser or his assignee can

(*a*) (1909) 36 Cal. 675, 1 I.C. 626.
(*b*) *Jogesh Chandra* v. *Asaba Khatun* (1926) 44 Cal. L.J. 220, 98 I.C. 46, ('27) A.C. 41.
(*c*) (1925) 27 Bom. L.R. 72, 86 I.C. 19, ('25) A.B. 123.
(*d*) (1905) 1 Ch. 336.
(*e*) (1891) 2 Ch. 554.
(*f*) *London & South-Western Rly.* v. *Gomm* (1882) 20 Ch. D. 562, 580.
(*g*) (1878) 9 Ch. D. 125, 11 Ch. D. 866; *Venkiah* v. *Krishnamoorthy* (1915) 38 Mad. 141, 19 I.C. 80.
(*h*) (1936) 1 Ch. 451.
(*i*) (1927) 2 Ch. 225, 240.
(*j*) (1923) 1 Ch. 149, 158.

enforce the covenant against the other purchasers (*k*). But there must be reasonably clear definition as to the area within which the mutual obligations are intended to operate (*l*). **S. 40**

(6) Affirmative covenants.—Affirmative covenants are collateral; they are not annexed to the land and do not run with the land. Covenants to lay out money in building or repairs cannot be enforced against the purchaser from the covenantor (*m*). A positive covenant never runs with the land either in law or equity (*n*). A covenant of indemnity is a personal covenant, and is therefore not a covenant running with the land and cannot be enforced by a purchaser of the land (*o*). A covenant in a sale deed by which the vendor retained certain portion of the land free from payment of land revenue did not amount to a covenant by the vendors or their heirs and transferees to pay the land revenue in respect of the lands retained by the vendor and that even if it did it was not binding on the heirs or transferees for it was not a covenant running with land (*p*). A covenant for the reconveyance of a right of Easement is also a personal covenant and does not run with the land (*q*).

Illustration.

A, a Hindu female, sold a plot of land in which she had only a limited interest (as a daughter under Hindu law as interpreted in Madras) to *B*. Her husband, *D* executed an agreement of indemnity agreeing to convey to *B* an equivalent plot of land, in case *B* should be dispossessed. *B* sold the land to *P* who after the death of *A* was dispossessed by *A*'s son. *P* then sued *D* on the agreement of indemnity to recover possession of the equivalent plot of land. The suit was dismissed, as an agreement of indemnity is a collateral agreement and not a covenant running with the land. There was, moreover, no privity of contract between *P* and *D*: *Natesa Vanniyan* v. *Gopalaswami Mudaliar* (1928) 51 Mad. 688, 110 I. C. 830, ('28) A.M. 894.

In an Allahabad case (*r*) an affirmative covenant to pull down rooms on a passage was enforced against a transferee from the vendee. The case was decided on the law as it stood before the amendment of the section.

Leases have always been an exception to this rule, and a covenant to pay rent is a covenant annexed to the land, and the benefit of it passes to the lessor's assignee—sec.109. The lessee's assignee is liable to the lessor by privity of estate (*s*). See note under sec. 108 (j) "Liability of assignee to lessor." On the other hand in the case of a sale, a covenant to pay money is a purely personal covenant and cannot run with the land. Should a vendee covenant on behalf of himself, his heirs and assigns that he or they would pay Rs. 20 annually for the Sheba of a Thakur, a subsequent purchaser is not bound by the covenant, for there is no such thing between a vendor and purchaser as a covenant to pay money running with the land (*t*). In an Allahabad case (*u*), a covenant that the

(*k*) *Nottingham Patent Brick & Tile Co.* v. *Butler* (1886) 16 Q.D.B. 778; *Cooverji* v. *Bhimji* (1880) 6 Bom. 528.

(*l*) *Reid* v. *Bickerstaff* (1909) 2 Ch. 305; *Torbay Hotel* v. *Jenkins, supra.*

(*m*) *Haywood* v. *Brunswick Permanent Building Society* (1881) 8 Q.B.D. 403; *Austerberry* v. *Corporation of Oldham* (1885) 29 Ch. D. 750; *Chathurbhuj* v. *Mansukram* (1925) 27 Bom. L.R. 73, 86 I.C. 19, ('25) A.B. 188.

(*n*) *Jogesh Chandra* v. *Asaba Khatun* (1927) 44 Cal. L. J. 220, 98 I.C. 46, ('27) A.C. 41.

(*o*) *Banti Mst.* v. *Mandu* (1928) 9 Lah. 659, 110 I. C. 425, ('28) A. L. 357; *Natesa Vanniyan* v. *Gopalaswami Mudaliar* (1928) 51 Mad. 688, 110 I. C. 830, ('28) A. M. 894; *Doughty* v. *Bowman* (1848) 11 Q.B. 444 but see *Hanwant Rai* v. *Chandi Prasad* (1929) 51 All. 651, 199 I. C. 243, ('29) A. A. 293.

(*p*) *Harihar Singh* v. *Kamla Prasad* (1944) A.O. 35.

(*q*) *Zal Rustomjee* v. *Anjuman* (1943) A.N. 4, (1943) Nag. 736, (1943) N.L.J. 392, 208 I.C. 199.

(*r*) *Nand Gopal* v. *Batuk Prasad* (1932) 54 All. 17, 135 I.C. 541, (1932) A.L.J. 36, ('32) A.A. 78.

(*s*) *Stevenson* v. *Lambard* (1802) 2 East, 575; *Thathalan* v. *Braipad Rajah* (1917) 40 Mad. 1111, 40 I. C. 341.

(*t*) *Mohini Mohan Roy* v. *Ramdas Paramhansa* (1924) 28 Cal. W. N. 271, 80 I. C. [illegible], ('24) A. C. 457; *Ramaddin* v. *Sheoratan* (1903) 6 O.C. 184.

(*u*) *Abdus Shakur* v. *Nandlal* (1931) 29 All. L.J. 439, 133 I.C. 543, ('31) A.A. 582.

S. 40 vendee would pay the vendor zarichaharam, *i.e.*, fourth of the purchase money, in case he sold the land was held not to run with the land. The Court dissented from a previous decision (*v*), but omitted to notice that that was a case of *lease*. Between a head lessor and a sublessee there is neither privity of contract nor privity of Estate. A sublessee is not therefore liable for a covenant in the lease to pay a specified rent, such covenant being an affirmative covenant (*w*).

(7) Covenant running with the land.—This is an expression borrowed from English law of real property, where it describes a covenant *annexed to the land* and which is an exception to the general rule that all covenants are *personal*. A covenant may run with the land (i) at law or (ii) in equity.

(i) A covenant runs with the land *at law* when the benefit of it passes to the assignee of the covenantee or where the burden of it passes to the assignee of the covenantor, and, in either case independently of notice. *A* grants subsoil rights below his surface land to a colliery company who covenant to pay damages if they cause a subsidence of the surface land. *A* sells his surface land to *B*. *B* can enforce the covenant because it is a covenant the benefit of which runs with the land at law : *Dyson* v. *Foster* [1909] A. C. 98. The burden of a covenant only runs at law in the case of an assignment of a lease.

(ii) A covenant runs with the land *in equity* when the burden of it can be enforced against the assignee of the covenantor under the rule in *Tulk* v. *Moxhay*. *A* sells a park in front of his house to *B* who covenants not to build upon it. *B* sells the park to *C* who *has notice* of the covenant. *A* can enforce the covenant against *C*, for it is a covenant running with the land in equity.

Covenants running with the land are defined in sec. 80 of the law of Property Act, 1925, for the purposes of that section where it is said that "a covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor, as the case may be."

Covenants that run with the land at law, in the Law of Property Act, 1925, are the implied covenants referred to in sec. 76 (6) and the lessee's covenants referred to in sec. 141 of that Act. (See pp. 170-171.)

Indian law.—Under the Transfer of Property Act covenants of which the benefit runs with the land at law are covenants for title implied in sales under sec. 55 (2), the covenant implied in mortgages under sec. 65, and in respect of leases, the covenant for quiet enjoyment implied in sec. 108 (c). A covenant to pay rates and taxes is a covenant that runs with the land (*x*); so also is a covenant in a lease that the lessee will pay the lessor a share of the purchase money if he should assign the lease (*y*). As these covenants run with the land at law, they are enforcible by any person in whom the interest in the property of the covenantee is vested, *irrespective of notice*.

Under the Transfer of Property Act covenants that run with the land in equity are the restrictive covenants referred to in the first paragraph of this section where the rule in *Tulk* v. *Moxhay* is followed. As these covenants run with the land in equity, they cannot be enforced against a purchaser for value *without notice* as stated in the last paragraph of the section.

(*v*) *Parbhu Narain Singh* v. *Ramsan* (1919) 41 All. 417, 49 I.C. 865.

(*w*) *Ganges Manufacturing Co.* v. *Smt. Radharani* (1949) A.C. 89.

(*x*) *Ardeshar* v. *K. D. & Brothers* (1925) 27 Bom. L. R. 559; 88 I. C. 79, ('25) A. B. 330 following *South of England Dairies Ld.* v. *Baker* (1906) 2 Ch. 681.

(*y*) *Saradakripa Lal* v. *Bepin Chandra* (1923) 37 Cal. L. J. 538, 74 I. C. 555, ('23) A. C. 979; *Kumarchandra* v. *Narendranath* (1930) 57 Cal. 958, 127 I.C. 96, ('30) A.C. 357; *Parbhu Narain Singh* v. *Ramsan* (1919) 41 All. 417, 49 I.C. 865.

Pre-emption.—Covenants for pre-emption have been described as covenants running with the land (z). This use of the expression was deprecated by Strachey, J., (a), and it is altogether incorrect. Such covenants are personal and collateral covenants falling under the second paragraph of the section. See note *infra* "Pre-emption." (P. 178.)

Illustration.

A sells his field to *B* who covenants that if he wishes to sell it he will give *A* the first refusal. *B* sells the field to *C* who has notice of the agreement for Rs. 1,000. *A* may require *C* to sell the field to him for Rs. 1,000. This illustration should be contrasted with the two preceding illustrations which were of covenants running with the land at law and in equity. The covenant in this illustration is not annexed to the land at all. It is purely a personal covenant and is enforceable for personal reasons. It was unconscionable of *B* to break his agreement and to sell to *C* and, as *C* had notice of the agreement, it was equally unconscionable of him to buy.

Second paragraph—Contractual obligation.

(8) Second paragraph—Contractual obligation.—The right referred to in the first paragraph of the section has come into existence before the transfer, and presupposes ownership of property. The right referred to in the second paragraph has also come into existence before the transfer, but does not presuppose ownership of property. It is a purely personal right arising out of contract and the person who has the right need not be the owner of any property at all. But the right though personal must be annexed to the ownership of immoveable property. The illustration shows that the purchaser under a contract of sale of land has the right defined in the second paragraph. That right in English law is an equitable estate in land. But, as explained in note (5) to sec. 5, the Indian Legislature has eschewed the doctrine of equitable ownership. According to sec. 3 of the Trust Act, 1882, what would be in English law the equitable estate of the *cestui que trust* is the benefit of an obligation annexed to the ownership of property. Section 54 of this Act expressly states that a contract of sale of immoveable property does not, of itself, create an interest in or charge upon such property, but it creates an obligation the fiduciary character of which is recognized in sec. 3 of the Specific Relief Act and in sec. 91 of the Trusts Act. A contract for sale therefore does not create an interest in land, but creates a personal obligation of a fiduciary character which can be enforced by suit for specific performance not only against the vendor but also against a volunteer and a purchaser for consideration with notice. In some cases this fiduciary obligation has been held to be a defence to a suit for ejectment although no suit for specific performance had been filed. But these cases are, in effect, overruled by the decision of the Privy Council in *Mian Pir Bux* v. *Sardar Mahomed Tahar* (b). See note 'Contract for sale' under sec. 53A.

An agreement to pay maintenance out of land, which fell short of creating a charge on any specific property has been said to create a contractual obligation under the second paragraph of this section and not to be enforcible against a purchaser without notice (c).

(9) Attachment.—There is a conflict of decisions as to whether the obligation annexed by this section to the ownership of property by a contract of sale will prevail against claims enforceable under an attachment. If after a creditor *C* has attached *A*'s

(z) *Karim Baksh* v. *Phula Bibi* (1886) 8 All. 102 F.B.; *Kuar Dat Prasad* v. *Nahar Singh* (1889) 11 All. 257; *Ram Jiawan* v. *[illegible] Singh* (1889) A.W.N. 81; *Bahadur Singh* v. *Ram Singh* (1904) 27 All. 12.

(a) See *Dalganjan Singh* v. *Kalka Singh* (1899) 22 All. 1 F.B.

(b) (1934) 61 I.A. 388, 60 Cal. L.J. 270, 67 Mad. L. J. 365, 36 Bom. L. R. 1196, (1934) All. L. J. 912, 151 I. C. 326, ('34) A. PC. 235.

(c) *Mohini Debi* v. *Purna Sashi Ghose* (1922) 26 Cal. W.N. 128, 35 C.L.J. [illegible], [illegible] I.C. 84, ('22) A.C. 52.

property, *A* sells it to *B*, the conveyance to *B* will be subject to the claims of *C* enforceable under the attachment. This is because under sec. 64 of the Code of Civil Procedure any private transfer by *A* after the attachment will be void as against such claims. But supposing the subsequent conveyance was in pursuance of an agreement of sale which was before the attachment. In that case, will the claims of *C* enforceable under the attachment be subject to the obligation created by the contract of sale to *B*? In *Taraknath* v. *Sanatkumar* (*d*) Cuming, J., held that the contractual obligation could not prevail against the rights of the attaching creditor. But in *Madan Mohan* v. *Rebati Mohan* (*e*) Woodroffe, J., held that the contractual obligation prevailed over the attachment. The Madras High Court has taken the same view on the ground that if a creditor attaches property which is subject to a particular obligation he should not be able to override it (*f*). In the case of an attachment before judgment this is so expressly provided by O. 38, r. 10 of the Code. Again if after the attachment the vendee filed a suit for specfic performance of the contract and the Court enforced execution of a conveyance, it is clear that such conveyance would not be a private transfer subject to the provisions of sec. 64 of the Civil Procedure Code (*g*).

(10) Pre-emption.—It is submitted that a covenant for pre-emption creates an obligation arising out of contract and annexed to the ownership of property as defined in the second paragraph of this section. This is the view taken by the Allahabad High Court in the cases of *Basdeo Rai* v. *Jhagru Rai* (*h*) and *Aulad Ali* v. *Ali Athar* (*i*) to which reference has already been made in the notes on sec. 14 as to the rule against perpetuity. The earlier Calcutta decisions (*j*) referred to in the same note, treat the covenant as creating an equitable interest in land and apply the rule against perpetuity on the analogy of *Gomm*'s case (*k*), and, as remarked by Sulaiman, J., in *Basdeo Rai* v. *Jhagru Rai* (*l*), overlook the fact that the principle on which the English decisions rest is swept away by sec. 54 of this Act. In view of the recent Full Bench decision of the Calcutta High Court in *Ali Hossein Miya* v. *Raj Kumar Haldar* (*m*) the earlier Calcutta decisions can no longer be regarded as good law. In two cases decided by the Allahabad High Court, Sulaiman J., expressed the opinion that a covenant for pre-emption unlimited in point of time was void for uncertainty (*n*). This view, which would have produced the same result as the earlier Calcutta decisions, is erroneous and was corrected in *Aulad Ali* v. *Ali Athar* (*o*). The rule against perpetuity was applied to a covenant for pre-emption in the Bombay case of *Dinkarrao* v. *Narayan* (*p*), because the agreement was before the Transfer of Property Act. This case and other Bombay and Madras decisions on the same point have already been discussed in the notes on sec. 14. A later Allahabad case (*q*) followed, *Aulad Ali*'s case but omitted to notice that the agreement was of 1874 and did not consider whether the rule against perpetuity was infringed.

(*d*) (1930) 57 Cal. 274, 122 I.C. 687, ('29) A.C. 494.

(*e*) (1916) 21 Cal. W. N. 158, 34 I.C. 953.

(*f*) *Venkata Reddi* v. *Yellappa Chetty* (1917) 38 I.C. 107; *Veeraraghavayya* v. *Kamaladevi* (1935) 68 Mad. L.J. 67, 157 I.C. 1104, ('35) A.M. 193; *Athinarayana* v. *Subramania* (1942) A.M. 67, (1941) 2 M.L.J. 722, 54 M.L.W. 474, 201 I.C. 307.

(*g*) *Qurban Ali* v. *Ashraf Ali* (1882) 4 All. 219, 225; *Sunkari Sitayya* v. *Mudaragaddi* (1924) 46 Mad. L.J. 361, 80 I.C. 388, ('24) A.M. 610; *Laxaman* v. *Ramchandra* (1932) 34 Bom. L.R. 117, 139 I.C. 610, ('32) A.B. 301.

(*h*) (1924) 46 All. 333, 83 I.C. 390, ('24) A. A. 400; *Athinarayana* v. *Subramania* (1942) A.M. 67 (1941) 2 M.L.J. 722, 54 M.L.W. 476, 201 I.C. 301.

(*i*) (1927) 49 All. 527, 100 I. C. 683, ('27) A.A. 170 F.B.

(*j*) *Nobin Chandra* v. *Nowab Ali* (1901) 5 Cal. W.N. 343; *Nabin Chandra* v. *Rajani Chandra* (1921) 25 Cal. W.N. 901, 63 I.C. 196, ('21) A. C. 162; *Swarna Kumar* v. *Prahlad Chandra* (1922) 26 Cal. W. N. 874, 67 I.C. 719, ('22) A. C. 474: *Haridhan* v. *Sailabala* (1939) A.C. 421, 183 I.C. 750 in which the decision of the Allahabad High Court in *Aulad Ali* v. *Alikhan* was not followed in view of a series of decisions of the Calcutta High Court to the contrary.

(*k*) (1882) 20 Ch. D. 569.

(*l*) (1924) 46 All. 333, 83 I.C. 390. ('24) A.A. 400.

(*m*) I.L.R. (1943) 2 Cal. 605 F.B.

(*n*) *Basdeo Rai* v. *Jhagru Rai* (1926) 46 All. 333, 83 I.C. 390, ('24) A.A. 400; *Muhammad Jan* v. *Fazal-ud-din* (1924) 46 All. 514, 85 I.C. 482, ('24) A. A. 657.

(*o*) (1927) 49 All. 527, 100 I.C. 683, ('27) A.A. 170 F.B.

(*p*) (1923) 47 Bom. 191, 24 Bom. L. R. 449, 82 I. C. 628, ('22) A. B. 54.

(*q*) *Shahzad Singh* v. *Jaichha Kunwar* (1932) 54 All. 966, 143 I. C. 368, ('33) A.A. 452.

It is submitted that the view taken in *Aulad Ali's* case and now in *Ali Hossein Miya's* case is correct, and that a covenant for pre-emption is a personal covenant not affected by the rule against perpetuity. This would appear to have been the view of Shepherd, J., in *Ramasami* v. *Chinnan* (r). As a personal contract it is binding on the immediate parties and their personal representatives, and it creates an obligation arising out of contract and is binding on a purchaser for value with notice and on a gratuitous transferee, under the second part of this section. The benefit of the covenant cannot, however, be transferred as it is restricted in enjoyment to the covenantee. See note (17) "Right of pre-emption not transferable" under sec. 6 (d). Ss. 40, 41

(11) Notice.—Notice of the contractual obligation may be constructive notice (s). Thus it is sufficient notice if the contract is entered in the wajib-ul-arz of the village (t), or the contract was for sale to a mortgagee who is in possession (u).

(12) Court sale.—A purchaser at a Court sale is a transferee by operation of law, and is therefore not a transferee within the meaning of this section. It has been suggested that the principle of the second paragraph of this section might apply to him (v). The point was raised before the Privy Council, but was not actually decided as the purchaser had not unequivocal notice of the contract. Lord Dunedin, however, observed that "judicial sales would be robbed of all their sanctity if vague references to antecedent contracts could be held to invalidate the buyer's title (w)." In an Allahabad case it was assumed that the Official Receiver in whom the property had vested by operation of law was a transferee under this section (x).

Transfer by ostensible owner.

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

(1) Principle.—The foundation of the section is the following well-known passage from the judgment of the Judicial Committee in *Ramcoomar* v. *Macqueen* (y):—

> "It is a principle of natural equity which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it."

(r) (1901) 24 Mad. 449, 457.
(s) *Jogmaya* v. *Tulsa* (1926) 48 All. 12, 89 I.C. 444, ('25) A.A. 70 (covenant of pre-emption in a registered lease); *Kameswaramma* v. *Sitaramanuja* (1906) 29 Mad. 177.
(t) *Baldeo Rai* v. *Jhagru Rai* (1924) 46 All. 233, 83 I.C. 290, ('24) A.A. 400.
(u) *Puthenpurayil* v. *Kandiyil* (1916) Mad. W. N. 81, 34 I.C. 905.
(v) *Venkatta Reddi* v. *Yellappa Chetty* (1917) 36 I.C. 107.
(w) *Nur Mahomed* v. *Dinshaw* (1922) 46 Mad. L. J. 770, 71 I.C. 625, ('24) A.P.C. 305.
(x) *Nand Gopal* v. *Batuk Prasad* (1932) 54 All. 17, 135 I.C. 541, ('32) A.A. 78.
(y) (1872) 11 Beng. L.R. 46, 52, I.A. Sup. Vol. 40, 48.

The section is a statutory application of the law of estoppel (*z*), the general principle of which is thus stated by the House of Lords in *Cairncross* v. *Lorimer* (*a*) :—

> " If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might have abstained—he cannot question the legality of the act he had so sanctioned—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

The law of estoppel is enacted in sec. 115 of the Indian Evidence Act and Shepherd and Brown point out that the leading case on that section falls equally under sec. 41 of the Transfer of Property Act. In that case (*b*), the owner transferred property to his wife as benamidar and after his death she mortgaged the property, her son assisting in the transaction and receiving the mortgage money. The son was held to be estopped from disputing the mortgage, while if this section had been applied, the case would have been decided on the ground that by the consent of the son the mother was the ostensible owner.

The section makes an exception to the rule that a person cannot confer a better title than he has (*c*). For exceptions as to moveable property see secs. 27 to 29 of the Indian Sale of Goods Act 3 of 1930 (replacing sec. 108 of the Indian Contract Act, 1872), and secs. 178 and 178A of the Indian Contract Act, 1872, as amended by Act 4 of 1930.

(2) Court sale.—The section applies only to voluntary transfers and has no application to Court sales (*d*).

(3) Requirements of the section.—The following conditions are necessary for the application of the section (*e*), namely :—

(1) the transferor is the ostensible owner,

(2) he is so by the consent, express or implied, of the real owner,

(3) the transfer is for consideration,

(4) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.

If any one of these elements is wanting the transferee is not entitled to the benefit of the section (*f*). The question whether the section applies to a given set of facts is a question of law (*g*). This is on the principle that " the proper legal effect of a proved fact is necessarily a question of law (*h*)."

(*z*) *Hoorbai* v. *Aishabai* (1910) 12 Bom. L. R. 457, 6 I.C. 898 ; *Satyanarayan Murthi* v. *Pydaya* (1943) A.M. 459.

(*a*) (1860) 3 Macq. 827, 829.

(*b*) *Sarat Chunder* v. *Gopal Chunder* (1893) 20 Cal. 296, 19 I.A. 203.

(*c*) *Kanhu Lal* v. *Palu Sahu* (1920) 5 Pat. L.J. 521, 535, 57 I.C. 353 ; *Maung Sin Ba* v. *Maung Kyme* (1934) 12 Rang. 55, 150 I.C. 667, ('34) A.R. 90.

(*d*) *Vaman Pandu* v. *Tikaram* (1927) 29 Bom. L.R. 471, 102 I.C. 64, ('27) A.B. 368 ; *Shahar Bano* v. *Raj Bahadur* (1934) 149 I.C. 357, ('34) A.O. 233 dissenting from *Nagapresh* v. *Parambali* (1916) 34 I.C. 494; *Puran Mal* v. *Shiva Lal* (1934) All. L.J. 1260, 150 I.C. 86, ('35) A.A. 234 ; *Dwarika Halwai* v. *Sitha Prasad* (1940) A.A. 256, (1940) All. 344, (1940) A.L.J. 186, 188 I.C. 784 ; *Lalit Mohan* v. *Thakurain Lachmi* (1946) A.O. 213 ; *Nandlal* v. *Sunderlal* (1944) A.A. 17.

(*e*) *Gholam Siddique* v. *Jogendra Nath* (1926) 31 Cal. W. N. 205, 96 I.C. 199, ('26) A.C. 916 ; *Nand Lal* v. *Mt. Karam Bibi* (1933) 146 I.C. 210, ('33) A.L. 258 ; *Baba Ramchandra* v. *Kondaa Jagna* (1939) 184 I.C. 797, (1940) A.N. 7 ; *Nand Lal* v. *Sunder Lal* (1944) A.A. 17.

(*f*) *Ballu Mal* v. *Ram Kishan* (1921) 43 All. 263, 64 I.C. 14, ('21) A.A. 311; *Partap Chand* v. *Saiyida Bibi* (1901) 23 All. 442, 447 ; *Macneil & Co.* v. *Saroda Sundari* (1928) 48 Cal. L. J. 374, 114 I.C. 142, ('29) A. C. 83, 86.

(*g*) *Mul Raj* v. *Fazal Imam* (1923) 45 All. 520, 74 I.C. 307, ('23) A.A. 563 dissenting from *Jamna Das* v. *Uma Shankar* (1914) 36 All. 303, 25 I. C. 158.

(*h*) *Nafar Chandra Pal* v. *Shukur* (1918) 45 I.A. 183, 46 Cal. 189, 51 I.C. 780.

(4) Ostensible owner.—An ostensible owner is one who has all the *indicia* of ownership without being the real owner. It has been held that the possession of a manager cannot be treated as ostensible ownership with the consent of the real owner (*i*) : and this was held to be so even in a case where the manager's name had been entered in the Municipal House Tax Register as the real owner (*j*). A *professed* agent or manager cannot of course be an ostensible owner (*k*) ; nor can the occupation of a menial servant constitute ostensible ownership (*l*). A mortgagor is the owner of a limited interest and is not an ostensible owner and therefore the purchaser of an equity of redemption is not entitled to the protection of this section as against the mortgagee (*m*). If this property vests in an idol, it would not be possible to hold that this trustee or the manager of the idol can set himself up as the owner of the property (*n*).

A Mahomedan son and daughter inherited property, but as the son remained in possession of his sister's share as well as his own for 25 years, had all the property entered in the revenue papers in his sole name, and alone executed mortgages of the whole property, he was treated as ostensible owner of his sister's share (*o*). So also, when the other heirs of a Mahomedan, who lived in another village, left the widow in sole possession and allowed her to deal with it as if she was solely entitled (*p*). Again a widow, who had a half share in a house and allowed her husband's cousin to deal with it as if it were his own, was estopped as she had held him out as ostensible owner (*q*). On the other hand, the manager of a Hindu family who has power to alienate family property only in case of necessity or for the benefit of the estate, cannot be treated as an ostensible owner (*r*). Where the transferor and the transferee are closely related as uncle and nephew the transferee is expected to know the real nature of the transaction and cannot claim the protection of the section (*s*). Nor can a transferee from a Hindu widow claim the protection of sec. 41, for a Hindu widow holds in her own right and not as ostensible owner (*t*).

A benamidar is an ostensible owner, and if a person purchases from a benamidar, the real owner cannot recover, unless he shows that the purchaser had actual or constructive notice of the real title (*u*).

Illustration.

A purchased property in his wife's name. The wife dealt with the property as if she were the owner and kabulayets and rent receipts were in the wife's name. The wife raised money on a mortgage of the property, and it was held that the mortgagee was protected by this section : *Annoda Mohan* v. *Nilphamari* (1922) 26 Cal. W. N. 436, 65 I.C. 245, ('21) A. C. 549.

(*i*) *Jamnadas* v. *Uma Shankar* (1914) 36 All. 308, 25 I. C. 156.

(*j*) *Muhammad Sulaiman* v. *Sakina Bibi* (1922) 44 All. 674, 69 I.C. 701, ('22) A.A. 392.

(*k*) *Dambar Singh* v. *Jawitri* (1907) 29 All. 292 ; *Abdullah Khan* v. *Bundi* (1912) 34 All. 22, 24, 11 I.C. 710 ; *Maung Bya* v. *Maung San* (1911) 10 I.C. 779.

(*l*) *Chooni Lal* v. *Nilmadhab* (1925) 41 Cal. L.J. 374, 86 I.C. 784, ('25) A.C. 1084.

(*m*) *Narayan* v. *Purshottam* (1931) 27 Nag. L.R. 144, 134 I.C. 676, ('31) A.N. 144. ; *Hira Singh* v. *Afzal Khan* (1941) A. Pesh. 59.

(*n*) *Ratan Sen* v. *Suraj Bhan* (1944) A.A. 1.

(*o*) *Mul Raj* v. *Fazal Imam* (1923) 45 All. 520, 74 I.C. 307, ('23) A.A. 583.

(*p*) *Mohammad Shakur* v. *Shah Jehan* (1921) 63 I.C. 125.

(*q*) *Thakuri* v. *Kundan* (1893) 17 All. 280.

(*r*) *Rangaswami* v. *Sundarapandia* (1928) 110 I.C. 543, ('28) A.M. 635.

(*s*) *Mengha Ram* v. *Makhna* (1941) A.L. 416, 43 P.L.R. 424, 198 I.C. 609.

(*t*) *Shib Deo Misra* v. *Ram Prasad* (1924) 46 All. 637, 87 I.C. 938, ('25) A.A. 79 ; *Panchan Singh* v. *Balak Ram* (1930) 28 All. L.J. 686, 127 I.C. 418, ('30) A. A. 374 ; *Kapura* v. *Madsodan* (1943) A.L. 168, 45 P.L.R. 183, 209 I.C. 609 ; *Md. Abdul Samad* v. *Girdhari Lal* (1942) A.A. 175, (1942) All. 259, 200 I.C. 269, (1942) A.L.J. 179.

(*u*) *Jokhu* v. *Mahdi* (1881) All. W.N. 67 ; *Luchmun Chunder* v. *Kali Churn* (1873) 19 W. R. 292 ; *Bhugwat* v. [illegible] (1868) 10 W.R. 185 ; [illegible] v. [illegible] (1868) 9 W.R. 593 ; *Ram Sunder* v. [illegible] *Narain* (1919) 48 I.C. 936 ; [illegible] v. *Krishna* (1942) A.M. [illegible].

S. 41

The principle of the section is not restricted to conveyances and applies also to mortgages. A mortgagee from an ostensible owner acting in good faith and with reasonable care has frequently been allowed the benefit of the section (*v*). In the undernoted case (*w*) there was a difference of opinion as to whether an ostensible mortgagee could be treated as an ostensible owner. It is submitted that he is the ostensible owner of the mortgagee's interest. If a purchaser for consideration of that interest, who had acted in good faith and with reasonable care, sought to enforce the mortgage, it seems clear that the mortgagor, who had created that interest, would be estopped.

Illustration.

A is induced by *B* to make a colourable conveyance of her house to her grand-daughter *C* who is *B*'s wife. *C* makes a colourable conveyance to *D* who is *B*'s brother. Ten years later *D* makes a colourable conveyance to *B*. The names of *C* and then of *D* have been registered as owners and *B* who is in possession mortgages the house to *E*. *E* accepts the mortgage after inquiry with reasonable care, in good faith believing *B* to be the owner. *E* obtains a decree for sale on the mortgage and purchases the house. *A* is barred by sec. 41 from setting up her title to the house: *Baidya Nath* v. *Alef Jan* (1922) 36 Cal. L.J. 9, 70 I.C. 194, ('23) A.C. 240.

(5) **Consent express or implied.**—The real owner is not responsible, unless the apparent ownership of the transferor has been permitted or created by him. He creates or permits the appearance of ownership either by express words of consent, or by acts or conduct which imply consent. It is not necessary that he should have been influenced by a fraudulent intention, for his liability rests upon his having put the transferor in a position which enabled him to commit a fraud. This is on the principle that "when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud" (*x*). The same principle was stated in somewhat wider terms by Ashurst J. in *Lickbarrow* v. *Mason* (*y*) "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such person to occasion the loss must sustain it."

Illustrations.

(1) A husband entered his land in the revenue records in his wife's name and went away on a pilgrimage. Before his departure he had allowed her to mortgage the land. After his departure she sold the land and the vendee paid off the mortgage. The husband on his return could neither recover the land nor redeem the mortgage: *Niras Purve* v. *Mst. Tetri Pasin* (1916) 20 Cal. W.N. 103, 32 I.C. 82: *Maung Po Sin* v. *Ma Myit* (1933) 146 I.C. 1063, ('33) A. R. 361.

(2) *A*, a Hindu husband, purchased land in the name of his wife, *B*. The land was then entered in *B*'s name in the revenue records. After *A*'s death *B*, the widow, mortgaged the land to *C* who took the mortgage after due inquiry believing in good faith that *B* was the owner. *C* obtained a decree for sale on his mortgage and purchased the land. But *D* was then in possession, for *D* had purchased the land in execution of a money decree against *A*. *C*'s suit against *D* for possession was decreed. *D* was the

(*v*) *Khwaja Muhammad* v. *Muhammad Ibrahim* (1904) 26 All. 490; *Baidya Nath* v. *Alef Jan*, *supra*; *Annoda Mohan* v. *Nilphamari* (1922) 26 Cal. W. N. 436, 65 I. C. 245, ('21) A. C. 549; *Karamat Khan* v. *Sami-ud-din* (1886) 8 All. 409; *Ghulam Fatima* v. *Gopal Das* (1940) A.L. 269, 190 I.C. 599; *Fakruddin Sab* v. *Ramayya Sethi* (1944) A.M. 293. *Parvathi Ammal* v. *Anga Muthu* (1942) A.M. 730.

(*w*) *Jogendra* v. *Salamat Khan* (1930) 33 Cal. W. N. 994, 125 I.C. 863, ('30) A.C. 92;

(*x*) Per Savage, C.J., in *Root* v. *French* (1835) 13 Wendell 570, approved by Lord Halsbury in *Farquharson Bros.* v. *King* (1902) A.C. 325, 332 and Mookerjee, J., in *Baidya Nath* v. *Alef Jan* (1922) 36 Cal. L.J. 9, 20, 70 I.C. 194, ('23) A.C. 240.

(*y*) (1787) 1 Smith L.C. 11th Ed. 693.

successor in interest of *A* who had held out his wife as the ostensible owner and could not defeat the mortgagee who was a transferee in good faith from the ostensible owner: *Annoda Mohan* v. *Nilphamari* (1922) 26 Cal. W. N. 436, 65 I.C. 245, ('21) A. C. 549. *Chapalavala* v. *Sarat Kumari* (1941) A. C. 318.

(3) *A*, a Hindu, dies leaving a daughter *B* who takes a limited estate by inheritance. *B* makes a statement to the revenue authorities that *A*'s separated brother *C* is his heir, and allows *C* to take possession of the estate. On *B*'s death, her son claims to succeed as reversionary heir of *A*. *C* is not entitled to the protection of s. 41, for his ostensible ownership has not been created by the real owner *A*, but by the limited owner *B*. *Sambhu Prasad* v. *Mahadeo Prasad* (1933) 55 All. 554, 1933 A.L.J. 1185, 144 I.C. 293, ('33) A.A. 493.

The consent must be a free consent as defined in sec. 14 of the Indian Contract Act and it has been held that it must be an intelligent consent and not one brought about by a misapprehension of legal rights (*z*). But a consent based on a mistake of fact has been held to be within the section (*a*). Section 41 does not apply to minors, and a minor's guardian who transfers the property of a minor cannot be treated as ostensible owner with the consent of the minor (*b*), for the minor, by reason of the disability of infancy, cannot give his consent (*c*). The doctrine of estoppel does not apply to minors (*d*), and still less will the Court hold an infant estopped by the acts and omissions of others (*e*).

Illustrations.

(1) The owner, a Mohamedan, died leaving a widow and two minor sons. The widow's share was ⅛th, but she got herself registered as owner of ⅓rd. She then mortgaged the ⅓rd share to *A*. *A* obtained a decree for sale on his mortgage and purchased the property. *A* then sold to *B*. The sons were entitled to recover their proper share from *B*. *A* could not be ostensible owner with their consent, express or implied, because they were minors: *Abdulla Khan* v. *Bundi* (1912) 34 All. 22 11 I.C. 710.

(2) *A* made a colourable conveyance of his patni estate to *B*, but retained possession of the conveyance and of the patni lease. After *A*'s death his widow as guardian of his minor son appointed *B* agent to collect the rents. *B* sold the property to *C*. The son was not barred by sec. 41 from asserting his title against *C*. This is because (1) appointment as agent did not make *B* ostensible owner, (2) even if *B* was ostensible owner he was not so with the consent, express or implied, of the son as the son was then a minor, and (3) if *C* had taken reasonable care he would have found that *B* was not in possession of the deeds of title: *Ram Charan Das* v. *Joy Ram* (1912) 17 Cal. W.N. 10, 16 I.C. 825.

When the widows of the sons of a deceased mortgagee accepted payment of the debt from the mortgagors and transferred the property to them, the real heirs were not bound, for although the widows' names were entered in the revenue records, they had not consented to the transfer (*f*).

Implied consent.—Implied consent is consent evidenced by conduct. Thus if the real owner knows that another person is dealing with his property as if it were his own,

(*z*) *Dungariya* v. *Nand Lal* (1906) 3 All. L.J. 534.

(*a*) *Ramprosad* v. *Imratbai* (1922) 65 I.C. 477, ('22) A. N. 79; *Shori Lal* v. *Damodar Das* (1936) A.L. 86, (1937) Lah. 783, 40 P.L.R. 296, 175 I.C. 832.

(*b*) *Abdulla Khan* v. *Bundi* (1912) 34 All. 22, 11 I.C. 710; *Dambar Singh* v. *Jawitri* (1907) 29 All. 292; *Dalibai* v. *Gopibai* (1902) 26 Bom. 433; *Maung Sin Be* v. *Maung Kyme* (1934) 12 Rang. 56, 150 I.C. 667, ('34) A.R. 90.

(*c*) *Shankar* v. *Daooji* (1931) 53 All. 290, 58 I.A. 205, 132 I.C. 602, ('31) A. PC. 118; *Satyanarayana Murthi* v. *Pydayya* (1943) A.M. 459, (1943) 1 M.L.J. 219; *Kalsum Begum* v. *Md. Ismail* (1936) A.L. 161; *Pooran Chand* v. *Radha Raman* (1943) A.A. 197.

(*d*) *Sadiq Ali Khan* v. *Jai Kishori* (1928) 30 Bom. L.R. 1346, 109 I.C. 387, ('28) A. PC. 152; *Gadigeppa* v. *Balangowda* (1931) 55 Bom. 741, 135 I. C. 161, ('31) A. B. 561, F.B. See note "Minor" under section 7.

(*e*) *Ram Charan Das* v. *Joy Ram* (1912) 17 Cal. W.N. 10, 16 I.C. 825.

(*f*) *Saraya* v. *Mst. Dhandan* (1930) 11 Lah. L.J. 219, 126 I.C. 544, ('30) A.L. 286.

S. 41

and acquiesces, his inaction will imply consent (*g*). In a case where the purchaser of a tenure allowed his vendor to represent himself to be still the tenant and to continue to pay the rent to the landlord, the purchaser was bound by a decree for sale in execution of a decree for rent against the vendor (*h*). But in a similar case where the vendor paid rent because the landlord refused to receive the rent from the purchaser, Mukerji, J. held that there was no acquiescence and that the purchaser was not bound by the landlord's decree (*i*). These cases were decided on the principle of sec. 41, for the transfer was involuntary and by operation of law. But silence will not work an estoppel, unless it is such as to induce a belief that the party keeping silence has no rights (*j*). When pardanishin ladies left the management of their property in the hands of male members of the family who dealt with it without their active concurrence, the Privy Council held that their conduct had not been such as to mislead the mortgagees of the property (*k*). But in another case where two Mahomedan sisters allowed a spendthrift brother to dissipate their share of the property, the Privy Council held that the brother was ostensible owner with the implied consent of the sisters and this was because both the sisters had husbands who understood business (*l*). Where one of the shares permitted the other co-sharer to treat the property as of his exclusive ownership, it was held that the latter could be treated as an ostensible owner (*m*).

A mortgage contained so inaccurate a description of the property that a purchaser from the mortgagor did not discover the mortgage on a search of the register. This inaccuracy was held to be due to gross negligence on the part of the mortgagee which enabled the mortgagor to hold himself out as ostensible owner so that the purchaser acquired a title free from the mortgage (*n*). But in a similar case it was doubted whether such negligence would amount to implied consent (*o*).

Attestation.—Attestation does not by itself imply consent (*p*). Attestation estops a man from denying nothing whatever except that he has witnessed the execution of the deed (*q*). It may, of course, be proved that attestation took place in circumstances which involved knowledge of, or consent to, the transaction (*r*) and it has been said that the ordinary practice in India is to require attestation in token of consent (*s*). But this practice has been condemned by the Privy Council. Lord Buckmaster said—"If in fact there be a practice, as is suggested from the evidence, that when the consent of parties to a transaction is required, it can be obtained by inducing them by one means or another to attest a signature of the executing parties, the sooner that practice is discontinued the better it will be for the straightforward dealing essential in all business matters" (*t*).

(*g*) *Sarat Chunder* v. *Gopal Chunder* (1893) 20 Cal. 296, 19 I.A. 203; *Ananda* v. *Parbati* (1907) 4 Cal. L.J. 198, 207; *Mulchand Hazarimal* v. *Hassomal* (1937) 171 I.C. 127 (1937) A. S. 177; *Mt. Shamez-un-Nissa Bibi* v. *Sh. Ali Asghar* (1935) O. W.N. 1376, 159 I.C. 780, (1936) A.O. 87.

(*h*) *Mahanta Bhagaban* v. *Bisweswar* (1927) 44 Cal. L. J. 434, 100 I. C. 302, ('27) A.C. 220.

(*i*) *Ali Mahamud* v. *Aftahuddin* (1915) 20 Cal. W.N. 355, 34 I.C. 251.

(*j*) *Joy Chandra* v. *Sreenath* (1902) 32 Cal. 357 P.C.; *Mohmad Surjat* v. *Mst. Chandhi* (1927) 97 I. C. 988, ('27) A. N. 41; *Kanchedilal* v. *Kanhai* (1932) 140 I.C. 890, ('32) A.N. 165; *Tejumal Josumal* v. *Rochalbai* (1940) Kar. 408, 191 I.C. 553, (1940) A.S. 212; *Nagorao Nimbaji* v. *Jogeshwar Murlidhar* (1944) A.N. 20.

(*k*) *Asima Bibi* v. *Shamialanand* (1913) 40 Cal. 378, 17 I.C. 758 P.C.

(*l*) *Earif-un-nisa* v. *Shafiq-uz-zaman Khan* (1928) 3 Luck. 372, 55 I.A. 303, 113 I.C. 113, ('28) A. PC. 202; *Firm Bhagat Amirchand* v. *Bibi Fatima* (1937) 169 I.C. 958, (1937) A. Pesh. 58.

(*m*) *Chandi* v. *Anant Bali* (1943) A.O. 398, (1943) O.W.N. 274.

(*n*) *K. V. Galliara* v. *U Thet* (1929) 7 Rang. 118, 117, I.C. 580, ('29) A.R. 117.

(*o*) *Pt. Sita Ram* v. *Raj Narayan* (1934) 150 I.C. 145, ('34) A.O. 283.

(*p*) *Banga Chandra* v. *Jagat Kishore* (1916) 44 Cal. 186, 43 I.A. 249, 36 I.C. 420; *Hari Kishen* v. *Kashi Pershad* (1914) 42 Cal. 876, 42 I.A. 64, 27 I.C. 674; *Raj Lukhee Debea* v. *Gokool Chandra* (1869) 13 M.I. A. 209, 12 W.R. 47 P.C.

(*q*) *Pandurang* v. *Markandeya* (1922) 49 Cal. 334, 49 I.A. 16, 65 I.C. 954 ('22) A. PC. 20; *Fazal Hussain* v. *Jiwan Shah* (1933) 14 Lah. 369, 142 I.C. 454, ('33) A. L. 551.

(*r*) *Tarabag Khan* v. *Nanak Chand* (1932) 138 I.C. 263, ('32) A. L. 566; *Bhagwat Rai* v. *Gorakh Rai* (1934) 150 I.C. 765, ('34) A.P. 93; *Sundar Kear* v. *Uday Ram* (1944) A.A. 42.

(*s*) *Kandasami* v. *Nagalinga* (1912) 36 Mad. 564, 16 I.C. 30; *Narayana* v. *Rama Aiyar* (1915) 38 Mad. 396, 20 I.C. 625.

(*t*) *Pandurang* v. *Markandeya*, *supra*, at p. 344; *Mollaya* v. *Krishnaswami* (1924) 47 Mad. L. J. 622, 85 I.C. 555, ('25) A. M. 94.

It has been said that the words "with the consent express or implied" govern the word "transfers" (*u*). This is erroneous for if the real owner consented to the transfer he would be estopped under sec. 115, Indian Evidence Act, irrespective of this section (*v*). Moreover the section applies when the person, who, with the consent express or implied of the real owner, is in the position of an ostensible owner, makes a transfer of which the real owner is unaware.

(6) Reasonable care.—Reasonable care has been explained to mean such care as an ordinary man of business would take (*w*). Reasonable care is to be expected from every one who claims to have purchased free from a really existing right (*x*). Revenue records are not documents of title, and it is not safe to rely on the entry of the transferor's name in the revenue registers. A transferee who does so and omits to inquire into title is not protected by this section (*y*). This also applies to entries in Municipal and Police registers (*z*). Mere entrusting an inquiry to a solicitor does not amount to reasonable care (*a*)

Illustrations.

(1) A tahsildar, being forbidden by departmental rules from acquiring land within the limits of his tahsil, purchased land in the name of his minor sons and entered it in their names in the revenue records. The sons afterwards sold and mortgaged the land to person who acted in good faith and in reliance on the entries in the revenue papers. Nevertheless the purchasers and mortgagees were not entitled to the protection of this section as they should not have been satisfied with entries in the revenue records: *Pertab Chand* v. *Saiyida Bibi* (1901) 23 All. 442.

(2) *A* is the owner of property which is entered in the revenue records in the name of *B*. *B* mortgages the property to *C* who accepts the mortgage relying on the revenue register. If *C* had made further inquiry he would have found that *A* had objected to the entry of the property in *B*'s name and that the property had been left to *A* by will. *C* is not protected by this section: *Nageshar Prasad* v. *Raja Pateshri* (1915) 20 Cal. W.N. 265, 34 I.C. 673 P.C.

It may be that on the facts of a case it is sufficient if the purchaser ascertains that his vendor *is in possession and is entered in the revenue records* (*b*) [ills. (1) and (2)], but this does not dispense with the duty to make the usual inquiry into title (*c*) [ill. (3)].

(*u*) *Shafiqullah* v. *Samiullah* (1930) 52 All. 139, 123 I.C. 101, ('29) A.A. 948.

(*v*) *Fazal Hussain* v. *Muhammad Kazim* (1934) All. L.J. 544, 56 All. 582, 150 I.C. 81, ('34) A.A. 193. See also *Fakruddin Saib* v. *Ramayya Setti* (1944) A.M. 299; *Jesa Ram* v. *Ghulaman* (1936) A. L. 816; *Satyanarayana Murthi* v. *Pydaya* (1943) A.M. 459.

(*w*) *Kanhu Lal* v. *Palu Sahu* (1920) 5 Pat. L.J. 521, 57 I.C. 353; *Siddappa* v. *Vishwanathsa* (1943) A.B. 419.

(*x*) *Zungabai* v. *Bhawani* (1907) 9 Bom. L. R. 388.

(*y*) *Nageshar Prasad* v. *Raja Pateshri* (1915) 20 Cal. W. N. 265, 34 I. C. 673 P. C.; *Partap Chand* v. *Saiyida Bibi* (1901) 23 All. 442; *Thungasalu Chetty* v. *Mangathayu Ammal* (1918) M. W. N. 674, 21 I.C. 21; *Maung Po* v. *Maung Mye* (1915) 8 Bur. L.T. 85, 27 I.C. 777; *Sheogobind* v. *Anwar Ali* (1929) 116 I. C. 779, ('29) A.P. 305; *Mohamad Sujat* v. *Mst. Chandbi* (1927) 97 I.C. 968, ('27) A. N. 41; *Ram Chalitra* v. *Shiunandan* (1934) 150 I.C. 932, ('34) A.P. 67; *Hargovind Prasad* v. *Babu Ambika Dutt Ram* (1934) 9 Luck. 571, ('34) A. O. 165; *Har Narain* v. *Ashiq Husain* (1942) 17 Luck. 686, 199 I.C. 808, (1942) A.O. 313.

(*z*) *Kartar Singh* v. *Mst. Mehr Nishan* (1934) 16 Lah. 313, 155 I.C. 1064, ('34) A.L. 885.

(*a*) *Purnendu Nath* v. *Hanut Mull* (1940) A.C. 565, 71 C.L.J. 520, 44 C.W.N. 813, 192 I.C. 416.

(*b*) *Mubarakunnissa* v. *Muhammad Raza* (1924) 46 All. 377, 79 I.C. 174, ('24) A.A. 384; *Makkoma* v. *Masambi* (1925) 27 Bom. L. R. 208, 86 I.C. 876, ('25) A. B. 299; *Muhammad Din* v. *Mst. Sardar Bibi* (1927) 104 I.C. 394, ('27) A. O. 448; *P. L. T. A. R. Chettyar Firm* v. *Maung Kyaing* (1929) 7 Rang. 276, 119 I. C. 217, ('29) A. R. 323; *Mahomed Shakir* v. *Shahjahan* (1921) 63 I. C. 125; *Mathura Prasad* v. *Anandi* (1923) 21 All. L. J. 496, 74 I.C. 911, ('24) A. A. 63; *Udho Das* v. *Mehr Baksh* (1933) 144 I.C. 340, ('33) A. L. 262.

(*c*) *Muhammad Shafi* v. *Muhammad Said* (1930) 52 All. 248, 122 I.C. 871, ('30) A.A. 337; *Muhammad Sulaiman* v. *[illegible] Bibi* (1922) 44 All. 674, 69 I.C. 761, ('22) A.A. 392.

Illustrations.

S. 41 (1) Three grandsons were heirs to $\frac{1}{3}$rd of an estate but they took possession of the whole and entered the whole in their names in the revenue registers, and mortgaged the whole property to a mortgagee who took in good faith. The other heirs to $\frac{2}{3}$rds of the property were barred by sec. 41 from disputing the mortgage of their share: *Mubarakunnissa* v. *Muhammad Raza* (1924) 46 All. 377, 79 I.C. 174, ('24) A.A. 384.

(2) *A* assigned a lease of town land to *B*, but *A* remained in possession and the land was not transferred to the name of *B* in the Government register. *A* leased a plot of the land to *C* who took the lease finding *A* in possession and the land standing in his name. *B* was barred by sec. 41 from asserting his title against *C*: *P.L.T.A.R. Chettyar Firm* v. *Maung Kyaing* (1929) 7 Rang. 276, 119 I.C. 217, ('29) A.R. 333.

(3) *A* gave a usufructuary mortgage of land to *B* in 1867 and *B*'s name was erroneously entered in the revenue records as owner. *B*, in 1914, mortgaged the land to *C*, part of the mortgage money being reserved to pay off a prior submortgage of 1902. *A* sued to redeem the mortgage of 1867. *C* pleaded that *B* was in possession, was registered as owner and represented himself to be owner and that he was not liable on the mortgage of 1867. If *C* had nade inquiry into title he would have found that in the mortgage of 1902 *B* had described himself as mortgagee. *C* was not entitled to the protection of this section: *Muhammad Shafi* v. *Muhammad Said* (1930) 52 All. 248, 122 I.C. 871, ('30) A.A. 847.

The transferee must show that he has made the usual inquiry into title otherwise he is not entitled to the protection of this section (*d*). In this connection the Courts have frequently quoted a well-known passage from Lord Lindley's judgment in *Bailey* v. *Barnes* (*e*):—

"A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way."

Illustrations.

(1) *A* and his brother *B* formed a joint and undivided Hindu family. *A* out of self-acquired funds purchased a house and took the conveyance in his own name. After *A*'s death his representatives sold the house to *C*. It appears that *A* had thrown the house into the common stock of the joint family, so that his representatives could only sell a half share. *C* claimed to have acquired title to the whole under sec. 41. But as he had made no inquiry into title at all and had not even seen the main deed of title passing the property to *A*, he was not entitled to the protection of this section: *Rajani Kanta* v. *Bashiram Mestari* (1929) 49 Cal. L.J. 532, 121 I.C. 409, ('29) A.C. 636.

(2) Sakina owned a house in Cawnpore. In 1912 she went on a pilgrimage to Mecca leaving the house in charge of a relation Badullah. In 1915 Badullah applied to the Municipality that he was not aware of Sakina's whereabouts and whether she was dead or alive,

(*d*) *Rajani Kanta* v. *Bashiram Mestari* (1929) 49 Cal. L. J. 532, 121 I. C. 409, ('29) A. C. 916; *Lala Jagmohan Dass* v. *Lala Indar Prasad* (1929) 4 Luck. 597, 115 I. C. 97, ('29) A. O. 160; *Zungbai* v. *Bhawani* (1907) 9 Bom. L. R. 388; *Rahiman Beebi* v. *Khatheon Bee* (1916) 35 I.C. 569; *Vyenkapacharya* v. *Yamanasami* (1911) 35 Bom. 269, 271, 10 I.C. 817; *Kusturi Bibi* v. *Ballirem* ('23) A. N.15, 68 I. C. 782; *Maung Hmwe* v. *Ma Lun* (1910) 11 I.C. 855; *Maung Than* v. *Ma On* (1910) 12 I.C. 858; *Kanchedilal* v. *Kanhai* (1932) 140 I.C. 390, ('32) A.N. 165; *Khatun Fatima* v. *Shib Singh* (1933) A.L.J. 1036, 147 I.C. 840, ('33) A.A. 917; *Sadha Singh* v. *Mangal Singh* (1933) 142 I.C. 860, ('33) A.O. 166; *U Po Shin* v. *Edward* (1934) 150 I.C. 896, ('34) A.R. 139; *Jamshedji* v. *Dorabji* (1933) 35 Bom. L.R. 1091, 149 I.C. 317, ('34) A.B. 1.

(*e*) (1894) 1 Ch. 25, 35.

and prayed that the house be entered in his name as he was her heir. The application was granted and two years later Badullah sold the house to the defendant who purchased in good faith after inspecting the Municipal register. Sakina returned to Cawnpore in 1918 and claimed the house. The defendant was not entitled to the protection of sec. 41 for he knew that Sakina was the original owner, and if he had carried his inquiries further he would have ascertained that Badullah had admitted in his application to the Municipality that he did not know whether Sakina was dead or alive and the presumption of death could not be made before the lapse of seven years: *Muhammad Sulaiman* v. *Sakina Bibi* (1922) 44 All. 674, 69 I.C. 701, ('22) A.A. 392.

(3) The male members of a Mahomedan family that had adopted the Hindu religion in matters of worship mortgaged family property without consulting the female members of the family. The mortgagee, a pleader, was under the impression that the parties were governed by Hindu law and that the females had no proprietary interest. The males had on previous occasions dealt with the property without the concurrence of the females. Nevertheless, as the mortgagee made no inquiry of the females or of their husbands and as the former were purdanisheen ladies who usually leave the management of property in the hands of male relations, the mortgagee was not protected by sec. 41: *Azima Bibi* v. *Shamalanand* (1913) 40 Cal. 378, 17 I.C. 758 P.C.

The title may be so clear that no particular inquiry is called for. In an Allahabad case (*f*) Stanley, C.J., said—"We think that where a person is found in possession of property, is recorded as owner, and holds the title deeds of the property and deals with a third party in respect of it, there is nothing to suggest a want of good faith in such third party in dealing with him in respect of the property." But there may be circumstances which demand further inquiry; and as to these it is not sufficient to assert generally that inquiries should have been made or that a prudent man would have made inquiry but some specific circumstance should be pointed out as a starting point of an inquiry which would have led to some result (*g*). The transferee cannot be held to have acted without reasonable care if there was no clue existing to suggest that the transferor was not the real owner (*h*). It is always necessary to make particular inquiry if the transferor is the karta of a joint family (*i*), or if the land is in possession of a person other than the transferor (*j*). A person who takes a mortgage from one whom he knows to be the sister's son or grandson of the original owner ought to inquire if there are any collaterals in existence (*k*).

When the real owner is a woman who has allowed her male relations to deal with her property or her share of the property, her right may be defeated by the operation of this section, if the transferee has acted bona fide and has taken reasonable care to investigate title. Such cases turn on their own facts. In *Azima Bibi* v. *Shamalanand* (*l*), a case already referred to, the Privy Council held that purdanisheen ladies who had left the management of their property to their male relations were not bound by a mortgage

(*f*) *Khwaja Muhammad* v. *Muhammad Ibrahim* (1904) 26 All. 490, 498.

(*g*) *Ramcoomar* v. *Macqueen* (1872) I.A. Sup. Vol. 4 ; 18 W. R. 166; *Baidya Nath* v. *Alef Jan* (1922) 36 Cal. L.J. 9, 70 I.C. 194, ('23) A. C. 240; *Rajani Kanta* v. *Bashiram Magari* (1929) 49 Cal. L.J. 582, 121 I.C. 409, ('29) A.C. 696; *Gholam Siddique* v. *Jogendra Nath* (1926) 31 Cal. W. N. 205, 96 I.C. 199, ('26) A.C. 916; *Sheetahal* v. *Lal Narain* (1930) 124 I.C. 418, ('30) A.A. 422; *Mt. Jasodar Dusadhin* v. *Mt. Sukurmani* (1937) 170 I.C. 1005, (1937) A.P. 253.

(*h*) *Maung Po Lu* v. *Bank of Chettinad* (1934) 154 I.C. 249, ('34) A.R. 313; *Shiam Lal* v. *Mata Din* (1934) 151 I.C. 576, ('34) A.O. 460; *D.A.V. College Reg. Society, Lahore* v. *Umrao* (1935) 157 I.C. 92, ('35) A.I. 410; *Mashir Hasan* v. *Mukhtar Hasan* (1938) A.A. 64, (1937) A.L.J. 1356, 173 I.C. 360.

(*i*) *Kanhu Lal* v. *Ram Singh* (1920) 5 Pat. L.J. 521, 57 I.C. 353.

(*j*) *Vyankapacharya* v. *Yamanasami* (1911) 35 Bom. 269, 10 I.C. 317.

(*k*) *Ballu Mal* v. *Ram Kishan* (1921) 43 All. 263, 64 I.C. 14, ('21) A.A. 311; *Fazal Hussain* v. *Muhammad Kasim* (1934) A.L.J. 544, 56 All. 580, 152 I.C. 81, ('34) A.A. 193.

(*l*) (1913) 40 Cal. 378, 17 I.C. 758 P.C.

S. 41

of family property executed by them alone. In an Allahabad case (*m*) Mukerji, J., observed that in Mahomedan families, the names of female heirs are never entered in the revenue records and that "if we are to say that Mahomedan sons, simply because their names alone are down in the *khewat*, are entitled to give good title to a transferee, and the mother and the sisters shall be precluded from claiming their shares, it would be disastrous indeed." Similarly in a Nagpur case (*n*) two Mahomedan brothers and a sister inherited property, and the sister allowed it to be entered in the revenue records in the names of the brothers who sold it without consulting the sister; but the Court said that "the facts that the transferors were Mahomedans ought to have put the present defendant and his predecessors in interest on enquiry as to whether there was a female heir in addition to the two transferors." In *Zarif-un-nisa* v. *Shafiq-uz-zaman Khan* (*o*) the Privy Council held that the Mahomedan sisters who left their share of inherited property in the hands of a spendthrift brother were barred by the section as they had husbands who understood business. But in *Mubarakunissa* v. *Muhammad Raza* (*p*) the property of a deceased Mahomedan was inherited by three grandsons and two daughters. The grandsons took possession of the whole property, entered it in their own names in the register and two years later mortgaged it. The daughters first heard of the mortgage when the mortgagee brought the property to sale, and although it does not appear that they had husbands to protect their interests, their claim was held barred by section 41. In *Macneill & Co.* v. *Saroda Sundari* (*q*) two Hindu brothers managed the property in which their mother had a third share, and the mother's share was held bound by a permanent lease which they had granted without reference to her. The Court distinguished the Privy Council case of *Azima Bibi* (*r*) on the ground that Hindu women do not as a rule succeed to property by inheritance.

(7) Good faith.—These words mean that the transferee has acted honestly and in the real belief that the ostensible owner is the real owner. Reasonable care is not enough if there is absence of good faith. A person may act without negligence, but at the same time without honesty. A purchaser may have made a reasonably careful inquiry, but if, after ascertaining the true facts, he chooses to ignore them, he is not protected (*s*). But when a man purchased a possessory title believing in good faith that his vendor was the real owner and any inquiry that he could have made would only have confirmed him in that belief; the Court held that he was protected by this section (*t*). The Court is slow to believe in the good faith of a transferee who lives in the same village as the real owner and is acquainted with all the circumstances of his family (*u*). Knowledge of the infirmity of the title of the transferor deprives the transferee of the protection of this section (*v*). Mere misconception of the rights of the transferor will not avail. So when a person bought property belonging to a female, who had been outcasted for unchastity, believing that her interest was forfeited he was not protected by this section (*w*). So also mere good faith is not sufficient. The purchaser must establish that he made reasonable inquiries (*x*).

(*m*) *Rasulam Bibi* v. *Nand Lal* (1930) A. L. J. 1091, 1093, 124 I.C. 757, ('30) A.A. 521; *Amir Jahn* v. *Khadim Hassain* (1931) 132 I.C. 74, ('31) A.O. 253.

(*n*) *Mahmad Sujat* v. *Mst. Chandbi* (1927) 97 I.C. 988, ('27) A.N., 41, 42.

(*o*) (1928) 3 Luck. 372, 55 I.A. 303, 113 I.C. 113, ('28) A.PC. 202.

(*p*) (1924) 46 All. 377, 79 I.C. 174, ('24) A.A. 384; *Mul Raj* v. *Fazal Imam* (1923) 45 All. 520, 74 I.C. 307, ('23) A.A. 583.

(*q*) (1928) 48 Cal. L.J. 374, 114 I.C. 142, ('29) A.C. 63, 33 Cal. W.N. 526.

(*r*) (1913) 40 Cal. 378, 17 I.C. 758 P.C.

(*s*) *Mt. Hakiman* v. *Mt. Badr-un-Nissa* (1934) 148 I.C. 742, ('34) A.L. 658.

(*t*) *Chandra Kanta* v. *Bhagjur* (1909) 1 I.C. 525.

(*u*) *Pateshri Pertab* v. *Nageshar* (1911) 8 All. L.J. 358, 10 I.C. 961 on app. (1916) 20 Cal. W.N. 265, 34 I.C. 673 P.C.

(*v*) *Lala Jagmohan Dass* v. *Lala Indar Prasad* (1929) 4 Luck. 597, 115 I.C. 97, ('29) A.O. 160; *Mollaya* v. *Krishnaswami* (1925) 47 Mad. L.J. 622, 85 I.C. 855, ('25) A.M. 95; *Ragho* v. *Dwarka Das* (1924) 79 I.C. 687, ('24) A.L. 788; *Mst. Abbas Bandi* v. *Saiyid Muhammad* (1929) 4 Luck. 452, 120 I.C. 387, ('29) A.O. 193.

(*w*) *Angammal* v. *Venkata* (1903) 26 Mad. 509.

(*x*) *Khwaja Afzal* v. *Md. Saheb* (1936) Nag. 177, 165 I.C. 177 (1936) A.N. 214.

(8) Partial interest.—The section also applies to cases where the transferor has actually some interest and the appearance of an interest greater than he really has. In one case the plaintiff granted a mortgage by conditional sale by two contemporaneous deeds, one a sale and the other an agreement of reconveyance. The plaintiff retained the agreement of reconveyance, and the mortgagee who was in possession sold the land after the lapse of 42 years to the defendant, who on inspection of the sale deed believed the mortgagee to be a vendee. The plaintiff sued to redeem the defendant, but sec. 41 was held to bar the suit (*y*). It may be observed, in passing, that such a case could not occur since the amendment of section 58 (c) which requires a condition of reconveyance in a mortgage to be engrossed in the same deed. Cases in which the transferor is a mortgagor or one of several heirs have already been cited.

(9) Onus of proof.—The section is an exception to the general rule that no person can dispose of an interest in property that is not vested in him and therefore the onus is in the first place on the transferee to show that the transferor was ostensible owner, and that he (the transferee) has acted in good faith and with reasonable care (*z*). The onus is then shifted on the party seeking to defeat the transferee's title to show that there was something to call attention and invoke inquiry. This is because the real owner having created the appearance of title in another person it is incumbent on him, or on those who derive title from him, to show something which amounts to constructive notice of the real title, some specific circumstance as the starting point of an inquiry which would have led to the discovery of it (*a*). The same rule was applied in a case where the ostensible owner had a lien on the property (*b*).

(10) Subsequent Transferee.—The section is not limited to the immediate purchaser from an ostensible owner but extends to subsequent purchasers also. Even if the immediate purchaser had notice, yet the ultimate purchaser if he purchases *bona fide* and with reasonable care is protected (*c*). *A* is the real owner of property and leaves it in the possession of *B* as ostensible owner. *B* sells it to *C* who has constructive notice of *A*'s title. *C* then sells it to *D* who is not aware of the fact which gave *C* constructive notice. *D* buys from *C* in good faith and after inquiry with reasonable care. *D* is entitled to the protection of the section.

(11) Section 52 Excludes Section 41.—The following case occurred in Allahabad. The property was in the possession of three illegitimate sons whose names were entered in the revenue records. The rightful heir filed a suit to recover possession and obtained a decree. But a few days after he filed the suit, the illegitimate sons mortgaged the property, and the mortgagee relying on their ostensible ownership claimed that the rightful heir was bound by the mortgage. The mortgagors whose names were entered in the revenue records and who were in possession were no doubt ostensible owners; but as the real owners had filed a suit against them it is clear that they were not on the date on which the mortgage was made ostensible owners with their *consent* express or implied. The doctrine of *lis pendens* under sec. 52, therefore, excludes the doctrine of ostensible ownership under this section (*d*).

(*y*) *Sethumadhava* v. *Bacha* (1928) 111 I.C. 539, ('28) A.M. 778. But see *Sahodra* v. *Badri Prasad* (1929) 122 I.C. 593, ('29) A.A. 737.

(*z*) *Maung Sin Ba* v. *Maung Kyme* (1934) 12 Rang. 55. 150 I.C. 667, ('34) A.R. 90; *Sunder Kuer* v. *Uday Ram* (1944) A.A. 42.

(*a*) *Rajani Kanta* v. *Bhashiram Mestari* (1929) 49 Cal. L.J. 582, 121 I. C. 409, ('29) A.C. 636; *Baidya Nath* v. *Alef Jan* (1922) 36 Cal. L.J. 9, 70 I. C. 194, ('23) A.C. 240; *Ramcoomar* v. *Macqueen* (1872) I.A. Supp. Vol. 40, 18 W.R. 166; *Mohamad Sujat* v. *Mst. Chandbi* (1927) 97 I.C. 968, ('27) A. N. 41.

(*b*) *Raja of Karvetnagar* v. *Saravana* (1916) 35 I.C. 893.

(*c*) *Gholam Siddique* v. *Jogendra Nath* (1926) 31 Cal. W.N. 205, 96 I.C. 199, ('26) A.C. 916; *Baidya Nath* v. *Alef Jan*, *supra*; *Purendu Nath* v. *Hemat Mal* (1940) A.C. 565, 71 C.L.J. 530, 44 C.W.N. 813, 192 I.C. 416.

(*d*) *Shafiqullah* v. *Samiullah* (1929) 52 All. 139, 123 I.C. 101, ('29) A.A. 948; *Gendmal* v. *Laxman* (1945) A.N. 84.

(12) Registration Act.—Section 41 should not be read so as to conflict with section 48 of the Registration Act, 1908. If *A* sells his property to *B* and before the sale deed is registered sells it again by a registered sale deed to *C*, *B*'s sale deed though registered later has priority. *C* cannot claim that *A* was the ostensible owner with the consent of *B* so as to bar *B*'s claim under sec. 41 (*e*).

(13) Section 66 of The Civil Procedure Code.—A transferee from a certified purchaser at a Court sale is, by virtue of sec. 66 of the Code of Civil Procedure, protected from a suit on the ground that his transferor was a benamidar (*f*).

Transfer by person having authority to revoke former transfer.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A* thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B*'s lease subject to the opinion of the surveyor as to *B*'s use of the house having been detrimental to its value.

Principle.—The principle of the section is that if a person has a right to transfer property, after exercising a right to revoke a previous transfer, a transfer of such property by him will imply an exercise of the right of revocation. The illustration shows that if the power of revocation is subject to a condition, the transfer is subject to the same condition (*g*).

If the first transfer is a gift and is revocable at the will of the donor it is void under sec. 126 of this Act.

There are no reported decisions under this section.

Transfer by unauthorised person who subsequently acquires interest in property transferred.

43. Where a person *fraudulently or* erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

(*e*) *Mathura* v. *Ambika* (1914) 12 All. L. J. 998, 25 I.C. 725.

(*f*) *Manji* v. *Hoorbai* (1911) 35 Bom. 342, 8 I.C. 752.

(*g*) See in this connection *Judah* v. *Mirza Abdool* (1874) 22 W.R. 60.

Illustration.

A, a Hindu, who has separated from his father *B*, sells to *C* three fields, X, Y and Z, representing that *A* is authorised to transfer the same. Of these fields Z does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying *A* as heir, obtains Z. *C*, not having rescinded the contract of sale, may require *A* to deliver Z to him.

(1) Amendment.—The words "fraudulently or" were inserted by the Amending Act 20 of 1929. The effect of the amendment is to make it clear that the erroneous representation may be either innocent or tainted with fraud. This had already been decided in cases decided before the amendment (*h*).

(2) Feeding the estoppel.—By the English law of estoppel, "where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or as it is usually expressed, *feeds the estoppel*" (*i*). The principle is based partly on the common law doctrine of estoppel by deed and partly on the equitable doctrine that a man who has promised more than he can perform must make good his contract when he acquires the power of performance.

Under the common law doctrine, if a man sells property which does not belong to him and afterwards acquires such title as enables him either wholly or partially to perform his contract, he is bound to do so; and the subsequently acquired estate feeds the estoppel which arises out of the vendor's covenants for title express or implied. In *Tilakdhari Lal* v. *Khedan Lal* (*j*), Lord Buckmaster stated the rule of estoppel by deed as follows —"If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes." The words "the estate instantly passes" are important, for under the common law rule the estate passed without any further act of the transferor, and the estoppel prevailed even against a purchaser for value. The application of the common law rule is complicated by many curious technicalities (*k*), and it is fortunate that it does not apply in India (*l*).

The equitable doctrine is an application of the equity which is enunciated in *Holroyd* v. *Marshall* (*m*), *Collyer* v. *Isaacs* (*n*) and *Tailby* v. *Official Receiver* (*o*), and which regards that as done which ought to be done. Under the English equity as soon as the property is afterwards acquired, an equitable estate in it passes to the transferee. Under the Indian system as soon as the property is afterwards acquired, no estate passes (see sec. 54) but an obligation is annexed to the property (see sec. 40) and the transferor becomes trustee of it for the transferee. This equitable rule is enacted in sec. 18 (a) of the Specific Relief Act, 1877, which is as follows.—

> "Where a person contracts to sell or let certain property having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights :
>
> (a) If the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest."

(*h*) *Radhey Lal* v. *Mahesh Prasad* (1885) 7 All. 864; *Sarat Chander* v. *Gopal Chunder* (1893) 20 Cal. 296, 19 I.A. 203.

(*i*) *Rajapakse* v. *Fernando* (1920) A.C. 892, 897; *Fernando* v. *Gunatillake* (1921) 2 A.C. 357, 363.

(*j*) (1920) 48 Cal. 1, 20, 47 I.A. 239, 254, 57 I.C. 465, ('21) A.PC. 112.

(*k*) See the criticism of Sir George Jessel in *General Finance, etc., Co.* v. *Liberator, etc., Society* (1878) 10 Ch. D. 15.

(*l*) *Zamindar Bomaya* v. *Virappa* (1864) 2 Mad. H.C. 174; *Dooli Chund* v. *Birj Bhookun* (1880) 6 Cal. L.R. 528; *Mst. Uday* v. *Mst. Ladu* (1870) 13 M.I.A. 585; *Tilakdhari Lal* v. *Khedan Lal* (1920) 48 Cal. 1, 47 I.A. 239, 57 I.C. 465, ('21) A.PC. 112.

(*m*) (1862) 10 H.L.C. 191.

(*n*) (1881) 19 Ch. D. 342.

(*o*) (1888) 13 A.C. 523.

S. 43 Section 43 follows the common law rule of estoppel by deed in that the subsequent estate passes to the transferee without any further act of the transferor. But it departs from the common law rule in two respects. For (1) the estate does not pass instantly but only at the option of the transferee, and (2) the transferee may be defeated by a purchaser for value without notice. Section 43 follows the equitable rule in that, until the option is exercised, it treats the transferee as the beneficiary of a trust who may be defeated by a purchaser for value without notice. But it departs from the equitable rule in that it does not require the transfer to be effected by a further conveyance. The word "deliver" in the illustration is significant of the meaning of the section. If the transferee were enforcing the contract under sec. 18 (a) of the Specific Relief Act, the transferor would be required to execute a further conveyance. But under sec. 43 the exercise of the option or the mere requisition of the transferee is sufficient to bring the subsequent interest within the scope of the original transfer.

The principle of the section has been held to apply to Hindu conveyances and to transactions before 1872 when the Indian Evidence Act enacted the equitable rule of estoppel in section 115 (*p*).

(3) Fraudulently or erroneously represents.—The English common law doctrine of estoppel by deed was extended by equity to estoppel by representation. This extension dates from *Pickard* v. *Sears* (*q*). The rule in India is the rule as extended by equity and it is enacted in sec. 115 of the Indian Evidence Act, and is explained in the leading case of *Sarat Chander* v. *Gopal Chunder* (*r*). As the equitable doctrine of estoppel requires a man to make his representation good, the words "fraudulently or erroneously represents" have been said to make estoppel the foundation of the section, and in the absence of such representation the section does not apply (*s*). The representation need not be intentionally false (*t*), and whether it is erroneous or not, is a question of fact (*u*). When a vendor sold as agent of a Hindu widow and then became her heir, the section did not operate, for he had sold as agent and had made no erroneous representation (*v*). But when a Mahomedan mortgaged his wife's property purporting to act on a power of attorney which was not proved, the share which he inherited at her death was liable for the mortgage (*w*). A ghatwal mortgaged land which he held on restricted tenure alleging it to be his jagheer and subsequently got a mokarari lease of it. He was estopped from pleading his subsequent title, and the mortgagee got the benefit of the mokarari interest (*x*). Two brothers mortgaged their interest in a tank in which their cousin had a half share. They subsequently acquired their cousin's share by inheritance but the mortgagee who had got a decree for sale on his mortgage, purchased the property and sold it to the plaintiff. The plaintiff did not get the benefit of the cousin's share as there had been no representation erroneous or fraudulent (*y*). But when the head of a joint Hindu family mortgaged joint family property representing that he had a right to do so, he was bound to make good his representation to the extent of a share which came to him afterwards on partition (*z*).

(*p*) *Krishna Chandra* v. *Rasik Lal* (1916) 21 Cal. W. N. 218, 33 I. C. 568.

(*q*) (1837) 6 A. & E. 469.

(*r*) (1893) 20 Cal. 296, 19 I. A. 203.

(*s*) *Jagan Nath* v. *Dibbo* (1908) 31 All. 53, 1 I. C. 818; *Pandiri Bangaram* v. *Karumoory Subaraju* (1910) 34 Mad. 159, 8 I.C. 388; *Ladu Narain* v. *Gobardhan Das* (1925) 4 Pat. 478, 86 I.C. 721, ('25) A.P. 470; *Krishna Paramada* v. *Dhirendra* (1929) 56 Cal. 813, 56 I.A. 74, 113 I.C. 465, ('29) A.PC. 50; *Jabedali* v. *Prasanna* (1923) 27 Cal. W.N. 433, 75 I.C. 281, ('23) A.C. 423; *Ram Bharosey* v. *Bhagwan Din* (1943) A.O. 196, (1943) O.W.N. 5, 204 I.C. 543.

(*t*) *Hattibudar* v. *Ander* (1915) 28 Mad. L.J. 44, 27 I.C. 785.

(*u*) *Saradamoyi* v. *Atul Chandra* (1922) 68 I.C 203, ('23) A.C. 165.

(*v*) *Syed Nurul Hossein* v. *Sheosahai* (1893) 20 Cal. 1, 19 I.A. 221.

(*w*) *Aisha Bibi* v. *Mahfuz-un-nissa* (1926) 46 All. 310, 78 I. C. 180, ('24) A.A. 362. See also *Hanuman Das* v. *Gursahay Singh* (1913) 18 Cal. L.J. 181, 21 I.C. 700.

(*x*) *Mokoda Debi* v. *Umesh Chundra* (1907) 7 Cal. L. J. 381.

(*y*) *Saradamoyi* v. *Atul Chandra* (1923) 68 I.C. 203, ('23) A.C. 165.

(*z*) *Kamla Prasad* v. *Nathuni* (1922) 66 I. C. 149, ('22) A. P. 347; *Ram Ratan* v. *Chaudhri* (1923) 26 O.C. 245, 71 I.C. 581, ('23) A. O. 265.

Again the father of a joint family consisting of himself and two sons sold family property representing that it was his self-acquisition. The vendee sued for possession and pending the suit one of the sons died. The vendee got the benefit of this accession to the father's estate and was awarded half of the property (*a*). So also where a member of a joint Hindu family mortgaged his undivided share in the joint property in favour of another person, alleging that he was separate from the rest of the members, and thereafter there was a partition giving such member certain property, it was held that the mortgage lien would be transferred to the property which fell to such member's share (*b*).

Illustration.

A and *B* were two brothers and effected a partition at which the equity of redemption of a mortgage shop was allotted to *A*. In 1903 *A* had disappeared and *B* sold the equity of redemption to *C* erroneously representing that it was ancestral property to which he was solely entitled. In 1924 *C* sued to redeem the mortgage of the shop and was met with the defence that he got no title from *B* as *A* was alive in 1903 and the equity of redemption belonged to him. It was proved that *A* died in 1914 leaving no heir except *B*. *C* was entitled to redeem as he was owner of the equity of redemption by virtue of this section : *Sundar Lal* v. *Ghissa* (1929) 27 All. L.J. 1087, 118 I.C. 705, ('29) A.A. 589.

When a person mortgages property which he has no right to mortgage and the property subsequently becomes vested in him, the mortgage will operate against him under the provisions of this section (*c*). When a lessor erroneously represents that he is authorised to lease a property and grants a lease of it, and afterwards acquires that property the lessee is entitled to have the property from the lessor (*d*). Where a partner sells the property of the firm in his own right and subsequently on the dissolution of the firm is allotted the same property, this section would apply (*e*).

Illustrations.

(1) A Hindu wife executed a mortgage of her husband's property as if it belonged to her, five years after he had disappeared. The mortgage was invalid as the presumption of death does not arise until 7 years. But when the mortgagee filed a suit more than 7 years later the mortgage was valid, as she then had acquired a widow's estate : *Mahadeo* v. *Har Buksh* (1928) 106 I.C. 489, ('28) A. O. 13.

(2) *A*, *B* and *C* owned a property in equal shares. *A* and *B* leased the whole property to *D* as if they were entitled to it to the exclusion of *C*. *C* died and bequeathed his share to *A* and *B*. *D*'s title as lessee of the whole property was perfected : *Sulin Mohan* v. *Raj Krishna* (1921) 25 Cal. W. N. 420, 60 I. C. 826, ('21) A. C. 582.

(3) *A* obtained property from *B* by way of exchange. At the time of the exchange *B* had only a half share although he professed to transfer the whole. When *B* subsequently purchased the remaining half it was available to perfect *A*'s title : *Bhairab* v. *Jiban* (1921) 33 Cal. L. J. 184, 60 I. C. 819, ('21) A. C. 748.

(4) Transferee acts on the representation.—The section does not expressly provide that the transferee should have been misled by the erroneous representation,

(*a*) *Muthuswami Pillai* v. *Sandana Velan* (1927) 53 Mad. L. J. 218, 101 I. C. 619, ('27) A.M. 649. Cf. *Sundar Lal* v. *Ghissa* (1929) 27 All. L. J. 1087, 118 I. C. 705, ('29) A.A. 589.

(*b*) *Kharag Narayan* v. *Janki Rai* (1936) 16 Pat. 230, 169 I.C. 906, (1937) A.P. 548.

(*c*) *Sarju Prasad* v. *Bindeshri* (1911) 33 All. 352, 9 I. C. 296; *Eshaq Lal* v. *Bulla* (1930) 122 I.C. 177, ('30) A.A. 115; *Villa* v. *Pelley* (1934) 148 I. C. 721, ('34) A.R. 51; *Ram Japan* v. *Jagesara Kuer* (1938) 182 I.C. 329, (1939) A.P. 116.

(*d*) *Protab Chandra* v. *Judisthir Das* (1914) 19 Cal. L. J. 408, 23 I. C. 69; *Aditya Prasad* v. *Parmananda* (1919) 4 Pat. L. J. 505, 53 I. C. 96; *Jyoti Prasad* v. *Chandra Kanta* (1937) 171 I.C. 435, (1937) A.P. 469.

(*e*) *Peyarelal* v. *Mt. Misri* (1940) A.A. 452, (1940) All. 674, (1940) A.L.J. [illegible], 192 I.C. 251.

S. 43 but, as said in *Mulraj* v. *Indar Singh* (*f*), the word "represents" clearly shows that the person in whose favour the equity is allowed to operate, must have acted on the representation. This has been settled by numerous decisions (*g*).

Illustration.

A mortgaged to *B* a half share in family property in which he was entitled only to a third share. Subsequently *A*'s father died and *A* became owner of a half share. But as *B* knew *A* had only a third share he could only enforce his mortgage against a third share: *Pandiri Bangaram* v. *Karumoory* (1911) 34 Mad. 159, 8 I. C. 388.

There is no estoppel by a false statement when the truth is known to both parties (*h*). The right of the transferee arises from the fact that he has not got what he paid for. If he knew that he was buying a defective title, he has paid less and got what he bargained for. So when a mortgagee of land attached to a deshgat watan knew that the mortgagor could only convey a life interest, the subsequent enlargement of the mortgagor's interest did not enure for his benefit, for he took merely the estate the mortgagor was capable of conveying at the date of the mortgage (*i*). It would, however, be otherwise if the transferor erroneously represented that he had the power to transfer (*j*).

Although it is necessary that the transferee should have been misled by the erroneous representation, it is no defence to the person estopped to plead that the transferee made no proper inquiry (*k*). Section 43 does not, like sec. 41, impose upon the transferee the duty of taking reasonable care (*l*). In *Bloomenthal* v. *Ford* (*m*) Lord Halsbury said that a person who has made a misstatement of fact that has been acted upon has no right to say "I told you so and so; but you ought not to have believed me. You were too great a fool. I had a right to mislead you because you were too great a fool."

Illustration.

A transfers property to *B* falsely representing that he is solely entitled to it. *B* believes *A*, but if he had made proper inquiry into the title he would have discovered that *A*'s cousin is owner of a share. *A* inherits his cousin's share. In spite of his negligence *B* is entitled to the share.

(5) For consideration.—The section does not apply if the transfer is not for consideration (*n*). A gift of future property is void: see sec. 124. It is a mere promise which cannot be enforced.

(6) Invalid transfer.—The section will not apply if the transfer is invalid as being forbidden by law or contrary to public policy. This follows from the principle that

(*f*) (1926) 48 All. 150, 92 I.C. 471, ('26) A. A. 102.

(*g*) *Pandiri Bangaram* v. *Karumoory* (1911) 34 Mad. 159, 8 I.C. 388; *Lakshmi Narasayyar* v. *Meenakshi* (1919) M.W.N. 707, 52 I.C. 992; *Chakrapani* v. *Gayamoni* (1919) 48 I.C. 228; *Hattikudur* v. *Andar* (1915) 28 Mad. L.J. 44, 27 I.C. 785; *Kodi* v. *Moidin* (1918) 35 Mad. L.J. 120, 49 I.C. 147; *Dwarka* v. *Nasir* (1925) 78 I.C. 850, ('25) A.O. 16; *Gopi Nath* v. *Rup Ram* (1930) 28 All. L.J. 926, ('30) A.A. 786; *Sundar Lal* v. *Ghisea* (1929) 27 All. L.J. 1087, 118 I.C. 705, ('29) A.A. 589; *Ladu Narain* v. *Gobardhan* (1925) 4 Pat. 478, 86 I. C. 721, ('25) A. P. 470; *Chakrapani* v. *Gayamani* (1918) 48 I. C. 228; *Jagernath* v. *Mt. Dhanpati* (1934) 151 I.C. 809, ('34) A.A. 969; contra, *Jag Mohan* v. *Sita Ra* (1917) 20 O.C. 72, 39 I.C. 186 (bad law).

(*h*) *Mohori Bibee* v. *Dhurmodas Ghose* (1905) 30 Cal. 539, 30 I. A. 114; *Prasanna Kumar* v. *Srikantha Rout* (1913) 40 Cal. 173, 16 I. C. 365; *Dwarka Prasad* v. *Nasir Ahmed* (1925) 78 I. C. 850, ('25) A. O. 16; *Bhagwan Din* v. *Muhammad Unus Khan* (1934) 9 Luck. 359, 148 I.C. 367, ('34) A.O. 112; *Maina* v. *Bhagwati Prasad* (1936) A.A. 557, (1936) A.L.J. 1230, 164 I.C. 193.

(*i*) *Gangabai* v. *Banwant* (1910) 34 Bom. 175, 5 I. C. 866.

(*j*) *Kunwar Bahadur* v. *Gilsher Khan* (1937) A.A. 287.

(*k*) *Gopi Nath* v. *Rup Ram* (1930) 28 All. L.J. 926, 133 I.C. 17, ('30) A.A. 786; *Madiraru* v. *Bommadevara* (1946) A.M. 107.

(*l*) *Maung Ba Tin* v. *Maung Po Kin* (1935) 14 Bur. L. R. 329; *Ganga Prasad* v. *Mt. Raghubansa* (1936) O.W.N. 1241, 165 I.C. 793, (1937) A.O. 127.

(*m*) (1897) A. C. 156, 162.

(*n*) *Jaggan Nath* v. *Dibbo* (1908) 31 All. 58, 1 I.C. 818.

there can be no estoppel against an Act of the Legislature. Thus if a minor transfers the section has no application (*o*). In *Barrow*'s case (*p*) Bacon, V. C., said that "estoppel only applies to a contract *inter partes*, and it is not competent to parties to estop themselves or any body else in the face of an Act of Parliament." No equities can arise out of a transaction that is forbidden on grounds of public policy (*q*). In *Annada Mohan* v. *Gour Mohan* (*r*), Mookerjee, J., said that the principle of feeding the estoppel has no application when the contract of assignment refers to property which has been expressly rendered inalienable by the Legislature. The interest of a Hindu reversioner is a *spes successionis* and is not transferable. An agreement to transfer, or a transfer of, such an interest does not become effective when the succession opens out (*s*). But in two cases the Madras High Court has held that if the reversioner transfers, not his reversionary interest, but the land *in præsenti* as if he were absolutely entitled, section 43 will apply to validate the transfer when he succeeds to the property (*t*). This distinction seems to have the support of the illustration to the section where *A* transfers field Z as to which he has only an expectancy of succession. In another case (*u*) the Madras High Court has dissented on the ground that such a distinction would defeat the provisions of sec. 6 (a). The Allahabad High Court however has followed the earlier Madras case holding that the illustration to sec. 41 is not repugnant to sec. 6 of the Act (*v*).

The section does not apply to transfers forbidden by law on grounds of public policy. Thus a mortgage by a proprietor disqualified under the Jhansi Encumbered Estates Act 16 of 1882, cannot be enforced after the disqualification has been removed (*w*). A purchaser of service inam land acquires no title after the land has been enfranchised (*x*). The Court cannot under the guise of sec. 43 uphold a transfer forbidden by law, but if the restriction on alienation is not an absolute restriction founded on considerations of public policy but is only imposed by agreement, grant, or decree of Court the section will apply (*y*).

A mortgage by a judgment-debtor of property which is the subject of execution by the Collector is absolutely void and is not effective against any residue that might be left after the Collector's regime has ended (*z*). On the other hand a mortgage by an undischarged insolvent becomes effective if the property reverts in the insolvent after his discharge (*a*).

(*o*) *Ajudhia Prasad* v. *Chandan Lal* (1937) A.A. 610 (F.B.)

(*p*) (1880) 14 Ch. D. 432, 441; *Sitharama* v. *Krishnaswami* (1915) 38 Mad. 374; *Sanjib Chandra* v. *Santosh Kumar* (1922) 49 Cal. 507, 69 I.C. 818, ('22) A.C. 436.

(*q*) *Sannamma* v. *Radhabhayi* (1918) 41 Mad. 418, 43 I.C. 935; *Ramasami Naik* v. *Ramasami Chetti* (1907) 30 Mad. 255; *Ramayya* v. *V. Jagannadhan* (1916) 39 Mad. 930, 30 I.C. 889; *Gopala Dasu* v. *Rami* (1921) 44 Mad. 946, 948, 64 I.C. 328, ('21) A. M. 410; *Ramayya* v. *Dhara Satchi* (1913) 25 Mad. L. J. 635, 21 I.C. 600.

(*r*) (1921) 48 Cal. 536, 59 I.C. 476, ('21) A.C. 501, on app. (1923) 50 Cal. 929, 50 I. A. 239, 74 I.C. 499, ('23) A.PC. 189.

(*s*) *Sri Jagannada* v. *Sri Rajah Prasada Rao* (1916) 39 Mad. 554, 29 I.C. 241; *Annada Mohan* v. *Gour Mohan*, *supra*; *Dwarka Prasad* v. *Nasir Ahmed* (1925) 78 I.C. 850, ('25) A.O. 16; *Bhairon* v. *Baldeo* (1903) 7 O.C. 98; *Bindeshwari Singh* v. *Har Narain* (1929) 4 Luck. 622, 127 I.C. 20, ('29) A.O. 185.

(*t*) *Alamanaya* v. *Murukuti* (1915) 29 Mad. L. J. 733, 29 I.C. 439; *Vellayammal* v. *Palaniyandi Ambulam* (1933) 65 Mad. L. J. 772, 147 I.C. 331, ('33) A.M. 856.

(*u*) *The Official Assignee of Madras* v. *Sampath Naidu* (1933) 65 Mad. L. J. 588, 145 I.C. 965, ('33) A.M. 795; *Ram Bharosey* v. *Bhagwan Din* (1943) A.O. 196 (1943) O.W.N. 5, 204 I.C. 547.

(*v*) *Shyam Narain* v. *Mangal Prasad* (1935) All. L. J. 13, 153 I.C. 163, ('35) A.A. 244.

(*w*) *Radha Bai* v. *Kamod* (1907) 30 All. 38.

(*x*) *Sannamma* v. *Radhabhayi*, *supra*; *Ramayya* v. *Dhara Satchi* (1913) 25 Mad. L. J. 635, 21 I.C. 600; *Narahari* v. *Korithan* (1913) 24 Mad. L. J. 462, 19 I.C. 881; *Ramayya* v. *Jagannadhan* (1916) 39 Mad. 930, 30 I.C. 889.

(*y*) *Balbhaddar* v. *Kueshar Das* (1928) 3 Luck. 636, 110 I.C. 357, ('28) A.O. 344; *Kueshar* v. *Balbhaddar* (1928) 107 I.C. 872, ('28) A.O. 158.

(*z*) *Gaurishankar* v. *Chinumaya* (1918) 46 Cal. 183, 45 I.A. 219, 48 I.C. 312 dissenting from *Magniram* v. *Bakubai* (1912) 36 Bom. 510, 16 I.C. 570.

(*a*) *Rup Narain Singh* v. *Har Gopal Tewari* (1933) 55 All. 508, (1933) All. L.J. 475, 143 I.C. 836, ('33) A.A. 449; *Dewan Chand* v. *Manakchand* (1934) 1[illegible] Lah. 202, 155 I.C. 938, ('34) A.L. 809.

S. 43

(6A) Punjab.—The principle of the section has been applied to the Punjab where a transfer of a *spes successionis* is valid, see note (8) to s. 6 (a). Therefore a mortgage of property to which the mortgagor has only a reversionary interest becomes effective when the succession opens out (*b*).

(7) Covenants for title.—In *Basava Sankaran* v. *Anjaneyulu* (*c*) an Official Receiver sold property before an order vesting it in him had been made, and the implied covenant of title was treated as an erroneous representation and under sec. 43 the title of the purchaser was held to be complete when the vesting order was subsequently made. It would appear, however, that the representation under this section should be distinct from the transfer and the covenant in the transfer.

(8) When there is no representation.—As stated above the section does not apply to cases where there has been no erroneous or fraudulent representation. But the section has its origin in two different equities, one of which does not involve misrepresentation. These are—

(1) The equity of estoppel with regard to the passing of property whereby the transferor is estopped from saying that the after-acquired interest did not pass, and

(2) The equity with regard to the personal obligation which compels the transferor to perform his contract when he is able to do so on the acquisition of the subsequent interest.

The first equity compels a man to make good his representation, and this comes very near the second equity which compels a man to perform according to his ability when performance becomes possible. Cases under the second equity where there is no representation may therefore bear a very close resemblance to cases under the section. The following are instances of the application of this second equity which is outside the rule of estoppel. In *Viraya* v. *Hanumanta* (*d*) a Hindu coparcener agreed to sell family property as if he was the owner. The purchaser sued to enforce the transfer and pending the suit one of the two other coparceners died. The purchaser was entitled to half the property. In *Gaya Din* v. *Kashi* (*e*) the plaintiff was suing for pre-emption, and in order to raise money for the litigation, in anticipation of a decree, mortgaged the property in suit. After he obtained a decree and got possession, equity treating that as done which ought to be done, gave the mortgagee a charge on the property and placed him in the position of a mortgagee. In *Deb Nath Moral* v. *Sashi Bhusan Moral* (*f*), a landlord made a settlement of a non-transferable holding. The settlement was invalid at the time it was made because the raiyat had not abandoned the holding. But the subsequent abandonment of the holding by the raiyat validated the settlement. In *Loot Narain* v. *Showkie Lal* (*g*) a ghatwal mortgaged his ghatwal land by zuripeshgi lease and shortly after the mortgage the zemindar got a decree by which the ghatwal tenure was extinguished and evicted the mortgagee. Some years later the zemindar granted the ghatwal a permanent lease of the same land. The ghatwal was held liable to make good the zuripeshgi lease out of his new estate. In *Surendra* v. *Rajendra* (*h*) a ghatwal mortgaged property which he held on restrictive tenure. The restriction was subsequently removed and as to the enlarged interest Mookerjee, J., said that the deed was operative as an executory

(*b*) *Autar Singh* v. *Lal Singh* (1934) 155 I.C. 880, ('34) A.L. 996.

(*c*) (1927) 50 Mad. 135, 99 I. C. 8, ('27) A. M. 1 F. B., followed in *Muthiah Chettiar* v. *Doraswami* (1927) M. W. N. 794, 106 I. C. 641, ('27) A. M. 1091; cf. *Narasimudu* v. *Basava Sankaram* (1925) 47 Mad. L. J. 749, 85 I. C. 439, ('25) A. M. 249.

(*d*) (1890) 14 Mad. 459; *Randhir Singh* v. *Bhagwan Das* (1913) 35 All. 541, 21 I. C. 654.

(*e*) (1907) 29 All. 163; *Ram Lal* v. *Shiama Lal* (1931) 29 All. L. J. 73, 131 I. C. 38, ('31) A.A. 275; *Bansidhar* v. *Sant Lal* (1888) 10 All. 133.

(*f*) (1934) 37 Cal. W. N. 1144, 58 Cal. L. J. 145, 149 I. C. 1099, ('34) A. C 82.

(*g*) (1878) 2 Cal. L. R. 382.

(*h*) (1918) 27 Cal. L. J. 289, 43 I. C. 740.

agreement which attaches to the property the moment the restriction is removed and is transferred by equity to the mortgagee. This case is very similar to *Mokhoda Debi* v. *Umesh Chandra* (*i*) which has already been referred to but in which there was an erroneous representation by the ghatwal and which was therefore decided under sec. 43. A very good instance of the distinction between the section and this equity is the case of *Rustom Ali* v. *Abdul Jubbur* (*j*). *A* transferred a field to his wife *B* in satisfaction of dower and another debt. But at the time of the transfer the owner of the field was *C*, the sister of *A*. *C* sold the field to a party who sold it back to *A*. The lower Appellate Court had held that *B* was entitled to *A*'s after-acquired interest in the field under sec. 43. This decision was objected to in second appeal on the ground that there was no finding that *A* had made an erroneous representation. The High Court, however, thought it unnecessary to remand the appeal for a finding on this issue because the wife was entitled to it under the equity enunciated by Mookerjee, J., in *Surendra* v. *Rajendra* (*k*). This equity will not apply when the professed transfer is by a person incompetent to transfer, *e.g.*, if the mortgagor is a judgment-debtor whose property is being sold by the Collector in execution of a decree (*l*).

This equitable interest (like that under sec. 43) is not available against a transferee for value without notice. *A*, an undivided coparcener in a Mitakashara family, made a mortgage to *B* of the family property which he was not authorised to make. Subsequently there was a partition and a share of the family property was allotted to *A*. This share should have been liable to *B*'s mortgage but as *A* had sold it to *C* who had no notice of the mortgage, *B* could not enforce his mortgage against *C* (*m*).

(9) Mortgages.—In the case of transfer by way of mortgage, a discharge by a mortgagor of an incumbrance (*n*) or of a prior mortgage (*o*) enures for the benefit of the mortgagee. When the mortgagor of a chak acquires the mokarari interest that interest is an accession to the security and passes with it to the purchaser at a sale in execution of a decree on the mortgage (*p*). In a Calcutta case (*q*) three coparceners mortgaged family property in which an aunt had a share reciting in the deed that "the properties are owned and possessed by us." After the mortgagee's suit the aunt died, and Rankin, C.J., held that the increased share of the mortgagors became liable to the mortgage not only under sec. 43 but also on the principle that any enlargement of the mortgagor's interest enures for the benefit of the mortgagee [see s. 70]. In *Basar Khan* v. *Moulvi Syed Leakat* (*r*), the mortgage was of a mokarari interest which had been granted to the mortgagor by the widow of the owner. That interest failed as the widow proved to be only a benamidar. Nevertheless, as the mortgagor had inherited a share of the same estate from the real owner, the Privy Council held that the mortgage was binding to the extent of that share.

(10) Any interests which the transferor may acquire.—The section applies to all transfers except gifts, and it applies whatever the nature of the after-acquired interest may be. It applies when the transferor has no interest and subsequently acquires one, as in the case already cited of the mortgage of the subject-matter of a pre-emption suit (*s*). When the transferor has no interest but subsequently acquires a charge upon part of the property, the benefit of that charge will pass to the transferee (*t*).

(*i*) (1907) 7 Cal. L. J. 381.
(*j*) (1923) 76 I. C. 499, ('23) A. C. 535.
(*k*) (1918) 27 Cal. L. J. 289, 43 I. C. 740.
(*l*) *Gaurishankar* v. *Chinnaya* (1918) 46 Cal. 183, 45 I.A. 219, 48 I.C. 312, ('18) A.P.C. 168 dissenting from *Magniram* v. *Babubai* (1912) 36 Bom. 510, 16 I. C. 579 (where sec. 43 was wrongly applied).
(*m*) *Mst. Bhagunnah* v. *Chandi Singh* (1911) 14 O. C. 295, 13 I. C. 466.
(*n*) *Shyama* v. *Ananda* (1880) 3 Cal. W. N. 222.
(*o*) *Manjappa* v. *Krishnayya* (1906) 29 Mad. 113.
(*p*) *Surja* v. *Nanda Lal* (1906) 33 Cal. 1212.
(*q*) *Behary Lal* v. *Indra Narayan* (1927) 31 Cal. W.N. 985, 104 I.C. 206, ('27) A.C. 665.
(*r*) (1919) 23 Cal. W. N. 841, 50 I.C. 673, ('19) A.P.C. 14.
(*s*) *Gaya Din* v. *Kashi* (1907) 29 All. 169.
(*t*) *Mohan Singh* v. *Sewa Ram* (1924) 75 I.C. 579, ('24) A. O. 299.

S. 43

The section applies also when the transferor's interest is enlarged by the removal of a restriction on alienation (*u*), or by the discharge of an encumbrance (*v*) or of a prior mortgage (*w*), or when a *muafi* tenure ripens into a proprietary right (*x*). In this connection *Zollikofer & Co.* v. *Official Assignee* (*y*) is an instructive case. *S* mortgaged property to *Z* erroneously representing that he was the sole owner, when as a matter of fact a quarter share belonged to *J*. The whole property was subject to a prior mortgage which *S* then redeemed. *S* obtained a decree for contribution in respect of one-fourth of the money due to him on the prior mortgage against *J* and the decree made this a charge on *J*'s quarter share. *Z* discovered the defects in *S*'s title and *S* delivered the decree against *J* to *Z*. The delivery of the decree did not amount to an assignment, nevertheless the charge was a subsequent acquisition to which *Z* became entitled. Therefore on *J*'s insolvency *Z* was entitled to a charge on *J*'s quarter share as against the creditors of the insolvent.

The section, of course, has no application if the transferor does not acquire a further interest in the property transferred (*z*).

(10A) In such property.—The section applies when the transferee acquires an interest in the property which is the subject of the transfer. It does not apply to an interest acquired in any other property (*a*).

(11) Subrogation.—The principle of this section overrides the rule of subrogation enacted in sec. 92. *A* mortgages his property first to *B* and then to *C* and lastly to *D*. If *D* redeem *B* he is subrogated to the rights of *B*, and *C* is still subject to *B*'s mortgage now held by *D*. But if *A* himself redeems *B* he is not subrogated to the rights of *B* and the interest so acquired enures for the benefit of *C* and *D* and has the effect of enlarging their security (*b*). A mortgagor paying a debt for which he is liable cannot set up a charge against a subsequent encumbrancer (*c*). See note "Other than the mortgagor" under sec. 92.

(12) Execution sales.—The section has of course no application to execution sales (*d*). An execution sale stands on a different footing. The decree holder does not guarantee the title of the judgment debtor and the intending purchaser knows that under the law he can acquire nothing beyond the right title and interest of the judgment debtor (*e*). So when a *ghatwal* tenure was sold pending negotiations for its enfranchisement, the sale was invalid and the execution purchaser got nothing although the tenure was subsequently enfranchised (*f*).

(13) At the option of the transferee.—The word "option" implies that the transferee may take the after-acquired interest, but that it cannot be forced upon him. The title in the after-acquired property does not pass the instant it is acquired, but only on demand made by the transferee.

(14) At any time when the contract of transfer subsists.—The option of the transferee to require that the transfer should operate on any subsequently acquired interest can only be exercised while the contract subsists. If the transferee has rescinded the

---

(*u*) *Mokhoda Debi* v. *Umesh Chandra* (1907) 7 Cal. L. J. 381.

(*v*) *Shyamana* v. *Ananda*, *supra*.

(*w*) *Manjappa* v. *Krishnayya*, *supra*.

(*x*) *Balbhaddar Singh* v. *Kuseher Das* (1928) 110 I.C. 618, ('28) A. O. 344.

(*y*) (1926) 4 Rang. 532, 100 I. C. 261, ('27) A.R. 100.

(*z*) *Ramkrishna* v. *Anasuyabai* (1924) 26 Bom. L. R. 475, 86 I.C. 265, ('24) A. B. 300.

(*a*) *Babu Lal* v. *Noor Mohammad* (1934) 149 I.C. 313, ('34) A. A. 731.

(*b*) *Manjappa* v. *Kirshnayya* (1908) 29 Mad. 113; *Badan* v. *Murari Lal* (1915) 37 All. 309, 28 I. C. 978.

(*c*) *Syed Lutf Ali Khan* v. *Futteh Bahadoor* (1890) 17 Cal. 23, 16 I.A. 129.

(*d*) *Alukmonee Dabee* v. *Banee Madhub* (1877) 4 Cal. 677; *Nanak Chand* v. *Gandu Ram* (1938) A.L. 360, 40 P.L.R. 202, 177 I.C. 746.

(*e*) *Prasanna Kumar* v. *Srikantha Rout* (1914) 40 Cal. 173, 16 I. C. 365.

(*f*) *Purna Chandra* v. *Soudamini* (1918) 28 Cal. L. J. 263, 48 I. C. 335.

contract and elected to seek a remedy in damages, the contract is not in existence and the transferee can have no interest in the subject-matter of the contract. If he had taken such partial interest as the transferor can convey, the contract has not been fully executed, and is still executory as to the remaining interest; and when that interest is acquired the transferee can claim it.

A contractual obligation becomes extinguished by merger when it becomes the subject of a decree. Accordingly it has been held that the option cannot be exercised after the transferee has obtained a decree on the contract. In an Allahabad case (*g*) a Hindu mortgaged his own and his brother's share. He had no authority to dispose of his brother's share, but he inherited that share on his brother's death, after the mortgagee had obtained a decree on the mortgage. It was correctly held that the inherited share was not liable to the mortgage. But in a Madras case (*h*) a mortgage was executed by a Mahomedan woman and her eldest son, and in the mortgagee's suit the shares of the two younger sons were exonerated and a decree was passed against the shares of the mother and the eldest son. After the decree these shares were increased by the death of one of the younger sons, and execution was allowed against the increased shares of the mother and the eldest son. This was a correct order having regard to the terms of the decree, but the Court erred in saying that the contract of transfer subsists as long as the decree passed in the suit to enforce it was not *executed*.

(15) Proviso.—The proviso protects transferees in good faith without notice of the option (*i*). The option can be exercised against an heir of the transferor and all persons claiming under him except a purchaser in good faith for consideration without notice of the existence of the option (*j*). This is because until the option is exercised the transferee's right to the after-acquired property is only a contractual obligation and the transferor holds the interest as his trustee; see note (2) above, "Feeding the estoppel." *A* representing that he had a transferable interest in property in which he had no such interest mortgaged it to *B*. *A* subsequently acquired the transferable interest which he transferred to *C* who had no notice of *B*'s mortgage. The transfer was made before *B* had exercised his option, and therefore *B*'s mortgage was subject to the rights of *C* (*k*). In an Oudh case (*l*) *A* mortgaged to *B* a share in property to which he had no title representing himself to be the owner. Subsequently he acquired a charge over it by paying off a prior mortgage decree. Before *B* exercised his option *A* assigned the charge to *C*. The Court held that as *C* was not aware of *B*'s option he was not affected by the mortgage. But as the report shows that *C* was aware of *B*'s mortgage it is difficult to understand how he was unaware of the option, unless he was not aware that *A* had no title when he mortgaged.

Transfer by one co-owner.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or

---

(*g*) *Jadu Bans* v. *Sheojit Singh* (1911) 10 I. C. 443.

(*h*) *Ajijuddin* v. *Sheik Budan* (1895) 18 Mad. 492, followed in *Durga Das* v. *Muhammad Ismail* (1906) A. W. N. 155; *Sinclair* v. *Sitab Khan* (1890) 3 C.P.L.R. 72.

(*i*) *Durga Das* v. *Muhammad* (1906) All. W. N. 155.

(*j*) *Beni Rai* v. *Nataber Sirkar* (1916) 33 I. C. 975; *Hanuman Das* v. *Gursahay Singh* (1913) 18 Cal. L. J. 181, 21 I. C. 709; *Oheta Bahira* v. *Purna Chandra* (1914) 19 Cal. W. N. 1272, 27 I.C. 962, 967.

(*k*) *Oheta Bahira* v. *Purna Chandra*, *supra*.

(*l*) *Mohan Singh* v. *Sara Ram* (1924) 75 I. C. 579, ('24) A. O. 209.

S. 44

part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

(1) **Transfer by one co-owner.**—The principle of this section is that of subrogation or substitution. When one of several co-owners transfers his share, the transferee stands in the shoes of the transferor. He acquires as against the other co-owners the same rights that the transferee had, and is subject to any conditions and liabilities affecting the share at the date of the transfer. The section may be compared with sec. 74 where the ownership of the property is not divided between co-sharers but between a mortgagor and a first and second mortgagee. The second mortgagee paying-off the first mortgagee has all the rights the first mortgagee had against the mortgagor.

Illustration.

A, *B* and *C* are co-owners of a field that is subject to a mortgage. *C* transfers his share to *D*. *D* has a right to joint possession with *A* and *B*, and has also a right to claim partition and separate possession of his share. But the share *D* has acquired is still subject to the mortgage.

The transferee of a co-sharer acquires the rights of his transferor so far as is necessary to give effect to the transfer and no further. The transferee of a Hindu coparcener may acquire a right to joint possession or to ascertain his share by partition, but he will not acquire the status of a coparcener in the family.

(2) **Hindu law.**—The section applies to Hindus, but it does not alter any rule of Hindu law. The rights of the transferee of a coparcener both as to joint possession and as to partition vary in different schools of Hindu law and in different provinces. These differences are not affected by the section, for they are saved by the words "subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred." In Madras a purchaser from a coparcener is in no case entitled to joint possession. The Madras High Court has said that sec. 44 does not override this rule (*m*). It is submitted that the saving clause as to conditions and liabilities shows that the section is not intended to override any such rule.

The purchaser of the interest of a Hindu coparcener takes that interest subject to any charges or encumbrances affecting the coparcenary property or interest at the time of the transfer (*n*).

A Hindu coparcener filing a suit for partition must bring all the joint property into hotchpot, and his purchaser acquires the right to enforce partition but is under the same obligation of suing for general partition (*o*). The Allahabad High Court had held that the purchaser is entitled to partition of the specific property purchased without bringing

(*m*) *Kota Balabadra* v. *Khetra Doss* (1916) 31 Mad. L. J. 275, 37 I. C. 168.

(*n*) *Udaram* v. *Ranu* (1875) 11 Bom. H. C. 76; *Narayan* v. *Nathaji* (1904) 28 Bom. 201; *Venkureddi* v. *Venku Reddi* (1927) 50 Mad. 535, 538, 100 I.C. 1018, ('27) A.M. 471.

(*o*) *Udaram* v. *Ranu*, *supra*; *Murarrao* v. *Sitaram* (1899) 23 Bom. 184; *Shivmurteppa* v. *Virappa* (1900) 24 Bom. 128; *Ishvappa* v. *Krishna* (1922) 46 Bom. 925, 67 I. C. 833, ('22) A. B. 412; *Venkatarama* v. *Meera* (1890) 13 Mad. 275; *Palani* v. *Masakonan* (1897) 20 Mad. 243; *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555.

a suit for general partition (*p*). This decision was always doubtful law, and must now be treated as superseded by the section. A purchaser of the undivided interest of a son in joint family property takes that interest subject to the Hindu law liability attaching to that interest of paying his father's personal debts not tainted with immorality (*q*).

(3) Transfers his share or interest.—The section applies to all transfers including sales and mortgages. But partition must be necessary to give effect to the mortgage, if the transfer is in the nature of a mortgage (*r*). A lessee of an undivided share can maintain a suit for partition, if partition is necessary to give effect to the lease (*s*). Even a monthly tenant was allowed to enforce a partition when there was no probability of the lease being determined (*t*). In a suit for partition there must be unity of possession and unity of title (*u*); and a lessee of a share fulfills these conditions, for it is not necessary that the title should be of the same degree (*v*). A lessee does not lose his right to partition because the lease is liable to forfeiture in certain contingencies (*w*). When these conditions are fulfilled the only ground on which partition can be refused is that of inconvenience (*x*). Where, however, a co-owner has executed a usufructuary mortgage of his share in favour of another person, it is that person and not the original co-owner who is entitled to the unity of possession with other co-owners. So long as the mortgage subsists, the original co-owner cannot exercise any right to joint possession (*y*).

(4) Conditions and liabilities.—As the transferee acquires the rights of the co-sharer, he is also bound by any conditions and *liabilities* affecting the share at the date of the transfer. Instances have already been cited under note "Hindu law" *supra*, with reference to a purchaser of a share of a Hindu coparcener. A purchaser of a share is of course not liable for damage caused to the rest of the property by the transferor after the date of the transfer (*z*).

(5) Dwelling house.—The transferee of a share of a dwelling house of an undivided family cannot be put into joint possession. This exception follows the opinion of Westropp, C.J., in a Bombay case (*a*), that such a procedure would be inconvenient and lead to breaches of the peace. The proper course is to direct delivery of possession by partition in execution proceedings, or to leave the purchaser to his remedy by separate suit for partition (*b*). The Partition Act 4 of 1893 gives the co-sharer the option of buying out the transferee at a valuation to be made by the Court. With reference to the Partition Act it has been held that the term "dwelling house" includes not only the structure of the building but also adjacent buildings, curtilage, court yard, garden or orchard and all that is necessary to the convenient occupation of the house (*c*): and that the phrase undivided family is not limited to Hindus (*d*) but includes any group of persons related in blood who live in one house under one head, and that it applies if they are undivided *qua* the dwelling house which they own (*e*). The same construction applies to the words used

(*p*) *Ram Mohan* v. *Mul Chand* (1906) 28 All. 39.

(*q*) *Venkureddi* v. *Venku Reddi*, *supra*.

(*r*) *Hariharayyar* v. *Ahammadunni* (1940) A.M. 491, 51 M.L.W. 511, (1940) M.W.N. 59, 191 I.C. 57.

(*s*) *Muhammad Jaffer* v. *Mazhar-ul-ahsan* (1906) 3 All. L. J. 474.

(*t*) *Rajanimohan* v. *Sambhunath* (1930) 57 Cal. 715, 126 I.C. 121, ('29) A.C. 710.

(*u*) *Durga Charan* v. *Khandkar* (1918) 27 Cal. L. J. 441, 45 I.C. 705; *Maung Ba Tu* v. *Ma That Su* (1927) 5 Rang. 785, 106 I.C. 809, ('28) A. R. 73.

(*v*) *Bhagwat Sahai* v. *Bepin Behari* (1910) 37 Cal. 918, 37 I.A. 198, 7 I.C. 549.

(*w*) *Bhagwat Sahai* v *Bepin Behari*, *supra*.

(*x*) *Hemadri Nath Khan* v. *Ramani Kanta Roy* (1897) 24 Cal. 575 [F.B.]; *Rajanimohan* v. *Sambhunath* (1930) 57 Cal. 715, 126 I.C. 121, ('29) A.C. 710.

(*y*) *Harnandan Das* v. *Muhammad Kalim* (1944) A.P. 341.

(*z*) *Chandra Shekar* v. *Abidalli* (1925) 80 I. C. 920, ('25) A. N. 68.

(*a*) *Balaji* v. *Ganesh* (1881) 5 Bom. 499.

(*b*) *Girija Kanta* v. *Mohin Chandra* (1916) 20 Cal. W.N. 675, 35 I.C. 294.

(*c*) *Kshirode Chander* v. *Saroda Prosad* (1911) 12 Cal. L. J. 525, 7 I. C. 436; *Nilkamal* v. *Kamakshaya* (1928) 109 I. C. 67, ('28) A. C. 539; *Pran Krishna* v. *Surath Chandra* (1918) 45 Cal. 873, 45 I.C. 604.

(*d*) *Sultan Begam* v. *Debi Prasad* (1908) 30 All. 324; *Kalka Prasad* v. *Bankey Lal* (1906) 9 O.C. 156; *Nilkamal* v. *Kamakshaya*, *supra*.

(*e*) *Kshirode Chander* v. *Saroda Prosad*, *supra*; *Sivaramayya* v. *Kapa Venkata Subbanna* (1930) 53 Mad. 417, 126 I.C. 562, ('30) A.M. 561.

Ss. 44, 45

in this section (*f*), and it is not necessary that the family should have constantly lived in the dwelling house (*g*).

Joint transfer for consideration.

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

(1) **Co-owners' interests.**—When a transfer for consideration to two or more persons jointly makes them co-owners of the property transferred, their interests are in proportion to the shares of the consideration that they have advanced. If the consideration is paid out of a common fund their shares would be the same as their interests in that common fund. Although a mortgage is indivisible as between the mortgagor and the mortgagee, yet as between the mortgagees *inter se* their interests in the property would be proportionate to the shares of the mortgage money they had advanced. When four mortgagees advanced money in equal shares, and the fourth mortgagee consented to the mortgagor redeeming the other three mortgagees, he could only recover his one-fourth share of the mortgage money by sale of one-fourth of the property mortgaged (*h*).

(2) **Joint tenancy or tenancy in common.**—The section does not deal with the question whether the transferees take as joint tenants or as tenants in common. The rule of English law is to presume that a transfer to a plurality of persons creates a joint tenancy with right of survivorship, unless there are words of severance (*i*). This principle has been adopted in sec. 106 of the Indian Succession Act, 1925, replacing sec. 93 of the Indian Succession Act, 1865. A joint tenancy has been recognized in a gift by will of a Native Christian (*j*) and a Parsee (*k*). The Hindu rule is exactly the opposite. In *Jogeswar Narain* v. *Ram Chund Dutt* (*l*), the Privy Council said—"The principle of joint tenancy appears to be unknown to Hindu law, except in case of coparcenary between members

(*f*) *Masitullah* v. *Umrao* (1929) 119 I. C. 523, ('29) A.A. 414.

(*g*) *Pabita Bibi* v. *Adhar Chandra* (1929) 118 I.C. 579, ('29) A.C. 231.

(*h*) *Partab* v. *Nihal Singh* (1926) 96 I. C. 134, ('26) A. A. 376.

(*i*) *Morley* v. *Bird* (1798) 3 Ves. 628.

(*j*) *Arakal* v. *Domingo* (1911) 34 Mad. 80, 6 I.C. 7.

(*k*) *Nowroji* v. *Perozbai* (1899) 23 Bom. 80.

(*l*) (1896) 23 Cal. 670, 23 I. A. 37, 44; *Gopi* v. *Mst. Jaldhara* (1911) 33 All. 41, 7 I. C. 697; *Mst. Jio* v. *Mst. Rukman* (1927) 8 Lah. 219, 100 I.C. 54, ('27) A.L. 126.

of an undivided family." Even if the grantees are members of a coparcenary they will take as tenants in common (*m*), unless a contrary intention appears from the grant (*n*).

A joint tenancy may be severed and converted into a tenancy in commom by one of the joint tenants disposing of or contracting to sell his interest, or by mutual agreement, or by a course of dealing by all the joint tenants sufficient to indicate a severance (*o*). A tenant in common is entitled to joint possession, and if excluded from such possession may sue for a declaration of his right. But if there is no exclusion or denial of his right a tenant in common who gives up joint possession has no right of suit for his share of the joint profits (*p*). Entry by one co-tenant, in the absence of clean proof to the contrary, enures for the benefit of all. If *A* and *B* are co-tenants of property of which *A* is in actual possession, and *B* sells his share to *C*, the possession of *A* is the possession of *C* (*q*). But in a case where *A* and *B* were tenants in common, each in possession of a moiety and *A* took possession of *B*'s share on *B*'s death by right of inheritance, his possession was adverse to a purchaser from *B* (*r*).

(3) Presumption of equality.—In the absence of evidence showing in what shares the consideration was paid, there is a presumption that the co-owners' interests are equal (*s*). In a case where a common share which had been forfeited, was bought in by the Collector out of a fund contributed by the co-sharers, it was presumed that the Collector had debited an equal amount to each co-sharer, and that each co-sharer had an equal interest in the share when it was recovered (*t*). It has been held that when a person can produce evidence of the amount of his share but fails to do so, he cannot avail himself of this presumption of equality (*u*).

Transfer for consideration by persons having distinct interests.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(a) *A*, owing a moiety, and *B* and *C* each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mauza.

(*m*) *Bai Diwali* v. *Patel Bechardas* (1902) 26 Bom. 445; *Kishori Dubain* v. *Mundra Dubain* (1911) 33 All. 665, 10 I. C. 565; *Ram Piari* v. *Krishna* (1921) 43 All. 669, 63 I.C. 301, ('21) A.A. 50; *Janakiram* v. *Nagamony* (1926) 49 Mad. 98, 93 I. C. 662, ('26) A. M. 273.

(*n*) *Yethirajulu* v. *Mukunthu* (1905) 28 Mad. 363; *Narpat Singh* v. *Mahomed Ali* (1884) 11 Cal. 1 P.C.

(*o*) *Williams* v. *Hensman* (1861) 1 John and H 546; *Tan Chow Hoe Neo* v. *Chee Swee Cheng* (1929) 56 I. A. 112, 56 Mad. L. J. 643, 116 I.C. 385, ('29) A.PC. 72.

(*p*) *Radhakanta Pal* v. *Manmohinee Pal* (1933) 60 Cal. 292, 144 I.C. 193, ('33) A.C. 297.

(*q*) *Biswanath* v. *Rabija Khatun* (1929) 56 Cal. 616, 117 I.C. 593, ('29) A.C. 250.

(*r*) *Krishnachandra Das* v. *Poornachandra Das* (1935) 62 Cal. 305, 39 Cal. W. N. 159, 60 Cal. L. J. 232, 155 I. C. 967, ('35) A. C. 195.

(*s*) *Saiyad Abdullah* v. *Saiyad Ahmad* (1929), 27 All. L.J. 1196, 1199, 122 I.C. 666, ('29) A.A. 817.

(*t*) *Debi Pershad* v. *Mst. Akilo* (1899) 4 Cal. W. N. 465.

(*u*) *Ram Phor* v. *Ajudhia Singh* (1925) 87 I. C. 17, ('25) A. O. 960.

Ss. 46, 47

(b) *A* being entitled to a life-interest in mauza Atrali and *B* and *C*, to the reversion, sell the mauza for Rs. 1,000. *A's* life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase-money, *B* and *C* to receive Rs. 400.

Distinct interests.—This section is the converse of sec. 45. That section refers to interests in the property of several purchasers, while this section to the shares in the consideration of several vendors. Tenants in common have joint possession but distinct interests. A tenant for life and a remainderman have distinct interests, and so have a mortgagee and a mortgagor, and a lessee and a lessor (*v*). The value of the interest of a mortgagee is the mortgage money, and when a mortgagee and a mortgagor join in a conveyance, then in the absence of a contract to the contrary, the mortgagee is entitled to the mortgage money as the price of his interest, and the mortgagor to the balance as the price of the equity of redemption. The shares of the transferors in the consideration are in proportion to their respective interests in the property transferred. The second illustration is that of a tenant for life and a remainderman where it is necessary to have the respective interests value.

Transfer by co-owners of share in common property.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share and *B* and *C*, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half an anna share from each of the shares of *B* and *C*.

Transfer by tenants in common—When owners who hold an estate as tenants in common transfer a part of the estate, the share of each co-owner is proportionately reduced. If the shares are equal, each share is reduced equally. If the shares are unequal there is a greater reduction in the greater share, and a lesser reduction in the lesser share. A learned commentator contrasts the word "extent" in this section with the word "value" in section 46, and suggests that a different principle is adopted owing to the difficulty of valuation, for a share of greater value might be of less extent. The learned commentator seems to read the word "extent" as synonymous with "area". It is submitted that this is incorrect, for the section refers to a tenancy in common where although the shares are defined, the possession is joint. If each co-owner had a distinct plot, it would not be a case of a tenancy in common and there could be no question of a transfer of a share of the whole. The word "value" is more appropriate in section 46 which includes interests in land which have to be valued, while the word "extent" in this section means only the fraction that each share bears to the whole. The same fraction would determine the share of the consideration that each co-owner would be entitled to under sec. 46.

(*v*) *Morris v. Debenham* (1876) 2 Ch. D. 540.

The principle of this section was applied in a Sind case (w), where two Mahomedan zemindars who held an estate as tenants in common in equal shares sold an undivided half of it. One of the zemindars had been under the protection of the Manager, Encumbered Estates Act, and was by virtue of the Sind Encumbered Estates Act (Bombay Act 20 of 1891) incapable of alienating beyond his lifetime. After his death his heirs sued for partition and it was held that the vendee had taken one-fourth from each zemindar, so that the heirs were entitled to one-fourth.

Priority of rights created by transfer.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

(1) **Priority.**—The transferor cannot prejudice the rights of the transferee by any subsequent dealing with the property. This self-evident proposition is expressed in the equitable maxim *qui prior est tempore potior est jure*. The application of this maxim in English law is complicated by the preference given to the legal estate over the equitable interest. This complication does not occur in Indian law, but the rule in India is subject to certain exceptions which will presently be noticed.

Registered deed.—A transfer operates from the date of execution of the deed although it may have been registered at a later date (x). This is the effect of sec. 47 of the Registration Act 16 of 1908. Under the old Registration Acts of 1843 a registered document operated from the date of registration and not of execution.

(2) **Successive transfers.**—If there are successive transfers of the same property, the later transfer is subject to the prior transfer. Thus if *A* mortgages his property to *B*, and subsequently sells it to *C*, *C* purchases only the equity of redemption (y). Similarly in the case of two successive mortgages, the later or puisne mortgage is subject to the prior mortgage. The puisne mortgagee is only an assignee of the equity of redemption of the prior mortgage, and as such may sue to redeem it—see sec. 91 (a) post. A puisne mortgagee may sue for sale on his mortgage, but the property will be sold subject to the prior mortgage (z). If he sues for sale making the prior mortgagee a party but claiming no relief against him the prior mortgagee is in the position of a holder by title paramount outside the controversy (a). If the mortgagor gives two usufructuary mortgages of the same property, the prior mortgagee is entitled to possession (b).

A mortgage by deposit of title deeds is a completed transfer and not an oral agreement. This is now made clear by sec. 58 (f) of this Act as amended by Act 20 of 1929. The proviso to sec. 48 of the Registration Act as inserted by Act 21 of 1929 enacts that a mortgage by deposit of title deeds shall take effect as against any mortgage deed subsequently executed and registered relating to the same property. Even before the amending Acts of 1929 it was recognized that a mortgage by deposit of title deeds was not an oral

(w) *Mir Ali Nawaz* v. *Mir Ali Asghar* (1926) 97 I. C. 124, ('27) A. S. 62.

(x) *Motichand* v. *Sagun* (1905) 29 Bom. 46; *Mathura* v. *Ambika* (1914) 12 All. L. J. 963, 25 I.C. 735; *Bindbasini* v. *Somnath* (1916) 14 All. L. J. 292, 35 I. C. 247; *Gopal Ram* v. *Lachmi* (1926) 95 I.C. 138, ('26) A.A. 549.

(y) *[illegible]* v. *Bhaichand* (1882) 6 Bom. 193, 208 F.B.

(z) *Kanti Ram* v. *Kutubuddin* (1895) 22 Cal. 33.

(a) *Radha Kishun* v. *Khurshed Hossein* (1920) 47 Cal. 662, 47 I.A. 11, 55 I.C. 959; *Official Assignee of Calcutta* v. *Jitendralal Mullick* (1924) 51 Cal. 494, 28 Cal. W.N. 466, 150 I.C. 321, ('24) A.C. 552.

(b) *Sukhdeo Misr* v. *Sheodial* (1901) A.W.N. 66.

S. 48

agreement, which according to sec. 48 of the Registration Act would not have precedence over a subsequent registered mortgage (*c*). Mortgages by deposit of title deeds are sometimes described as equitable mortgages. The judgment in an old Bombay case (*d*) suggests that a formal registered mortgage being a legal "mortgage" would have priority over an "equitable mortgage." As observed by Ghose this is a confusion caused by the "use of technical terms borrowed from a foreign system" (*e*). In *Imperial Bank of India* v. *U Rai Gyaw Thu* (*f*) Lord Dunedin said—"It is to be observed that there is here no distinction between a legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal has done or omitted to do something which prevents him in equity from asserting his paramount rights."

A charge is not a transfer of an interest in property and an oral non-possessory charge has not priority over a subsequent mortgage if the mortgagee has no notice of it. This is the effect of sec. 100 of this Act. In a case in which sec. 100 was construed as not having retrospective effect the same conclusion was arrived at by reference to sec. 48 of the Registration Act (*g*).

A Raja made a grant of certain villages to the defendant as maintenance for life, and then gave a putni of the villages to the plaintiff on the allegation that the grant to the defendant had been revoked. But as the grant had not been revoked, the Court held that the putni took effect after the death of the defendant (*h*).

(3) Same date.—If two mortgages are executed on the same date, evidence may be taken as to which was executed first, and the first has priority. If this cannot be determined the mortgagees take as tenants in common or joint tenants (*i*).

(4) Exceptions.—There are several exceptions to the rule of priority. Section 50 of the Registration Act gives a subsequent registered deed priority over a prior unregistered deed of which registration is optional. This exception is subject to the doctrine of notice (*j*), and only applies when the deeds are antagonistic, and not when effect can be given to one without infringement of the other (*k*). But as optional registration has been abolished by this Act as regards sale deeds by sec. 54, and as to mortgage deeds by sec. 59 as amended by Act 6 of 1904, the scope of this exception is very limited, being applicable only to those territories to which this Act does not extend.

Under sec. 98 of the Bengal Tenancy Act (Beng. Act 8 of 1885) a previous mortgage by a co-owner of his share is subject to a subsequent charge created by a manager over the whole estate (*l*).

Similarly in a suit for partition, if a receiver, under the direction of the Court mortgages the whole or part of the estate, the mortgagee would be entitled to priority over an execution creditor by whom the property was attached after the commencement of

(*c*) *Coggan* v. *Pogose* (1884) 11 Cal. 158, 160; *Gobind Dass* v. *Eastern Mortgage and Agency Co.* (1906) 33 Cal. 410, 421; *Stewart* v. *Bank of Upper India* (1916) P.R. 31, 34 I. C. 987; *Ralli Brothers* v. *Punjab National Bank* (1930) 11 Lah. 564, 129 I.C. 21, ('30) A.L. 920.

(*d*) *Dayal* v. *Jivraj* (1875) 1 Bom. 237.

(*e*) Ghose on Mortgages, Vol. I, p. 442.

(*f*) (1923) 50 I. A. 283, 289, 1 Rang. 637, 51 Cal. 86, 76 I.C. 910, ('23) A.PC. 211.

(*g*) *Chhaganlal* v. *Chunilal* (1934) 36 Bom. L.R. 277, 152 I.C. 267, ('34) A.B. 139.

(*h*) *Chota Bahira* v. *Puma Chandra* (1915) 19 Cal. W.N. 1272, 27 I.C. 982.

(*i*) *Ram Ratan* v. *Bishun Chand* (1906) 11 Cal. W.N. 732.

(*j*) *Hathisingh* v. *Kuvarji* ([illegible]) 10 Bom. 105; *Moreshwar* v. *Dattu* ([illegible]) 12 Bom. 569; *Abdool Hossein* v. *Raghu Nath* (1886) 13 Cal. 73; *Harnandan Singh* v. *Jawad Ali* (1900) 27 Cal. 468; *Bhikhi Rai* v. *Udit Narain Singh* (1903) 25 All. [illegible].

(*k*) *Sobhagchand* v. *Bhaichand* (1882) 6 Bom. 193, 206 [F.B.]; *Bapuji* v. *[illegible]* (1882) 6 Bom. 490, [illegible]; *Ramaraja* v. *Arunachala* (1884) 7 Mad. 248; *Ishri Prasad* v. *Gopi Nath* (1912) 34 All. 631, [illegible], 17 I.C. 19.

(*l*) *Amarchunder Kundu* v. *[illegible] Bhusan Roy* ([illegible]) 31 Cal. 305, 31 I.A. 24.

the suit for partition (*m*). Again when a Court for the purpose of preserving the property in suit directs the receiver to execute a mortgage, it has jurisdiction to order that the mortgage shall take precedence over prior charges (*n*). This is an application of the equity which gives salvage liens, *i.e.*, liens for money advanced for the purpose of saving the property from destruction or forfeiture, priority over all their encumbrances. With regard to such liens the general rule is reversed and they are entitled to priority in inverse order of their dates (*o*). Salvage liens are confined in English law to maritime liens. A salvage lien was claimed in an old Calcutta case (*p*) in respect of an advance made for the purpose of carrying on an indigo factory, and again in another case (*q*) in respect of an advance made to enable the mortgagor to pay the rent of the premises mortgaged, but in both cases the claim was repelled. Ss. 48, 49

The lien of a co-sharer for owelty money on partition is entitled to precedence over prior mortgagees of property allotted to the co-sharer who is liable to pay owelty (*r*).

(5) Crown debt.—Apart from statutory provisions to the contrary, a crown debt is no exception to the rule of priority and is not entitled to precedence over a prior secured debt (*s*). It is only with regard to payment of unsecured debts that the Crown has priority (*t*).

(6) Priority forfeited.—Priority is forfeited by fraud, misrepresentation or gross negligence. See sec. 78 and notes thereon.

If a prior mortgage is to secure future advances and expresses the maximum to be secured, a puisne mortgagee who has notice of the prior mortgage is not entitled to priority over subsequent advances by the prior mortgagee within the amount of the expressed maximum. See sec. 79 and notes thereon.

Transferee's right under policy

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Insured property.—If the property is at the date of the transfer insured against loss or damage by fire, the section enacts that the transferee may require the transferor to apply the insurance money, in case of damage by fire, to the restoration of the premises. If the transfer is a mortgage, the mortgagor, as the insured, would receive the insurance money, and the mortgagee would have the right to require it to be applied as the section

(*m*) *Herumbo Nath Banerjee* v. *Satish Chandra* (1906) 33 Cal. 1176.

(*n*) *Giridhari Lal* v. *Dhirendra* (1906) 34 Cal. 427; cf. *Strapp* v. *Bull* (1895) 2 Ch. 1; *In re Glasdir Copper Mines Ld.* (1906) 1 Ch. 365.

(*o*) *Giridhari Lal* v. *Dhirendra* supra.

(*p*) *Moran* v. *Mittu Bibee* (1877) 2 Cal. 58; *Baldeo* v. *Miller* (1903) 31 Cal. 667.

(*q*) *Hari Mohan* v. *Grish Chandra* (1877) 1 Cal. L.R. 182.

(*r*) *Shahebzada* v. *Hills* (1908) 35 Cal. 388; *Poovamalingam Servai* v *Veerayi* (1926) 92 I.C. 1055, ('26) A.M. 186.

(*s*) *Dost Muhammad* v. *Mani Ram* (1907) 29 All. 537 F.B.; *Ibrahim* v *Rangasami* (1905) 28 Mad. 420; *Bank of Upper India* v. *Administrator General of Bengal* (1918) 45 Cal. 653, 47 I.C. 520; *Ma Joo Tean* v. *The Collector of Rangoon* (1924) 12 Rang. 437, ('24) 155 I.C. 776 A.R. 321.

(*t*) *Bank of Upper India* v. *Administrator General of Bengal*, supra; [illegible] v. *Secretary of State* (1917) 40 Mad. [illegible], 28 I.C. [illegible]; *Secretary of State* v. [illegible] *Narain* (1926) 90 I.C. [illegible], ('26) A.O. [illegible]

directs, in reinstating the security (u); and he can do so against a creditor of the mortgagor who has attached the insurance money (v). If the mortgagor failed to do so the mortgagee would have the right, under sec. 68 (b), to sue for his mortgage money. In the case of a lease the lessor would receive the insurance money, and the lessee would under this section require the lessor to restore the property. If the property were wholly destroyed or rendered unfit for the purpose for which it was leased, the lessee has the option of avoiding the lease under sec. 108 (e), and in that case he would have no right under this section.

In the case of a sale the section, in effect, makes the vendor a trustee of the insurance money for the purchaser, and this is also the effect of sec. 47 (1) of the Law of Property Act, 1925, subject to the consent of the insurers.

In *Gnana Sundaram* v. *Vulcan Insurance Co.* (w) the Rangoon High Court held that a contract to purchase confers upon the intending purchaser an insurable interest; but it is submitted that this is a misapplication of the English doctrine of equitable ownership.

In English law the purchaser of an insured house was formerly not entitled to the benefit of the policy unless it had been assigned to him. This was decided in the case of *Rayner* v. *Preston* (x). In that case James, L. J., in a dissenting judgment was of opinion that as under the contract the purchaser was the owner in equity, the seller held the insurance money as trustee for him. The English law has been altered in conformity with this doctrine of equitable ownership, and sec. 47 (1) of the Law of Property Act, 1925, makes the vendor liable to pay the purchaser the insurance money in case of damage occurring after the contract of sale.

The purchaser cannot himself claim the insurance money from the insurance company (y).

Rent bona fide paid to holder under defective title.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to *B* at a rent of Rs. 50, and then transfers the field to *C*. *B*, having no notice of the transfer, in good faith pays the rent to *A*. *B* is not chargeable with the rent so paid.

(1) Rents paid bona fide.— This section protects rents paid bona fide to a holder under a defective title. The principle is described by Willes, J., in *De Nicholls* v. *Saunders* (z) as "a rule of general jurisprudence not confined to choses in action . . . that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation; that is a rule which is declared rather than enacted by 4 Anne c. 16 sec. 10." That statute did away

(u) *In re Barber, Ex parte Gerdy* (1884) 4 DeG. J.F. & Sm. 477.
(v) *Sinnott* v. *Bowden* (1912) 2 Ch. 414.
(w) (1931) 9 Rang. 452, 134 I. C. 221, ('31) A. R. 210.
(x) (1881) 18 Ch. D. 1 C.A.
(y) *P. V. Chetty Firm* v. *Motor Union Insurance Co.* (1922) 67 I.C. 777, ('22) A.R. 6.
(z) (1870) L.R. 5 C.P. 589, 594.

with the necessity for attornment but protected the tenant in cases where he had paid the rent due from him before notice of the assignment (*a*). Similar provisions occur in sec. 109 of this Act and in sec. 148 of the Agra Tenancy Act, U. P. Act 12 of 1881; and as regards actionable claims, in sec. 130 of this Act. In a Bombay case (*b*), the lessor's interest passed on his death first to his brother and then to his sister, but the lessor's widow collected the rents when the person entitled was the sister. Nevertheless as the payments were made in good faith and without notice of the sister's interest, the tenant was not chargeable. A mortgage of tenanted property operates as an assignment of the lessor's interest, and the mortgagee is entitled to recover the rent from the date of the mortgage; but rents paid bona fide to the mortgagor without notice of the mortgage are protected (*c*). S. 50

The illustration refers to the case of a transfer by a lessor, as to which sec 109 enacts that "if the lessee not having reasons to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee."

There is no statutory obligation on the assignee to give notice of the assignment to the lessee, but if he omits to do so and the lessee pays rent to the assignor, the assignee will not be entitled to recover it from the lessee (*d*). On the other hand if the assignee of the lessor gives notice to the lessee, he will be entitled to the rent after the assignment (*e*).

(2) Rent paid in advance.—In order to get the benefit of sec. 50 the tenant must have paid the rent, as rent, and not in advance, for a payment in advance is treated as a loan (*f*). The reason is that section refers to the fulfilment of an obligation imposed by law to pay rent, while payment in advance is a loan to the landlords with an agreement that on the day when the rent becomes due, such loan will be treated as the fulfilment of the obligation. This distinction is made in the judgment of Willes, J., in *De Nicholls v. Saunders* (*g*). Rent that is payable in advance by the terms of the lease is of course paid as rent and not as a loan (*h*).

(3) Good faith.—The payment is not protected unless it is made in good faith. In *Sivaswami Odayar v. Subramania Aiyer* (*i*) the Court of execution erroneously refused to stay a sale although the judgment debtor had applied under the Provincial Insolvency Act to be declared insolvent. The Official Receiver declined to recognize the sale and granted a lease of the property that had been sold. The lessee paid rent in good faith to the Official Receiver and was not chargeable again with rent by the Court auction purchaser. But if a tenant knowing that there is a dispute between two persons

---

(*a*) *Horn v. Beard* (1912) 3 K.B. 181.

(*b*) *Kaveramma v. Lingappa* (1909) 33 Bom. 96, 1 I C. 654; *Chatri v. Bahadur Singh* (1888) A.W.N. 45.

(*c*) *Cook v. Guerra* (1872) L.R. 7 C.P. 132; *Kiran Chandra v. Dutt & Co.* (1925) 29 Cal. W.N. 94, 85 I.C. 522, ('25) A.C. 251; *Tiloke Chand Surana v. J. B. Beattie & Co.* (1926) 29 Cal. W.N. 953, 94 I.C. 538, ('26) A.C. 204; *Rustomji v. Keshavji* (1926) 28 Bom. L.R. 1162, 98 I.C. 436, ('26) A.B. 567; *Kiran Chandra v. Dutt & Co.*, *supra*. *Butto Kristo v. Govindram Marwari* (1939) I.C. 132, (1939) A.P. 540.

(*d*) *Tiloke Chand Surana v. J. B. Beattie, supra*; *Kiran Chandra v. Dutt & Co., supra*; *Madan Mohan v. Holloway* (1884) 12 Cal. 555.

(*e*) *Collector v. Hurrosundary* (1864) W.R. (Act 10 Rulings) 6; *Ram Lal v. Mahadeo* (1921) 63 I.C. 587, ('22) A.P. 339.

(*f*) *Ram Lal v Mahadeo* (1921) 63 I.C. 587, ('22) A.P. 339, *Tiloke Chand Surana v. J. B. Beattie* (1926) 29 Cal. W.N. 953, 94 I.C. 538, ('26) A.C. 204; *Official Assignee v. Abdul Hussein* (1928) 107 I. C. 209, ('28) A.S. 95; *Cook v. Guerra* (1872) L.R. 7 C.P. 132; *De Nicholls v. Saunders* (1870) L.R. 5 C.P. 589; *Pale Zabaing Rural Co-operative Society v. Maung Tha Daw* (1931) 9 Rang. 470, 135 I.C. 646, ('31) A.R. 292; *Official Assignee v. Abdul* (1928) 107 I.C. 209, ('28) A.S. 95; *Govind Rao v. Gopal Rao* (1901) C.P.L.R. 65; *Ramesharam Lal v. Butto Kristo Rai* (1934) 13 Pat. [illegible], 152 I.C. 992, ('34) A.P. 653.

(*g*) (1870) L.R. 5 C.P. 589.

(*h*) *Toon Chan v. P. C. Sen* (1914) 24 I.C. [illegible].

(*i*) (1932) 56 Mad. 216, 63 Mad. L.J. [illegible], 136 I.C. [illegible], ('33) A.M. 96.

claiming to be landlords, arbitrarily chooses to pay one he does so at his own risk (j). A payment to the transferor after notice is not a valid payment (k).

Illustration.

H had a house in Calcutta which he leased to the defendant in 1907, and mortgaged to *S* in 1914. The defendant in 1920 paid Rs. 7,800 to *H* as an advance of rent up to the end of August 1923 in order to enable him to make repairs. In July 1921 *H* gave a second mortgage of the house to the plaintiff and paid off the mortgage to *S*. In 1921 the defendant made further advances of rent for the same purpose to *H* up to a date in 1926. In 1923 the plaintiff obtained a decree for sale on his mortgage and purchased the house. The plaintiff then gave notice to quit to the defendant and claimed arrears of rent. The Court held that the defendant was entitled to rely on the payment of Rs. 7,800 for rent up to the end of August 1923, as his possession was constructive notice to the plaintiff of the arrangement made with the mortgagor. But the defendant was not entitled to rely on the further advances made in 1921. The mortgage to the plaintiff operated as an assignment of the lessor's interest and rent paid after the mortgage in good faith would have been protected by sec. 50 if it had been paid as rent: but having been paid in advance it was a mere loan to *H* and was not protected. The defendant was liable to the plaintiff for rent as from the 1st September 1923: *Tiloke Chand Surana* v. *J. B. Beattie & Co.* (1926) 29 Cal. W. N. 953, 94 I.C. 538, ('26) A.C. 204.

Improvements made by bona fide holders under defective titles.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

(l) **Improvements by holder of defective title.**—This section is an application of the equitable maxim that he who seeks equity must do equity. This equity has been enforced in England when a person entitled in equity recovers the property from the owner of the legal estate with the assistance of the Court. The Court may then put him to equitable terms and compel him to make an allowance for an expenditure which would not form the subject of an active claim against him. As compensation could [illegible]

(j) [illegible] v. *Sakharam* (1927) 101 I. C. 987, ('27) A.N. 237.

(k) [illegible] *Chandra* v. *Surendra* (1905) 7 Cal. W.N. 454; *Peary Lal* v. *Madhab* (1913) 17 Cal. L.J. 372, 19 I.C. [illegible]; *Pope* v. *Biggs* (1892) [illegible]; [illegible] *Azim* v. [illegible] (1942) I.O. 105, (1942) O.W.N. 612, [illegible] I.C. [illegible].

claimed in an independent action by the defendant, the equity which requires a plaintiff to allow compensation has been called a passive equity.

Dart states the rule in this section as follows :—

> "Where a purchaser for value is evicted in equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements (except improvements made after he had discovered the defect of title), and will be debited with the rents which he has received" (*k*1).

The equity involved in this section was enforced by the Privy Council in *Kidar Nath* v. *Mathu Mal* (*l*), a case from the Punjab, and not governed by the Transfer of Property Act. A Hindu widow sold property in which she had only a widow's estate without legal necessity, and the reversioner, at whose instance the sale was set aside and the vendee evicted, was put on terms to compensate the vendee for the improvements he had made. The section was applied by the Privy Council in a case in which a Hindu widow made a gift to a stranger of property inherited by her, and the donee *sold* the property, and the purchaser effected improvements believing in good faith that he was the owner (*m*).

The section is almost identical with sec. 2 of the Mesne Profits and Improvements Act 11 of 1855. There are similar provisions with reference to tenants' compensation in the Bengal Tenancy Act, and in the English Land Improvement Act, 1864 and in the Landlord and Tenant Act, 1851.

The section does not rest upon estoppel, and therefore stands clear of the line of cases headed by *Ramsden* v. *Dyson* (*n*) in which the owner is put on equitable terms by the doctrine of estoppel by acquiescence. See note *infra* "Acquiescence."

(2) Scope of the section.—The scope of the section is limited as it applies to a transferee who in good faith believes himself to be absolutely entitled. A lessee is not absolutely entitled, and cannot believe himself to be absolutely entitled. A mortgagee is not absolutely entitled, but in some cases it has been held that a mortgagee may in good faith believe himself to be absolutely entitled. Where a husband builds on the land belonging to his wife knowing he has no right to do so, the latter is entitled to the building (*o*).

Lessee.—A lessee cannot appeal to this section (*p*), even if he is a permanent lessee (*q*). When a Hindu widow granted a permanent lease the lessee, when evicted by the reversioner, was not entitled to compensation for improvements he had made, for he could not have believed himself to be absolutely entitled (*r*). There is a Madras case (*s*) which holds that a perpetual lessee is entitled to the benefit of this section, but it is submitted that the judgment confuses the rule in this section with the doctrine of equitable estoppel. The correctness of this decision has since been doubted in a later Madras case (*t*) where Wadsworth referred to the author's comments in the last sentence with approval.

(*k*1) Dart, 8th Ed., p. 798; cf. *Mill* v. *Hill* (1851) 3 H.L.C. 828; *Nesson* v. *Clarkson* (1845) 4 Hare 97, 101; *Stepney* v. *Biddulph* (1865) 13 W.R. (Eng.) 576.

(*l*) (1913) 40 Cal. 555, 18 I.C. 946 P.C.

(*m*) *Narayanaswami Ayyar* v. *Rama Ayyar* (1930) 57 I.A. 305, 53 Mad. 69, 125 I.C. 261, ('30) A.PC. 297.

(*n*) (1865) L. R. 1 H. L. 129.

(*o*) *K. K. Das* v. *Amina Khatun* (1940) A.C. 356, (1940) 1 Cal. 161, 44 C.W.N. 247, 189 I.C. 161.

(*p*) [illegible] *Kumar* v. *Banamali Gayen* (1902) 29 Cal. 871; *Narasayya* v. *Raja of Venkatagiri* (1914) 37 Mad. 1, 7 I.C. 202; *[illegible] Pillai* v. *Ramanathan* (1917) 33 Mad. L.J. 94, 41 I.C. 788; *Buneshwar* v. *Lal Bahadur* (1919) 51 I.C. 380; *Banamali* v. *Nihal* (1919) 48 I.C. 854; *Rajrup Kunwar* v. *Gopi* (1925) 47 All. 430, 87 I.C. 44, ('25) A.A. 261; *Madan Gopal* v. *Sundaram* (1940) 189 I.C. 785, (1940) A.R. 172.

(*q*) *Rajrup Kunwar* v. *Gopi*, *supra*; *Perumal Gramani* v. *Mahomed Kasim* (1915) 28 I.C. 840, *Venkatayyier* v. *Ramasamy* (1919) Mad. W.N. 548, 52 I. C. 817; *contra* *Raja Pratab* v. *Debi Prasad* (1905) 8 O.C. 18.

(*r*) *Rajrup Kunwar* v. *Gopi*, *supra*; *Bishan Nath* v. *Har Narain* (1937) 170 I.C. 385, (1937) A.O. 446. This decision reverses the decision at p. 75 of the same report.

(*s*) *Subba Rao* v. *V[illegible]* [illegible] 136 I.C. 729, ('[illegible]) A.[illegible]

(*t*) *Pandaram* [illegible] v. [illegible] (1939) A.M. [illegible] (1939) M.W.N. 1394, [illegible]

51 *Mortgagee.*—A mortgagee is not a person absolutely entitled, but in some cases it has been held that he may in good faith believe himself to be absolutely entitled. As to the facts which may induce such a belief the cases are not consistent. In *Gopi Lal* v. *Abdul Hamid* (u), a mortgage of 1859 contained a stipulation that in default of payment within two and a half years the mortgagee was to be the owner of the property. The suit for redemption was filed nearly 60 years after due date but the Court observed that the rule "once a mortgage always a mortgage" was as clear in 1859 as it was to-day, that the mortgagee could not have believed himself to be absolutely entitled, and so refused compensation for a building which the mortgagee had erected. But in a somewhat similar case from Madras (v), where a condition converting a mortgage into a sale was held to be a clog on the equity of redemption, the mortgagee who was misled by the condition into believing himself to be the absolute owner, was allowed compensation for improvements. Compensation was also allowed in a Punjab case (w) where the mortgagee who made improvements was misled by a term of the mortgage that after five years the transaction was to be treated as a sale. In *Narayan* v. *Ganesh* (x) the Bombay High Court allowed compensation to a mortgagee who was misled by an erroneous order of the Court and believed himself to be absolutely entitled. In *Ramappa* v. *Yellappa* (y) the mortgagee was not allowed compensation. Madgavkar, J., said: "In regard to improvements, sec. 51 of the Transfer of Property Act does not appear to have been relied upon in the lower courts. But in any case the respondents must be taken to have had notice of the existence of Kristappa (one of the mortgagors) so that they could not be said to have believed in good faith that they were entitled to the whole." Other Bombay cases seem to have been decided irrespective of this section and to refer to improvements made by a mortgagee qua mortgagee. In one case (z) a Hindu widow mortgaged property without legal necessity and the mortgagee with her consent reconstructed a building on the mortgaged property which had been destroyed by floods. On the death of the widow the reversioner was allowed to redeem without compensating the mortgagee. But in a subsequent case (a) where the facts were similar Macleod, C.J., said that though the position of the mortgagee was not the same as that of a person who thinks he has an absolute title to the property by sale yet there was an equity in his favour. The law as to improvements made by a mortgagee qua mortgagee is now codified in the new section 63A.

(3) Condition to be fulfilled.—Two conditions must be fulfilled before the equity enacted in this section arises. These are—

(1) the person evicted must be a transferee; and

(2) he must have made the improvements believing in good faith that he was absolutely entitled.

(4) Transferee.—The following are instances of transferees who have been given the benefit of the section: a purchaser from a *de facto* guardian of a minor who erroneously believed that the guardian had authority to sell (b); a purchaser of a life estate who

---

(u) (1928) 26 All. L.J. 887, 116 I.C. 91, ('28) A.A. 381; *Hansraj* v. *Mt. Somni* (1922) 44 All. 665, 67 I.C. 314, ('22) A.A. 261; *Bachu* v. *Bhabhuti Prasad* (1930) 52 All. 831, 124 I.C. 781, ('31) A.A. 201.

(v) *Pandiyan Pillai* v. *Vellayappa* (1917) 33 Mad. L.J. 316, 42 I.C. 435.

(w) *Mussammat Rah Kaur* v. *Partab Singh* (1919) P.R. 55, 51 I.C. 589; *Ludha Mal* v. *Jagannath* (1886) P.R. 129.

(x) (1926) 28 Bom. L.R. 993, 97 I.C. 700, ('26) A.B. 580.

(y) (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150.

(z) *Vrijbhukandas* v. *Dayaram* (1908) 32 Bom. 32; *Parashar* v. *Ganu* (1903) 5 Bom. L.R. 643.

(a) *Shiddappa* v. *Pandurang* [illegible] 47 Bom. 696, 72 I.C. 626, [illegible].

(b) *Harilal* v. *Gordhan* (1927) 51 Bom. 1040, 105 I.C. 722, ('27) A.B. 611 (Hindu guardian); *Dorasi Rau* v. *Fakir Sahib* (1907) 30 Mad. 197 (Mahomedan guardian).

believed that his vendor was absolutely entitled (c); a purchaser who was put in possession of a larger area than he was entitled to and who in ignorance of the mistake made improvements on the excess area (d); a transferee under an oral sale of immoveable property worth Rs. 100 or more (e) but not a trespasser (f).

Illustrations.

(1) *A* purchased the property of a Mahomedan minor from his mother who was acting as *de facto* guardian, believing in good faith that she had authority to sell. When *A* was evicted by the minor he was entitled to compensation for improvements that he had made: *Durgozi Row* v. *Fakeer Sahib* (1907) 30 Mad. 197.

(2) A grantee of land from a Tahsildar believing himself to be absolutely entitled improved the land by laying out a casuarina plantation. The Collector revoked the grant and evicted the grantee but the latter was entitled to compensation for the improvement: *Chennapragada* v. *Secretary of State* (1925) 48 Mad. L. J. 682, 90 I.C. 555, ('25) A.M. 963.

In all these cases the rule was applied when the transferee was evicted by the better title. But the principle of the section was applied to a case (g) where there was no direct eviction and no better title. A purchaser had erected a building on land which was subject to a mortgage of which she was unaware. The Court directed the mortgagee to pay the cost of the improvement as a condition precedent to bringing the property to sale in enforcement of his mortgage.

Again a purchaser who had made improvements to property which he was under covenant to reconvey was allowed compensation when sued in specific performance of his covenant (h).

In a Bombay case (i) a *de facto* guardian of a minor sold the minor's house to the defendant who, believing that he had become absolutely entitled, pulled down the house and built a new one. The guardian had no authority to sell and when the minor attained majority and evicted the defendant, the latter was allowed compensation for the improvement. The case was exactly under the section, for the minor had the better title and had evicted a transferee who had made improvements in good faith. Marten, C.J., however, observed that the section applied even when the evictor is the transferor. This dictum was not necessary as the minor was not the transferor, his case being that the guardian did not represent him. It is submitted that the dictum is too broadly stated, for if the evictor were the transferor, other considerations would arise, and the transferor might be estopped from derogating from his own grant.

In an Allahabad case (j) a Hindu father sold his son's share in a house without legal necessity, and when the vendee was evicted by the son he was allowed compensation for improvements made in good faith. Ashworth, J., seemed to think that sec. 51 would not apply as a defeasible title is not a defective title. It is submitted that this is a distinction without a difference. The case was one of eviction by better title.

The section is not applicable to a son governed by the Dayabhaga law, who makes improvements on the ancestral property (k).

(c) *Nanjamma* v. *Nacharammal* (1907) 17 Mad. L.J. 622.

(d) *[illegible] Thevan* v. *District Board of Tanjore* (1926) 95 I.C. 789, ('26) A.M. 921.

(e) *Tayammal* v. *Chanchalammal* (1940) Kar. 241, 188 I.C. 323 (1940) A.S. 77.

(f) *L. W. Crest* v. *Ganparaj* (1937) A.C. 129.

(g) *Kalyan Das* v. *Jan Bibi* (1929) 51 All. 454, 112 I.C. 765, ('29) A.A. 12.

(h) *Chinakkal* v. *Chinnathambi* (1934) 67 Mad. L. J. 635, 152 I.C. 634, ('34) A.M. 763.

(i) *Harilal* v. *Gordhan* (1927) 51 Bom. 1040, 106 I.C. 722, ('27) A.B. 611.

(j) *Lachmi Prasad* v. *Lachmi Narain* (1927) 25 All. L.J. 926, 107 I.C. 36, ('28) A.A. 41.

(k) *Dharma Das* v. *Amulyadhan* (1906) 33 Cal. 1119.

The section is of course not applicable to improvements made by the transferor and when a purchaser from a Hindu widow is evicted by the reversioner, he cannot claim compensation for improvements made by the widow (*l*). Nor does the section apply to a person who has not himself made the improvements, but who has purchased the immoveable property from the improver (*m*).

Trespasser.—A trespasser is not a transferee and is not entitled to compensation for improvements (*n*). If however a trespasser acting bona fide erects a structure he is, upon ejectment, entitled to remove the materials (*o*). There are no equities in favour of a trespasser (*p*), or of a person who is fraudulently in possession (*q*). In fact, the construction of buildings by such a person is only an aggravation of the trespass for which the appropriate remedy is an injunction for their removal (*r*). But a person who encroached by mistake on adjoining land and cleared it of jungle believing it to be his own, was held to be entitled to compensation when evicted (*s*).

(5) Good faith.—Good faith is here used in the sense of the phrase as defined in the General Clauses Act 10 of 1897, *i.e.*, "A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not." It will be observed that the requirement of reasonable care, which occurs in secs. 38 and 41, is omitted in this section. That requirement would be inappropriate, for if the defect in title were due to want of authority or ostensible ownership and reasonable care had been exercised the defective title would be cured by estoppel and the question of compensation could not arise (*t*). The expression "believing in good faith" merely means honestly believing (*u*). Honest belief is not incompatible with negligence (*v*) or mistake of law (*w*). On the other hand, as said by Lord Selbourne in *Agra Bank* v. *Barry* (*x*), omission to investigate title may be evidence, if it is not explained, of a design, inconsistent with bona fide dealing, to avoid knowledge of the title. Accordingly it has been said that if a person consciously avoids making an inquiry, though he may have a belief in the matter, it would not be a belief in good faith (*y*). Thus a purchaser from a Hindu widow who omits to make inquiry as to circumstances justifying the sale cannot be said to believe in good faith that he has acquired an absolute title (*z*). But this is not a rule of law, for the state of a man's mind is a question of fact, and in exceptional cases a purchaser from a Hindu widow who sold

(*l*) *Meenatchi* v. *Manicka* (1914) 24 I.C. 918.

(*m*) *Nagendrabala Dasee* v. *Punchanan Mouris* (1934) 60 Cal. 1388, 150 I.C. 42, ('34) A.C. 290.

(*n*) *Secretary of State* v. *Dugappa* (1926) 95 I.C. 789, ('26) A.M. 921; *L. A. Crest* v. *Gangaraj* (1937) A.C. 129.

(*o*) *Krishna Prasad* v. *Adyanath Ghatak* (1944) A.P. 77.

(*p*) *Mudhoo Soodun* v. *Juddooputty* (1869) 9 W.R. 115; *Thakoor Chunder* v. *Ramdhone* (1868) 6 W.R. 228; *Ganga Din* v. *Jagat* (1914) 12 All. L.J. 1026, 25 I.C. 198.

(*q*) *Musadee Mahomed* v. *Meerza Ally* (1854) 6 M.I.A. 27, 50; *Sadashiv Bhasker* v. *Dhakubai* (1883) 5 Bom. 450; *Murlidhar* v. *Parmanand* (1932) 34 Bom. L.R. 164, 137 I.C. 560, ('32) A.B. 190.

(*r*) *Jethalal* v. *Lalbhai* (1908) 28 Bom. 298.

(*s*) *Bhupendra* v. *Pyari* (1917) 40 I.C. 464.

(*t*) See the judgment of Mukerji, J., in *Lachmi Prasad* v. *Lachmi Narain* (1927) 25 All. L.J. 926, 107 I.C. 36, ('28) A.A. 41.

(*u*) *Chennappagala* v. *Secretary of State* (1925) 48 Mad. L.J. 682, 90 I.C. 555, ('25) A.M. 963; *Narayana Aiyar* v. *Sankaranarayana Aiyar* (1915) 24 I.C. 940; *Moitheenea* v. *Apsa Bivi* (1913) 36 Mad. 194, 12 I.C. 444; *Fursund Ali* v. *Aka Ali* (1879) 3 Cal. L.R. 194.

(*v*) *Nanjappa* v. *Peruma* (1909) 32 Mad. 530, 4 I.C. 18; *Rama Aiyar* v. *Narayanswami Aiyar* (1926) 51 Mad. L.J. 313, 96 I.C. 483, ('26) A. M. 609; *Shahabuddin* v. *Vahidbux* (1920) 14 S. L. R. 12, 56 I.C. 492; *Narayana Aiyar* v. *Sankaranarayana Aiyar*, *supra*.

(*w*) *Harilal* v. *Gordhan* (1927) 51 Bom. 1040, 105 I.C. 722, ('27) A.B. 611; *Durgozi Row* v. *Fakeer Sahib* (1907) 30 Mad. 197; *Rama Aiyar* v. *Narayanaswami Aiyar*, *supra*.

(*x*) (1874) L.R. 7 H.L. 135, 157.

(*y*) *Abhoy Churn Ghose* v. *Attarmoni* (1910) 13 Cal. W. N. 931, 31 I.C. 415; *Mt. Shubratan* v. *Shabbirali* (1940) 187 I.C. 317, (1940) A.O. 266.

(*z*) *Nanjappa* v. *Peruma*, *supra*; *Kandarpa* v. *Jogendra Nath* (1910) 12 Cal. L.J. 391, 6 I.C. 141; *Nandi* v. *Sarup Lal* (1917) 39 All. 463, 40 I.C. 71; *Hans Raj* v. *Mst. Somni* (1922) 44 All. 665, 67 I.C. 214, ('22) A.A. 194; *Muddasami Sidappa* v. *Lakshmi* (1915) M.W.N. 631; *Etisad Husain* v. *Bani Bahadur* (1918) 45 I.C. 242; *Suleman* v. *Perichamala* (1925) 86 I.C. 195, ('25) A.M. 670; *Jogeshwar* v. *Janki Bai* (1926) 95 I.C. 265, ('26) A.N. 384; *Raj Kishore* v. *Jaint Singh* (1914) 36 All. 387, 23 I.C. 364.

without necessity, or after her estate was divested by an adoption, has been held to have believed in good faith in his absolute title (*a*). S. 51

Illustration.

A, a Hindu widow, sold property to *B* in 1906. She adopted a son *C* in 1910. *C* sued in 1912 to set aside another alienation by *A* but did not sue to set aside the sale to *B*. *B* assuming the sale to him was valid made improvements in 1918. But *C* sued in 1922 to evict *B* and it was held that the improvements were made in good faith and that *B* was entitled to compensation: *Gangadhur* v. *Rachappa* (1929) 31 Bom. L. R. 453, 119 I. C. 182, ('29) A. B. 246.

Compensation has also been allowed where the gift was for the religious benefit of the widow's husband's soul and the donee believed himself to be absolutely entitled (*b*). A person who makes improvements in anticipation of a grant cannot be said to have believed himself to be absolutely entitled (*c*). A person who is aware that his title is terminable is not entitled to the benefit of the section (*d*). The test is whether the transferee had acted in the bona fide belief that he was absolutely entitled (*e*).

Illustrations.

(1) The defendant purchased property from a Sind zemindar honestly believing that he had got a good title. The zemindar's estate had been under management, and under sec. 28 of the Sind Encumbered Estates Act the zemindar could not alienate beyond his lifetime, so that after the death of the zemindar the defendant was evicted by his heir. The defendant's negligence in not discovering the defect in the title was not incompatible with good faith and he was entitled to compensation for improvements: *Shahabuddin* v. *Vahidbux* (1920) 14 S. L. R. 12, 56 I.C. 492.

(2) The defendant purchased property from a Hindu widow without making inquiries as to whether the sale was justified by necessity. He made improvements, but as he could not have believed in good faith that he had an absolute title, he was not entitled to compensation when evicted by the reversioner: *Nanjappa* v. *Peruma* (1909) 32 Mad. 530, 4 I.C. 18.

A purchaser with notice of a prior contract of sale by his vendor is not entitled to compensation for improvements when evicted (*f*). Improvements made pending litigation are not made in good faith, for the party knows he is running a risk and if he is in possession under a decree he must be aware that the decree may be reversed on appeal (*g*).

(5A) Punjab.—The principle of the section has been followed in the Punjab where the Act is not in force. A person, who had made improvements in the belief that his title rested on an exchange, was allowed compensation by the Lahore High Court when he proved to be a vendee and was evicted by a pre-emptor (*h*).

(6) Court Sale.—The section does not apply to a purchaser at a Court sale, and a purchaser at a Court sale who has made improvements is entitled to compensation irrespective of any question of bona fides, when the judgment is reversed and the sale becomes invalid (*i*).

(*a*) *American Baptist Mission* v. *Amalanadhuni* (1919) 48 I. C. 859; *Gangadhar* v. *Rachappa* (1929) 31 Bom. L. R. 453, 119 I. C. 182, ('29) A. B. 246; *Narayanaswami Ayyar* v. *Rama Ayyar* (1930) 53 Mad. 69, 57 I. A. 305, 123 I. C. 261, ('30) A. PC. 297.

(*b*) *Panachand* v. *Manoharlal* (1917) 42 Bom. 136, 144, 43 I.C. 729.

(*c*) *Dasaramani* v. *Padda Bhinaka* (1915) M.W.N. 143, 28 I. C. 51.

(*d*) *Onkar Mal* v. *Secretary of State* (1920) 56 I.C. 813. See also *Harnaman* v. *Dasondhi* (1920) 1 Lah. 210, 56 I. C. 733.

(*e*) *Sitha* v. *Samiuddin* (1918) 42 I. C. 428; *Ramappa* v. *Yellappa* (1928) 52 Bom. 307, 109 I. C. 532, ('28) A. B. 150.

(*f*) *Haradhan* v. *Bhagabati* (1914) 41 Cal. 852, 23 I. C. 214.

(*g*) *Velusami* v. *Bommachi* (1913) 25 Mad. L. J. 324, 21 I. C. 219.

(*h*) *Quaim* v. *Ghulam Din* (1933) 146 I. C. 36, ('33) A.L. 540.

(*i*) *Moitheena* v. *Appa Bivi* (1912) 36 Mad. 191, 12 I.C. 44.

S. 51

(7) Option as to compensation.—The transferee may, on eviction, be compensated in two ways, either (1) by being paid the value of the improvements, or (2) by buying out the better title at a valuation of the property irrespective of the improvements. It is settled law that the option as to the mode of compensation is that of the evictor, who can either pay the value of the improvements and take the land, or sell the land instead of evicting the transferee (*j*). A mortgagee who had erected a building on the property mortgaged and who was not entitled to the benefit of the section was allowed by the Allahabad High Court to remove the building materials (*k*). It is submitted that this is correct, for the equity under this section does not affect the right recognized before the Act in *Paramanick's* case (*l*). The Rangoon High Court has disagreed on the ground that this section is an exception to the principle *quicquid plantatur solo, solo cedit* (*m*). But this maxim does not generally apply in India—see note "English law of fixtures" under sec 3. In a case (*n*) where the evictor had not the means to pay for the improvements the Allahabad High Court made an order requiring him to sell the property.

(8) Valuation.—The valuation of improvements would be, as pointed out in *Kider Nath* v. *Mathumal* (*o*), not the amount expended in making the improvement, but the extent to which the value of the property as a marketable subject has been enhanced thereby.

(8A) Lien.—The transferee has no lien on the land for the value of the improvements (*p*).

(9) Improvements.—Ordinary operations of agriculture such as manuring and levelling land are not improvements within the meaning of this section (*q*). Section 63 A refers to improvements by a mortgagee, and the phrase there includes necessary repairs. But under this section repairs are not improvements (*r*), and it has been held that putting a new staircase into an old house is an ordinary repair and not an improvement (*s*).

(10) Crops.—If the transferee has grown crops upon the land in the bona fide belief that he is absolutely entitled, he has the right to remove them on eviction. As ancillary to that right he has the right of free ingress and egress to gather and carry them away. This right constitutes no bar to eviction, but after the eviction the transferee has the right to carry away the crops (*t*). A similar right is reserved to a lessee of uncertain duration when evicted for no fault of his own, sec. 108 (i).

The ordinary rule is that the right to growing crops passes with the sale of the land and when a mortgagee in possession brings the land to sale he cannot recover the value of the crops he has grown, from the purchaser (*u*).

(11) Mesne Profits.—Even if a transferee is not entitled to compensation under this section, yet if a decree for mesne profits is passed against him he will be entitled to credit for profits due to his improvements. This is expressly enacted in sec. 2 (12) of the

(*j*) *Rama Aiyar* v. *Narayanaswami Aiyar* (1926) 51 Mad. L. J. 313, 96 I. C. 483, ('26) A. M. 609; *Narayan* v. *Ganesh* (1926) 28 Bom. L. R. 993, 97 I. C. 700, ('26) A. B. 599; *Motichand* v. *British India Corporation* (1932) 30 All. L. J. 54, 136 I. C. 78, ('32) A.A. 210.

(*k*) *Hans Raj* v. *Mst. Somni* (1922) 44 All. 665, 67 I. C. 314, ('22) A. A. 194; *Venkatappier* v. *Ramaswami* (1917) Mad. W. N. 548, 52 I. C. 517.

(*l*) (1866) 6 W. R. 228, Beng. L. R. Sup. Vol. 595.

(*m*) *Maung Aung* v. *Ma Nyun* (1928) 117 I. C. 56, ('28) A.R. 141.

(*n*) *Lachmi Prasad* v. *Lachmi Narain* (1927) 25 All. L. J. 926, 107 I. C. 36, ('28) A.A. 41.

(*o*) (1913) 40 Cal. 555, 19 I.C. 946 P.C.; *Kunhi* v. *Kunkan* (1896) 19 Mad. 384; *Gangadhar* v. *Rachappa* (1929) 31 Bom. L. R. 453, 119 I.C. 182, ('29) A.B. 246.

(*p*) *Dharma Das* v. *Amulyadhan* (1906) 33 Cal. 1119, 1130.

(*q*) *Sudalai Muthu* v. *Sankara* (1915) 24 I.C. 879.

(*r*) *Meenatchi* v. *Manicka* (1914) 24 I.C. 918, 920.

(*s*) *Sidramappa* v. *Shidappa* (1929) 31 Bom. L. R. 461, 119 I. C. 650, ('29) A.B. 230.

(*t*) *Deo Dat* v. *Ram Autar* (1886) 8 All. 502.

(*u*) *Ramalinga* v. *Santiappa* (1890) 13 Mad. 15.

Code of Civil Procedure and for the reason that mesne profits are in the nature of damages. An instance of such an order is to be found in the case of *Raja Rai Bhagwat Dayal* v. *Ram Ratan Sahu* (v).

(12) **Acquiescence.**—Some cases (w) and indeed some text books treat sec. 51 as an extension of the equitable doctrine of estoppel by acquiescence. In spite of a superficial similarity the two cases rest on a totally different foundation of principle. Estoppel by acquiescence occurs when the person having the better title "knows facts which are unknown to the other persons acting in violation of the right which those facts give, and does not inform them about it, but lies by and lets them run into a trap" (x). The distinction between this class of case and sec. 51 is as follows :—

(1) Estoppel by acquiescence looks to the conduct of the would-be evictor, while sec. 51 looks to the conduct of the person evicted.

(2) Estoppel by acquiescence does not merely put the evictor upon equitable terms but compels him to make good his representation and prevents him from evicting. Section 51 merely puts the evictor upon equitable terms as to compensation. The one denies the right; the other admits the right but raises a plea in mitigation of it.

(3) Estoppel by acquiescence rests on the doctrine of estoppel, while sec. 51 rests on the maxim that he who comes into equity must do equity.

In *Willmott* v. *Barber* (y) Fry, J., said—"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights."

To raise an estoppel by acquiescence against a plaintiff the following conditions must be fulfilled (z) :—

(1) the defendant must have made a mistake about his rights,

(2) the plaintiff, the better title, must know of the existence of his own right which is inconsistent with that claimed by the defendant,

(3) the plaintiff must know that the defendant has made a mistake as to his rights,

(4) the defendant must have expended money or done some act on the faith of his mistaken belief,

(5) the plaintiff must have encouraged the defendant to spend the money or do the act, either directly, or by abstaining from asserting his right.

If these conditions are fulfilled the equitable estoppel goes far beyond sec. 51. The party estopped is not put to terms to pay compensation but is compelled to make good his representation. Ashburner says (a): "If I build on your land and you are estopped from asserting your title, I take the land; I do not merely get a charge on the land as against you for the money spent on the building."

In *Ramsden* v. *Dyson* (b) Lord Kingsdown said—"The rule of law applicable to the case appears to me to be this : If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession

(v) (1922) 24 Bom. L. R. 336, 26 Cal. W. N. 257, 65 I. C. 69, ('22) A.PC. 91.

(w) Cf. *Bhupendra* v. *Pyari* (1918) 40 I. C. 454; *Collier* v. *Baron* (1906) 2 Nag. L. R. 34; *Gangadhar* v. *Rachappa* (1929) 31 Bom. L. R. 453, 119 I.C. 182, ('29) A.B. 246; *Subba Rao* v. *Veeranjanayaswami* (1930) 126 I.C. 270, ('30) A.M. 298.

(x) *Russell* v. *Watts* (1883) 25 Ch. D. 559, 576.

(y) (1880) 15 Ch. D. 96, 105.

(z) *Willmott* v. *Barber*, *supra*.

(a) Principles of Equity, p. 631.

(b) (1866) L. R. 1 H. L. 129, 170.

of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.'' This principle was applied by the Privy Council in *Forbes* v. *Ralli* (c). In that case the landlord granted a lease to the defendant " for the purpose of erecting buildings for trade.'' The defendant then asked permission to erect a residence for his manager. The plaintiff replied that the lease was a permanent lease which gave the tenant the right to erect buildings but that the rent was liable to enhancement. Relying on this assurance the defendant built the residence. The plaintiff then sought to evict the defendant but the Privy Council held that whatever the nature of the tenancy in its inception, the plaintiff was estopped from questioning its permanency. Mr. Ameer Ali delivering the judgment of the Board said—"Estoppel prevents the plaintiff from evicting from their holding the defendants, whom he, the plaintiff, induced by his representation and conduct to believe that they had a fixity of tenure, although not of rent, in the lands that had been leased to them. It gives effect to the representation that induced them to act as they did.'' The rule in *Ramsden* v. *Dyson* is in India subject to the exception that a party building on the land of another is allowed to remove the building. The right of course does not exist, when the action is malafide and tortious, but when there is acquiescence and bona fide belief (*d*). In *Lala Beni Ram* v. *Kundan Lall* (*e*) the Privy Council has observed that the owner of land cannot sue for ejectment " where he sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference with the view of claiming the building when it is erected.'' Other Indian cases in which the principle is referred to are cited in footnote (*f*). In *Nundo Kumar* v. *Banomali Gayan* (*g*) the doctrine is explained to be outside the scope of sec. 51.

There is a class of cases which is sometimes referred to as equitable estoppel, although it is really one of implied contract. The defendant has a limited interest as lessee or mortgagee and is aware of the plaintiff's rights, but plaintiff's conduct has led him to believe that those rights will not be enforced against him, and the defendant has erected buildings or altered his position in consequence of such belief. In such a case a promise to compensate the defendant is implied. In *Lala Beni Ram* v. *Kundan Lall* (*h*), yearly tenants erected substantial buildings and then contended that they could not be evicted, but the Privy Council rejected this contention saying that in order to raise the equitable estoppel against the lessors it was encumbent on the lessees " to shew that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation.'' In many such cases the conduct of the landlord is construed as an implied agreement to compensate the tenants when evicted (*i*). When a mortgagee spent money in repairing a well the consent of the mortgagor was implied (*j*).

(*c*) (1925) 4 Pat. 707, 52 I. A. 178, 187, 87 I.C. 818, ('25) A.PC. 146; *Ahmad Yar Khan* v. *The Secretary of State for India* (1901) 28 Cal. 693, 28 I. A. 211.

(*d*) *Abdul Razak* v. *Nandlal* (1938) A.N. 506.

(*e*) (1899) 21 All. 496, 26 I. A. 58.

(*f*) *Ismail Khan Mahomed* v. *Jaigun Bibi* (1900) 27 Cal. 570; *Nundo Kumar* v. *Banomali Gayan* (1902) 29 Cal. 871; *Ehsad Hussain* v. *Bani Bahadur* (1918) 45 I. C. 242; *Narasayya* v. *Raja of Venkatagiri* (1914) 37 Mad. 1, 7 I.C. 202; *B. Stocking* v. *Tata Iron and Steel Co.* (1917) 2 Pat. L. J. 600, 41 I. C. 175; *Syed Ali Kasemini* v. *Manik Chandra* (1923) 27 Cal. W. N. 969, 80 I. C. 580, ('24) A.C. 156; *Shyam Kristo* v. *Ganesh* (1930) 124 I.C. 634, ('30) A.P. 20; *Karan Singh* v. *Budh Singh* (1938) A.A. 342, (1938) A.L.J. 465, 176 I.C. 185; *Budsu Dubari Lal Mudi* v. *Raneeganj Coal Association* (1943) 22 Pat. 554 and *Subodh Chandra* v. *Bhagwandas* (1946) 50 C.W.N. 851.

(*g*) (1902) 29 Cal. 871.

(*h*) (1899) 21 All. 496, 26 I. A. 58, 63.

(*i*) *Dattatrya* v. *Shridhar* (1893) 17 Bom. 736; *Yeshwadabai* v. *Ramchandra* (1894) 18 Bom. 66; *Ramchandra* v. *Vishnu* (1920) 22 Bom. L. R. 948, 58 I. C. 323; *Kunhammed* v. *Narayanan* (1889) 12 Mad. 320; *Muhalakshmi Ammal* v. *Palani Chetti* (1871) 6 Mad. H. C. 245.

(*j*) *Durga Singh* v. *Naurang* (1895) 17 All. 282.

Similarly when the original grant was lost and the tenant had been 25 years in possession and had erected buildings to the knowledge of the lessor the Court presumed that the grant was of a permanent tenancy for building purposes (*k*).

But if there is no implied promise, and the tenant has made improvements or erected buildings merely in the hope that he will not be dispossessed, the landlord cannot be deprived of his right to take back his property with all the improvements imprudently made by the tenant (*l*).

In a recent case before the Privy Council from Canada (*m*), Lord Russell of Killowen contrasted the cases of *Ramsden* v. *Dyson* and *Lala Beni Ram* v. *Kundan Lall* and said that the foundation on which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying.

The following case illustrates the conditions that must be fulfilled before the rule of equitable estoppel can be applied :—

> Bowyer in 1869 granted to Barber a lease of three acres of land for 99 years, and the lease contained a covenant against assignment without the consent of the lessor. In 1874 Barber leased one acre of the land to Willmott, who owned an adjacent saw mill, for the remainder of his term under the head lease, and also gave Willmott the option of purchasing his interest in the whole three acres within five years. Willmott laid out large sums of money in raising the level of the land and converting it into a timber yard. Then in 1877 Willmott gave notice of his intention to exercise his option. Barber refused on the ground that his lessor Bowyer refused his consent to the assignment. Willmott sued for specific performance of the agreement of option by Barber, and to compel Bowyer to give his consent. Fry, J., held that Barber could not be compelled to commit a breach of the covenant in the head lease and that although Bowyer was aware of the expenditure of money he was not liable because he did not know that Willmott was acting in ignorance of his rights, and because he was himself not aware of the covenant against assignment in his lease to Barber (*n*).

Transfer of property pending suit relating thereto.

52. During the *pendency* in any Court having authority in the Provinces, or established beyond the limits of the Provinces by the Central Government, of *any* suit or proceeding *which is not collusive and* in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding

(*k*) *Yeshwadabai* v. *Ramchandra*, *supra*.

(*l*) *Naunihal* v. *Rameshar* (1894) 16 All. 328.

(*m*) *Canadian Pacific Rly.* v. *The King* (1932) 61 Mad. L. J. 958, 138 I. C. 282, ('32) A.P.C. 108.

(*n*) *Willmott* v. *Barber* (1880) 15 Ch. D. 96.

S. 52 *in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.*

(1) **Amendments.**—This section has been amended by the Amending Act 20 of 1929. Before the amendment it was as follows :—

"During the active prosecution in any Court having authority in British India or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to effect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

The following amendments have been made by the amending Act 20 of 1929. The word "pendency" has been substituted for the words "active prosecution" as the latter words gave rise to many conflicting decisions. The words "any suit or proceeding which is not collusive" have been substituted for the words "a contentious suit or proceeding." The Explanation is new and fixes the time during which a suit is deemed to be pending for the purposes of the section. These are matters which are discussed in detail in the notes which follow.

(2) **Lis Pendens.**—The section enacts the doctrine of *lis pendens* which is expressed in the maxim "*ut lite pendente nihil innovetur.*" The scope of the section is discussed in the undernoted cases (*o*). The principle on which the doctrine rests is explained in the leading case of *Bellamy* v. *Sabine* (*p*) where Turner, L. J., said—

> "It is as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation— that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of preceeding."

Lord Cranworth in the same case explained that the doctrine did not rest on the ground of notice. His Lordship said—

> "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

(*o*) *Ramdhan* v. *Kedarnath* (1938) A.C.I.; *Hiranya Bhusan* v. *Gouri Dutt* (1943) A.C. 207, 76 C.L.J. 191, 208 I.C. 75.

(*p*) (1857) 1 DeG. & J. 566, 578, 584; *Lakshmandas* v. *Dasrat* (1882) 6 Bom. 168; *Basappa* v. *Bhimangowda* (1928) 52 Bom. 208, 108 I.C. 17, ('28) A.B. 65; *Dodey Ram* v. *Gulkando* (1929) 118 I.C. 669, ('29) A.A. 601.

These judgments were quoted and followed by the Privy Council in *Faiyas Husain Khan* v. *Prag Narain* (q) which is the leading case on the doctrine of *lis pendens* in India. Mookerjee, J., speaking of the application of the doctrine to suits for specific performance of contracts to transfer immoveable property, said that if, when the jurisdiction of the Court had once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to litigation and justice would be defeated (r). The rule is therefore based not on the doctrine of notice, but on expediency, *i.e.*, the necessity for final adjudication (s). It is immaterial whether the alienee *pendente lite* had or had not notice of the pending proceeding (t). Story in his Equity Jurisprudence says, in a passage that is frequently quoted by Courts in India, that the effect of the maxim is not to annul the conveyance, but only to render it subservient to the rights of the parties to the litigation (u). The section merely declares what was already law, for the doctrine was acted upon in many cases before the passing of the Act (v).

Registration.—It need hardly be said that it makes no difference to the operation of the rule that the transfer is by registered deed while the suit is on an unregistered instrument (w).

(3) Omission of the words "active prosecution."—The omission of the words "active prosecution" simplifies the rule. These words which occurred in the section before it was amended were probably suggested by Lord Bacon's order (x) which applied the rule while the suit was in full force without any intermission. In *Kinsman* v. *Kinsman* (y), Lord Lyndhurst said: "Without going so far as to say with Lord Bacon that there must be a constant and vigorous prosecution of the suit, still something should be done to keep it alive and in activity." Accordingly the Bombay High Court did not apply the rule to a sale of property which had been charged by a prior mortgage decree, because the decree had not been executed *for seven years* (z); and in another case (a) where property subject to a charge for the maintenance of a Hindu widow created by a decree of 1902 was sold in 1906 to a purchaser who had no notice of the charge, the same High Court said that the purchase was not subject to *lis pendens* as the widow had taken no steps *for four years* to execute the decree. Moreover these cases assumed that the *litis contestatio* ended with the decree, unless the decree was the inception of further proceedings so that it was conceded that a transfer after a mortgage decree and *during* proceedings

(q) (1907) 29 All. 339, [illegible] A. 102.

(r) *Jahar Lal Bhutra* [illegible]*upendra Nath* (1922) 49 Cal. 495, 67 I.C. 108, ('22) A.C. 412; *Nathaji* v. *Nana* (1907) 9 Bom. L. R. 1178.

(s) *Setappa Goundan* v. *Muthia Goundan* (1908) 31 Mad. 268; *Dinonath* v. *Shama Bibi* (1901) 28 Cal. 23; *Hakim Singh* v. *Charan Das* (1903) P.R. 80 F. R.; *Achut* v. *Shivajirao* (1937) A.B. 244, 39 Bom. L.R. 224, 170 I.C. 172.

(t) *Maharaj Bahadur* v. *Shaikh Abdul Rahim* (1922) 1 Pat. 5, 62 I.C. 900, ('22) A.P. 394.

(u) Commentaries on Equity Jurisprudence, 3rd English Ed., sec. 406, p. 166; *Liladhar Uttamchand* v. *Shivaji Ganesh* (1936) Nag. 82, 165 I.C. 550, (1936) A.N. 125.

(v) *Tarakant* v. *Puddomoney* (1866) 10 M.I.A. 476, 5 W.R. 68 P.C.; *Umamoyi* v. *Tarini Prasad* (1867) 7 W.R. 225; *Digamburee* v. *Eshan* (1871) 15 W.R. 372; *Raj Kishen Mookerjee* v. *Radha Madhub* (1874) 21 W.R. 349; *Ram Kishen* v. *Doolee Chand* (1874) 22 W.R. 547; *Sami Ayyan* v. *Ammai Ammal* (1871) 6 Mad. H.C. 234; *Manual* v. *Sangapalli* (1872) 7 Mad. H. C. 104; *Balaji* v. *Kushalji* (1874) 11 Bom. H.C. 24; *Gulabchand* v. *Dhondi* (1874) 11 Bom. H.C. 64; *Lala Kali* v. *Bull Singh* (1877) 4 Cal. 789; *Pranjivan* v. *Baju* (1880) 4 Bom. 34; *Lakshmandas* v. *Dasrat* (1882) 6 Bom. 168; *Parvati* v. *Kisansingh* (1882) 6 Bom. 567.

(w) *Bhagwan Das* v. *Nathu Singh* (1884) 6 All. 444; *Pir Baksh* v. *Kadir Baksh* (1898) P. R. 32.

(x) Cf. Tothill's Chancery Reports, P. 45. ("But where he comes in *pendente lite* and while the suit is in full prosecution and without any colour of allowance or privity of the Court; then regularly the decree bindeth").

(y) (1830) 1 R. & M. 617.

(z) *Venkatesh* v. *Maruti* (1888) 12 Bom. 217.

(a) *Bhoja Mahadev* v. *Gangabai* (1913) 37 Bom. 621, 21 I.C. 54, dissented from by Seshagiri Ayyar, J., in *Ramasami* v. *Govinda* (1916) 31 Mad. L.J. 859, 35 I.C. 1, and in *Abdul Muhammad* v. *Sithalakshmi* (1931) 130 I.C. 666, ('31) A.M. 120, but apparently approved in *Laxman* v. *Ramchandra* (1932) 34 Bom. L.R. 117, 139 I.C. 810, ('32) A.B. 201.

S. 52 to bring the property to sale was subject to *lis pendens* (*b*). The Calcutta High Court also referred to the conduct of the plaintiff in the prosecution of the suit and considered whether a *delay in filing an appeal* showed that the suit was not actively prosecuted (*c*). In England there is a system of registration of suit for the purpose of *lis pendens*, and if the proceedings are not prosecuted bona fide, the registration of the *lis pendens* can be vacated (*d*). The introduction of a similar system in India was recommended by Jenkins, C.J. (*e*), on the ground that the consideration of remissness and laches must lead to much uncertainty in the application of the rule. It is often difficult to say if the plaintiff is responsible for the delay, and it is impossible to define exactly the standard of diligence that would constitute "active prosecution." The words "active prosecution" have accordingly disappeared from the section.

(4) Whether section as amended has retrospective effect.—The question whether the amendment of the section by the omission of the words "active prosecution" has retrospective effect was discussed in a Nagpur case (*f*). The suit was for specific performance of an agreement of sale of land. The purchaser obtained a decree, but was dilatory in enforcing execution of the decree. The vendor executed a mortgage to a third party while execution proceedings were pending and before the Court conveyance was executed. The Court held that as execution proceedings had not been actively prosecuted and had lasted *for nearly four years* (from 30th June 1921, the date of decree of the Court of Appeal, till the 14th February 1925, the date of the Court conveyance) the purchaser was not protected by *lis pendens*, and took subject to the mortgage. Section 52 is not specified in sec. 63 of Act 20 of 1929 as one of the sections which shall not have retrospective effect, but the Court relied on the following clause in the section :—

> "and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April 1930, in any proceeding pending in the Court on that date."

In a Bombay case (*g*) decided by a single Judge, it was assumed that the section is not retrospective. In *Madho Ram* v. *Kulya Nand* (*h*) the Judicial Committee held that if the mortgage affected by *lis pendens* came into existence before the amendment of 1929 came into force, sec. 52 as it stood before the amendment applied. In another case (*i*) the Bombay High Court held that the section is retrospective.

(5) Omission of the word "contentious."—The word "contentious" which occurred in the section before it was amended led to considerable difficulty and misunderstanding. It was supposed that a suit became contentious only when it was brought to the notice of the defendant by service of summons (*j*), or when a written statement was filed (*k*); and that a suit could not be contentious if it ended in an *ex parte* decree (*l*), or a consent decree (*m*). The effect of these decisions was that a party, by not appearing, or by consenting to a decree, could effect an alienation which would deprive the decree holder of the fruits of his judgment (*n*).

(*b*) *Shivjiram* v. *Waman* (1898) 22 Bom. 939, following *Radhamadhub* v. *Monohur* (1888) 15 Cal. 756, 15 I.A. 97; *Samal* v. *Babaji* (1904) 28 Bom. 361.

(*c*) *Dinonath* v. *Shama Bibi* (1901) 28 Cal. 2327.

(*d*) Lis Pendens Act, 1867, 30 and 31 Vict. 47, s. 2, now replaced by secs. 2 & 3 of the Land Charges Act, 1925, 15 Geo. 5, c. 22.

(*e*) *Krishnappa* v. *Shivappa* (1907) 31 Bom. 393, 400.

(*f*) *Harlal* v. *Lala Prasad* (1931) 133 I.C. 395, ('31) A.N. 138.

(*g*) *Laxman* v. *Ramchandra* (1932) 34 Bom. L.R. 117, 139 I.C. 610, ('32) A.B. 301.

(*h*) (1944) A.PC. 96.

(*i*) *Leelachand* v. *Vishnu* (1945) A.B. 409.

(*j*) *Abboy* v. *Annamalai* (1889) 12 Mad. 130; *Parsotam* v. *Sanehi Lal* (1889) 21 All. 408; *Radhasyam* v. *Sibu* (1888) 15 Cal. 647; *Chaturbhuj* v. *Lachman* (1906) 28 All. 196; *Jogendra* v. *Fulkumari* (1900) 27 Cal. 77.

(*k*) *Krishna Kamini* v. *Dinomony* (1904) 31 Cal. 658.

(*l*) *Upendra Chandra* v. *Mohri Lal* (1904) 31 Cal. 745.

(*m*) *Vythinadayyan* v. *Subramanya* (1889) 12 Mad. 439; *Kailas Chandra* v. *Fulchand* (1872) 8 Beng. L. R. 474.

(*n*) *Annamalai Chettiar* v. *Malayandi* (1906) 29 Mad. 426 F. B., overruling *Vythinadayyan* v. *Subramanya*, *supra*.

The law was however settled by the judgment of the Privy Council in the leading case of *Faiyaz Husain Khan* v. *Prag Narain* (*o*). A mortgagee sued to enforce his mortgage, but before service of summons the mortgagor effected a puisne mortgage. The prior mortgagee continued his suit and brought the property to sale without making the puisne mortgagee a party. The Privy Council held that after the sale the puisne mortgagee's right to redeem the prior mortgage was extinguished. Their Lordships said that they were " unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of sec. 52 of the Act of 1882 until a summons is served upon the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty." This passage makes it clear that the word "contentious" refers to the origin and nature of the suit and not to the conduct of the plaintiff with reference to its prosecution. Sir Lawrence Jenkins in *Krishnappa* v. *Shivappa* (*p*) made the matter clearer still by saying that the word " contentious " is used to introduce into the section a condition that the suit must be real and not collusive.

(6) Suits decided ex parte.—It is now settled law that, in the absence of fraud or collusion, the doctrine of *lis pendens* applies to a suit which is decided *ex parte* (*q*), or by a compromise (*r*). If the suit is withdrawn and a compromise is then recorded in a conveyance between the parties, such compromise would not be protected by the doctrine of *lis pendens* (*s*). It is hardly necessary to add that when a compromise includes matters which do not relate to the suit, the compromise would not be protected as to such extraneous matter.

(7) Lis pendens between co-defendants.—At the same time the party whose rights are affected must be a party between whom and the party alienating there is, an issue for decision. As in *res judicata*, the rule of *lis pendens* will not apply between co-defendants unless the relief claimed in the suit involves a decision between them. This is illustrated by the following case (*t*). The plaintiff sued for a declaration that he was not bound by his sale to *A* nor by *A*'s mortgage to *B*. In the suit *A* and *B* made common cause against the plaintiff and a decree was passed affirming the sale, but declaring that the plaintiff had a lien for unpaid purchase money in priority to *B*'s mortgage. During the pendency of the suit the property was purchased in execution of a money decree against *A*. After the suit *B* filed a suit to enforce his mortgage and contended that the execution purchaser was barred by *lis pendens* from disputing it. But the Court held that the rule of *lis pendens* did not apply, as there was no issue between *A* and *B*.

(8) Compromise or consent decree.—The fact that a suit results in a consent decree is no bar to the application of the doctrine of *lis pendens*. As was observed in

(*o*) (1907) 29 All. 339, 345, 34 I.A. 102.

(*p*) (1907) 31 Bom. 393.

(*q*) *Krishnappa* v. *Shivappa* (1907) 31 Bom. 393; *Ram Bharose* v. *Rampal Singh* (1920) 42 All. 319, 58 I.C. 484; *Brojo Kishoree* v. *Meajan Biswas* (1908) 13 Cal. W.N. 1138, 3 I.C. 791; *Durga Prasad* v. *Madho Prasad* (1908) 8 Cal. L.J. 158; *Bhagirathi* v. *Raj Kishore* (1930) 28 All. L.J. 766, 122 I.C. 887, ('30) A.A. 354.

(*r*) *Annamalai Chettiar* v. *Malayandi* (1906) 29 Mad. 425 F.B.; *Mati Lall* v. *Preo Lall* (1908) 13 Cal. W.N. 226; *Tinoodhan* v. *Trailokhya* (1912) 17 Cal. W. N. 418, 18 I. C. 177; *Tangor Majhi* v. *Jaladhar* (1910) 14 Cal. W.N. 822, 5 I. C. 691; *Bharat Ramanuj* v. *Srinath Chandra* (1922) 49 Cal. 220, 66 I. C. 273, ('22) A. C. 358; *Parvathi Ammal* v. *Govinda Raja* (1924) 45 Mad. L. J. 682, 76 I. C. 876, ('24) A. M. 359; *Mst. Ramdulari Kuer* v. *Upendranath* (1925) 4 Pat. 619, 90 I.C. 251, ('25) A.P. 462; *Bhagirathi* v. *Raj Kishore* (1930) 28 All. L. J. 766, 122 I.C. 887, ('30) A.A. 354; *Mst. Jhuna* v. *Munshi Tara Chand* (1910) 6 I.C. 168; *Raghubar* v. *Ghasite* (1910) 13 O.C. 93, 6 I.C. 750; *Basappa* v. *Bhimangowda* (1928) 52 Bom. 208, 108 I. C. 17, ('28) A. B. 65; *Periamurugappa* v. *Manicka* (1926) 49 Mad. L. J. 68, 87 I.C. 218, ('26) A.M. 50; *Sat Narain* v. *Badri* (1928) 107 I. C. 556, ('28) A. O. 146; *Dhiraj Singh* v. *Dina Nath* (1910) 8 I.C. 238.

(*s*) *Subramonian Chetty* v. *Mohan Ali* (1919) 52 I.C. 624.

(*t*) *Krishnaya* v. *Maliya* (1918) 41 Mad. 456, 44 I.C. 471 F.B.

S. 52 a Calcutta case (u), "unless a compromise is collusive, the very fact that there is a compromise shews that the suit was in its origin and nature contentious, otherwise there would be nothing to compromise." But if the compromise has not been fairly and honestly obtained the suit which ended in the compromise will not operate as a *lis pendens* (v).

(9) **Not collusive.**—The substitution of the words "any suit or proceeding which is not collusive" for the words "a contentious suit or proceeding" does not import any change in the law. It only gives effect to the judgment of the Privy Council in *Faiyaz Hussain Khan* v. *Prag Narain* (w), and these are the very words used by Sir Lawrence Jenkins in *Krishnappa* v. *Shivappa* (x). The doctrine therefore comes into operation from the very movement of the institution of a bona fide suit which is in no way collusive (y). Merely because the defendant in the suit admitted the plaintiff's claim, it would not render the suit non-contentious within the meaning of the section, as it stood before the amendment (z).

A collusive suit is not a real suit at all, not a battle, but a sham fight (a). A suit may be collusive in its very inception, or a decree may be obtained by collusion in a suit which was honestly begun. When the parties to a suit entered into an agreement for the express purpose of defeating the rights of a transferee and obtained a decree in terms of the agreement, the rule of *lis pendens* did not apply (b). With reference to the word "contentious" in the old section it has been suggested that the doctrine of *lis pendens* does not apply to friendly suits brought by agreement of parties to obtain a declaration by the Court of their rights (c). But such suits are neither fraudulent nor collusive, and there can be no doubt but that they fall within the scope of the section. A collusive proceeding is binding on the immediate parties but not on their transferees (d).

(10) **During the pendency—Explanation.**—The section has now been simplified by the omission of the words "active prosecution," and it applies to transfers during the entire "pendency" of the suit. The question then arises, for what period is the suit pending? There are many decisions on this point but these have lost much of their importance, for the question is to a great extent answered by the Explanation now added by the Amending Act 20 of 1929. The explanation was added to affirm the correct view to be taken regarding the application of the rule of *lis pendens* (e).

A suit is commenced by the filing of a plaint, and appeals and execution proceedings are a continuation of the suit. A miscellaneous proceeding commences with the presentation of a petition or application. When an application to sue in *forma pauperis* is admitted, the suit is pending from the time of presentation of the application to the Court (f) but not if it is rejected (g). If the plaint is presented in a Court of higher grade, and is returned for

(u) *Bharat Ramanuj* v. *Srinath Chandra* (1922) 49 Cal. 220, 229, 66 I.C. 273, ('22) A.C. 358. See *Shiam Lal* v. *Sohan Lal* (1928) 50 All. 290, 106 I.C. 255, ('28) A.A. 3; *Nathu* v. *Ramchand* (1946) A.B. 462; *Hiranya Bhusan* v. *Gouri Dutt* (1943) A.C. 227, 76 C.L.J. 191, 208 I.C. 75.

(v) *Juthan* v. *Parasnath Singh* (1934) 151 I.C. 70, ('34) A.P. 270.

(w) (1907) 29 All. 339, 34 I.A. 142.

(x) (1907) 31 Bom. 393.

(y) *Shafiqullah* v. *Samiullah* (1930) 52 All. 139, 123 I.C. 101, ('29) A.A. 943; *Ram Narain* v. *Nawab Sajjadali Khan* (1946) A.O. 99.

(z) *Gharbhoya Bhimji* v. *Deodatta Bihari* (1937) Nag. 452, 172 I.C. 389, (1937) A.N. 400.

(a) *Ahmedbhoy* v. *Vulleebhoy* (1882) 6 Bom. 703; *Chennirappa* v. *Puttappa* (1887) 11 Bom. 708; *Nusbat-ud-dowla* v. *Dilband Begam* (1913) 16 O.C. 225, 21 I.C. 570; *Bharat Ramanuj* v. *Srinath Chandra* (1922) 49 Cal. 220, 66 I.C. 273, ('22) A.C. 358.

(b) *Periamuruguppa* v. *Manicka* (1926) 49 Mad. L. J. 68, 87 I.C. 213, ('26) A. M. 50; *Nusbatuddaula* v. *Dilband Begam*, *supra*.

(c) *Jogendra* v. *Ful Kumari* (1900) 27 Cal. 77; *Kathir* v. *Maremadissa* (1915) 38 Mad. 450, 20 I.C. 976.

(d) *Nusbat-ud-dowla* v. *Dilband Begam*, *supra*.

(e) *Kulandaivelu* v. *Sowbagyammal* (1945) A.M. 350.

(f) *Ambika Pratap* v. *Dwarka Prasad* (1908) 30 All. 95; *Pattumadammal* v. *Nanjappa* (1939) A.M. 275, 49 M.L.W. 241, (1939) M.W.N. 311, 184 I.C. 824; *Jogarao* v. *Chinnayya* (1936) A.M. 851, 71 M.L.J. 201, 164 I.C. 1006.

(g) *Sahaudrabai* v. *Shri Deo Radha Ballabhji* (1938) A.N. 30.

presentation to the Court of lowest grade competent to try it, the suit is pending from the time of first presentation, for sec. 15 of the Code of Civil Procedure is only a matter of procedure (*h*). If the plaintiff's valuation is disputed and the plaint returned after inquiry for presentation to a Court of higher grade, an alienation effected in the interval is affected by the doctrine of *lis pendens* (*i*). On the other hand it has been held that if the plaint is insufficiently stamped and is rejected and is then represented after making good the deficiency, an alienation between the two dates of presentation would not be subjected to *lis pendens* (*j*). If however the Court does not return the plaint but recovers the deficit fee, the principle of *lis pendens* would apply (*k*). If a suit is dismissed for default and then restored, the order of restoration relates back and a transfer after dismissal and before restoration is subject to *lis pendens* (*l*). But an amendment of the plaint will not relate back for the purpose of *lis pendens*. So also if a suit is instituted into a wrong Court which has no jurisdiction and was returned for presentation to the proper Court an alienation effected before its presentation to the proper Court is not affected by *lis pendens* (*m*). In an Allahabad case (*n*) the suit was to cancel a deed of gift, but the plaint omitted reference to a particular property which the defendant sold before it was included in the suit by an amendment of the plaint. The Court held that the sale was not affected by the doctrine of *lis pendens*. Where, however, the property is transferred after an application has been made for amendment to include the property but before the order for amendment has actually been made, the section will apply, for the order for amendment will relate back to the date of the application. This will be so even when the transfer is made by the heir of a deceased dependant before such heir has been brought on the record (*o*).

An appeal or execution proceeding is a continuation of the suit and *lis pendens* continues during the appeal or execution (*p*). A lease from a decree-holder will not bind his adversary if the decree is reversed on appeal (*q*). Even after the dismissal of a suit a purchaser is subject to *lis pendens*, if an appeal is afterwards filed (*r*). There is a case from Bombay which seemed to hold that *lis pendens* terminated with the decree (*s*). With this exception, cases under the old section recognized that *lis pendens* may continue after the decree. A suit for sale on a mortgage is pending after the preliminary decree for sale (*t*) and until the security is realised for the satisfaction of the judgment creditor (*u*). A suit for foreclosure is pending until decree absolute for foreclosure (*v*). A suit to enforce a mortgage by sale continues after the decree *nisi* for

(*h*) *Tangor Mahji* v. *Jaladhar* (1909) 14 Cal. W. N. 322, 5 I.C. [illegible]; *Asutosh Roy* v. *Ananta Ram* (1919) 50 I.C. 727.

(*i*) *Ma Than* v. *Maung Ba Gyan* (1927) 5 Rang. 101, 101 I.C. 797, ('27) A.R. 145.

(*j*) *Mohendra Nath* v. *Parameswar* (1921) 60 I.C. 439.

k *Shivs hankarappa* v. *Shivappa* (1943) A.B. 27.

(*l*) *Ashutosh Ray* v. *Ananta Ram* (1919) 50 I.C. 727.

(*m*) *Nathu Singh* v. *Anandrao* (1940) 186 I.C. 688, (1940) A.N. 185.

(*n*) *Wali Bandi* v. *Tabeya Bibi* (1919) 41 All. 534, 50 I.C. 919; *Ramchandra* v. *Bhagwan* (1920) 57 I.C. 652.

(*o*) *Nallakumara Goundan* v. *Pappayi Ammal* (1949) A.M. 219.

(*p*) *Mahommad Hanif* v. *Khairatali* (1940) 20 Pat. 346, at p. 353, 192 I.C. 45, (1941) A.P. 577 and the cases referred to therein; see also *Nallakumara* v. *Pappayi*, *supra*.

(*q*) *Radhika* v. *Radhamani* (1884) 7 Mad. 96.

(*r*) *Dinonath Ghose* v. *Shama Bibi* (1900) 28 Cal. 23; *Gobind Chunder* v. *Guru Churn* (1888) 15 Cal. 94; *Sukhdeo* v. *Jamna* (1901) 23 All. 60; *Settappa Goundan* v. *Muthia* (1908) 31 Mad. 268; *Motichand* v. *British India Corporation* (1932) 30. All. L. J. 64, 136 I.C. 78, ('32) A.A. 210.

(*s*) *Venkatesh* v. *Maruti* (1888) 12 Bom. 217. See also the judgment of Bakewell, J. in *Ramasami* v. *Govinda* (1916) 31 Mad. L. J. 839, 38 I. C. 1; *Govindappa* v. *Hanumanthappa* (1915) 38 Mad. 36, 39, 17 I.C. 420.

(*t*) *Chunni Lal* v. *Abdul Ali* (1901) 23 All. 331; *Bhugwan* v. *Nilkanta* (1904) 9 Cal. W.N. 171; *Surjiram Marwari* v. *Barhamdeo Persad* (1905) 2 Cal. L.J. 288; *Madaneswar* v. *Mahamaya Prosad* (1911) 15 Cal. W.N. 672, 9 I.C. 1027; *Braja Nath* v. *Joggeswar* (1909) 9 Cal. L.J. 346, 1 I.C. 62; *Ammayi M.* v. *C. Sitaramayya* (1925) 87 I.C. 714, ('25) A. M. 1039; *Chunder Koomar* v. *Gopee Kristo* (1873) 20 W.R. 204.

(*u*) *Bepin Krishna* v. *Priya Brata* (1921) 26 Cal. W. N. 36, 66 I.C. 345, ('21) A. C. 730; *Ramasami* v. *Govinda* (1916) 31 Mad. L. J. 839, 38 I.C. 1.

(*v*) *Parsotam* v. *Chheda Lal* (1907) 29 All. 76; *Premsukh Das* v. *Peerkhan* (1926) 95 I. C. 979, ('26) A. N. 21.

sale or the preliminary decree for sale, and a purchaser (w) or a lessee (x) or a subsequent mortgagee (y) after a preliminary decree for sale takes subject to the rights of the auction purchaser at the execution sale.

Illustrations.

(1) *A* mortgaged property to *B*. *B* sued on the mortgage and obtained a decree *nisi* for foreclosure. Before the decree was made absolute, *A* sold the property to *C*. The decree for foreclosure was made absolute and it was held that *C* was not entitled to redeem. If he had purchased before suit, he would have been entitled to redeem though not made a party. But as his purchase was *pendente lite* he was bound by the decree: *Parsotam* v. *Chheda Lal* (1907) 29 All. 76.

(2) *A* mortgaged property to *B*. *B* sued *A* on the mortgage and obtained a decree for sale. While this decree was in execution, *A* leased the property to *C* for ten years. *B* brought the property to sale and purchased it himself. As *C*'s lease was affected by the rule of *lis pendens*, it was held that *B* was entitled to evict *C*: *Nisar Husain* v. *Sundar Lal* (1928) 50 All. 202, 104 I.C. 292, ('27) A.A. 657; *Ram Rup* v. *Special Manager, Court of Wards, Balrampur Estate* (1934) 9 Luck. 365, 147 I.C. 910, ('34) A.O. 55.

(3) *A* mortgaged property to *B*. *B* sued on his mortgage and obtained a preliminary decree for sale. *A* then made a usufructuary mortgage of the same property in favour of *C*. *B* obtained a final decree for sale and in execution the property was sold and purchased by *D*. *C*'s usufructuary mortgage was invalid as against *D* under the rule of *lis pendens*. *D* was entitled to recover possession from *C* and to recover also all rents collected by *C* from the date of *D*'s purchase: *Nagendra* v. *Sarat Kamini* (1922) 26 Cal. W.N. 386, 66 I.C. 879, ('22) A.C. 235.

(4) *A*, as executor of the deceased owner mortgaged an entire taluk to *B*. Afterwards *C*, an ½ co-sharer in the taluk mortgaged his ½ share to *D*. *B* filed a suit on his mortgage but did not implead *D*. During the pendency of *B*'s suit *E* purchased ½ share from one of the co-sharers. *B* obtained final decree for sale in his suit and purchased the property in the court sale and transferred his interest to *E*. *D* then filed his suit on his mortgage and obtained a final decree for sale and purchased the mortgaged property *i.e.*, ½ share himself at court sale. *D* then filed a suit against *B* and *E* for redeeming *B*'s mortgage of the whole taluk. Held that as between *B* and *D*, *D* was entitled to redeem the whole taluk and not merely the ½ share, because not having been impleaded as a defendant in *B*'s suit his right of redemption remained intact. Held further that *E* having purchased ½ share during the pendency of *B*'s suit, as between *B* and *E*, *E*'s right was subject to *B*'s rights as purchaser in the court sale in execution of the final decree in *B*'s suit but as between *D* who was not a party to *B*'s suit and *E* there was no question of *lis pendens* and *E*'s right to redeem remained intact and *E* having stepped into *B*'s rights *D* could only be entitled to redeem ⅝ of the taluk: *Amulya Krishna* v. *Raruli Pioneer Co-operative Bank Ltd.* (1940) A.C. 150, 70 C.L.J. 397, 187 I.C. 416. See also *Md. Juman Mia* v. *Akali Mudiani* (1943) A.C. 577, 47 C.W.N. 682, 77 C.L.J. 162, 210 I.C. 67.

A purchaser from a defendant, who is being sued for possession and against whom a decree for possession and mesne profit is made, takes subject to the decree, and the

(w) *Samal* v. *Babaji* (1904) 28 Bom. 361; *Har Shanker* v. *Shew Gobind* (1899) 26 Cal. 966; *Brojo Kishores* v. *Meajan Biswas* (1908) 13 Cal. W. N. 1138, 3 I.C. 791; *Sami Nath* v. *Thakur Prasad* (1927) 100 I.C. 294, ('27) A.A. 309; *Mansing* v. *Amantara* (1915) 26 I.C. 879; *Naba Krishna* v. *Mohit Kali* (1911) 9 I.C. 840; *Mirza Abid Husain* v. *Munnoo Bibi* (1927) 2 Luck. 496, 102 I.C. 72, ('27) A.O. 261; *Lachiram* v. *Bholu* (1925) 82 I.C. 452, ('25) A.N. 132; *Dheraj* v. *Dinanath* (1910) 6 Nag. L.R. 140, 8 I.C. 288.

(x) *Thakur Prasad* v. *Gaya* (1898) 20 All. 349; *Ramasami* v. *Govinda Iyer* (1916) 31 Mad. L.J. 339, 38 I.C. 1; *Madan Mohan* v. *Raj Kishori* (1917) 21 Cal. W.N. 88, 39 I.C. 182; *Nisar Husain* v. *Sundar Lal* (1928) 50 All. 202, 104 I.C. 292, ('27) A.A. 657.

(y) *Nagendra* v. *Sarat Kamini* (1922) 26 Cal. W.N. 386, 66 I.C. 879, ('22) A.C. 235; *Wazir Hussain* v. *Beni Madho* (1930) 126 I.C. 389, ('30) A.O. 362.

decree for mesne profits may be executed against him as from the date on which he enters into possession (*z*).

The Explanation enacts what had already been decided, namely, that the doctrine of *lis pendens* applies not only during the pendency of the suit, but also of the appeal which finally disposes of the suit ; and if the decree is executory until satisfaction of the decree by execution or until further execution is barred by limitation (*a*).

Applications for review or revision.—The Explanation would appear to exclude applications for review or revision. An alienation in the interval between a final decree and an application for review or revision would not, it seems, be subject to the rule of *lis pendens*. But an alienation while such an application was pending would no doubt be subject to the order made thereon. There is one case on the point, but it is a curious case, for although the application for review was successful, and a money decree was altered into a mortgage decree, yet the Court refused to apply the principle of the section as there had been a delay in applying for a review (*b*).

O. 21, *r.* 63.—The Explanation seems to exclude a transfer in the interval between an order made on a claim in execution proceedings and the subsequent suit under O. 21, r. 63. The right of suit under O. 21, r. 63 is not personal and a suit by a purchaser from the unsuccessful claimant will lie. Such a purchase is not affected by sec. 52 (*c*). Where the transfer was made by the judgment debtor after an order allowing the claim and the decree-holder sued the successful claimant sec. 52 did not apply (*d*) because the judgment debtor was not a party to the suit. But in cases where the decree-holder sued the successful claimant who had transferred the property after the order allowing the claim and before the suit under O. 21, r. 63, it has been held that the transferee, though not a party, is bound because the suit was a continuation of the claim proceedings (*e*). It is submitted that this is no longer law. The claim proceedings terminate with the order under O. 21, r. 63, and if the transfer is made after that order, it is necessary to make the transferee a party.

Proceeding.—A proceeding before a Settlement Officer is not a proceeding which can operate as a *lis pendens* under this section (*f*). But a Registrar of Co-operative Societies is a Court and a proceeding under rule 14 of the Co-operative Societies Act 2 of 1912 operates as *lis pendens* (*g*).

(11) Any Party.—These words are not merely descriptive but refer to the time when the transaction takes place. A puisne mortgagee who is not joined as a party in a prior mortgagee's suit is not a party and an assignment by him during the suit is not affected by *lis pendens* although the assignee is subsequently joined in the suit (*h*).

(*z*) *Midnapore Zemindari Co.* v. *Naresh Narain* (1912) 39 Cal. 220, 11 I.C. 129 ; *Damodar* v. *Miller* (1921) 6 Pat. L.J. 166, 61 I.C. 753, ('21) A.P. 102.

(*a*) *Ghanshyam Das* v. *Ragho Singh* (1931) 10 Pat. 234, 130 I.C. 257, ('31) A.P. 64 ; *Abdul Muhammad* v. *Seethalakshmi* (1931) 130 I.C. 666, ('31) A.M. 120 ; *Aravamudhu Ayyangar* v. *Zamindarini Srinath Abiramvalliedayah* (1934) 66 Mad. L. J. 566, 150 I.C. 930, ('34) A.M. 353.

(*b*) *Nagappa Chetty* v. *Maung Po Gwe* (1912) 12 I.C. 849.

(*c*) *Ganesh* v. *Kashi Nath* (1904) 26 All. 89.

(*d*) *Pathu Ayyar* v. *Sankaranarayana* (1917) 40 Mad. 955, 38 I.C. 778.

(*e*) *Krishnappa Chetty* v. *Abdul Khader* (1915) 38 Mad. 535, 25 I.C. 11 ; *Shrinivas* v. *Shiddika* (1925) 27 Bom. L.R. 931, 89 I.C. 990, ('25) A.B. 418 ; *Khairulla* v. *Seth Dhanrupmal* (1925) 80 I.C. 905, ('25) A. N. 82 ; *Mt. Anande* v. *Lala Ram* (1939) 14 Luck. 543, 181 I.C. 362, (1939) A.O. 178 ; *Ma Ma Huya* v. *Maung Nyo Lone* (1937) A.R. 473.

(*f*) *Jaglal Rai* v. *Makhna Kuar* (1888) A. W. N. 246.

(*g*) *Velayuda Mudali* v. *Co-operative Rural Credit Society* (1934) 57 Mad. 425, 66 Mad. L.J. 90, 148 I.C. 1096, ('34) A.M. 40.

(*h*) *Mussamat Sheoratan Koer* v. *Kamta Prasad* (1932) 11 Pat. 415, 139 I.C. 78, ('32) A.P. 270.

S. 52

(12) Affect the rights.—The purchaser *pendente lite* is bound by the result of the litigation (*i*). If the other party has assented to the transfer, he cannot afterwards object to it on the ground of *lis pendens* (*j*). In an Allahabad case (*k*), *A* sued to recover possession of an immoveable property from *B*. While this suit was pending *A* mortgaged the property to *C*. The suit for possession ended in a compromise, by which half the property was allotted to *A* and the other half to *B*, and one of the terms of the compromise was that *B* should discharge the mortgage. *C* then sued to enforce his mortgage. *A*'s half share was of course liable; but as the mortgage was executed *pendente lite* the half share of *B* was not liable. If *B* had assented to the mortgage his share would have been liable. But his agreement to discharge the mortgage was subsequent to the mortgage and created a personal liability, not to *C*, but to *A*. *C* could recover on the personal liability against *A* and then *A* could sue *B* for an indemnity.

A compromise of a dispute as to the transfer of an equity of redemption, after a redemption suit had been filed, was held not to affect the rights of the mortgagee, as both the transferor and the transferee were parties to the redemption suit (*l*). A compromise of a partition suit by which a father surrenders his interest to his minor sons and appoints trustees to manage the property for their benefit and to pay the family debts is not within the scope of this section (*m*).

In a Madras case (*n*) a creditor sold property of a deceased debtor in execution of a decree against the widow as his legal representative. The sale was held pending a suit by a legatee in which his right to represent the deceased debtor was established. The Court held that as the widow was also a legal representative of the deceased and as the legatee claimed the property as representing the deceased, his rights were not affected. This is true, but the legatee's suit was to establish a personal right and could not operate as a *lis pendens*. The section expressly provides for all cases of decrees in suits relating to immoveable property whether they involve a mortgage or a charge or recovery of possession. It makes no exception in favour of a bona fide transferee for value without notice (*o*). An estoppel under sec. 41 cannot override the provisions of sec. 52 (*p*).

(13) Transfer before suit.—A transfer before suit is not subject to *lis pendens* (*q*). In *Umes Chunder* v. *Mst. Zahoor Fatima* (*r*) property was sold in execution of a decree of a prior mortgagee. The plaintiff claimed under puisne mortgages, executed, some before, and some after, the prior mortgagee's suit. He had not been made a party and sued to redeem the prior mortgagee. The Privy Council held that the right to redeem could be exercised only by virtue of the puisne mortgages executed before the suit. As to the puisne mortgages executed during the pendency of the suit their Lordships said: "But if the transfer took place *pendente lite*, the transferee must take his interest subject to the incidents of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds." A transfer by a person before he is made a party is not affected by the rule of *lis pendens* (*s*). But a transfer by a person

(*i*) *Shib Chandra* v. *Lachmi Narain* (1929) 51 All. 686, 56 I.A. 339, 119 I. C. 612, ('29) A.PC. 243.

(*j*) *Tiloke Chand Surana* v. *Beattie & Co.* (1924) 29 Cal. W.N. 953, 94 I.C. 538, ('26) A.C. 204.

(*k*) *Shiam Lal* v. *Sohan Lal* (1928) 50 All. 290, 106 I.C. 255, ('28) A.A. 3.

(*l*) *Krishnaji* v. *Motilal* (1929) 31 Bom. L.R. 476, 122 I.C. 66, ('29) A.B. 337.

(*m*) *Chhotabhai* v. *Dadabhai* (1934) 36 Bom. L.R. 738, 152 I.C. 715, ('35) A.B. 54.

(*n*) *Chatturbhujadoss* v. *Rajamanicka* (1930) 60 Mad. L.J. 97, 129 I.C. 469, ('30) A.M. 930.

(*o*) *Kulandaivelu* v. *Sowbagyammal* (1945) A.M. 350.

(*p*) *Gendmal* v. *Laman* (1945) A.N. 86.

(*q*) Cf. *Joy Chandra* v. *Sreenath Chatterjee* (1905) 32 Cal. 357; *Muhammad Juman Mia* v. *Abali Mudiani* (1943) A.C. 577, 77 C.L.J. 162, 47 C.W.N. 682, 210 I.C. 67.

(*r*) (1891) 18 Cal. 164, 17 I.A. 201, 212.

(*s*) *Annayya* v. *Narayana* (1925) 86 I.C. 187, ('25) A.M. 487.

who is the legal representative of a deceased defendant in a pending suit made prior to his being substituted in the place of the deceased defendant is hit by the doctrine (*t*). The transfer to which the provisions of this section apply is the creation of the mortgage itself and not the subsequent sale in execution (*u*).

Illustration.

A makes a gift of land to *B*. *C* sues *A* for possession of the land. While this suit is pending *B* transfers the land to *D*. *A* dies and *C* obtains a decree for possession against *B* as legal representative of *A*. Is *D*'s title affected by the rule of *lis pendens* so as to be subject to *C*'s decree ? No, because (1) *A*'s gift was before the suit, and (2) *B* was not a party to the suit at the time of the transfer by *B* to *D* : *Bala Ramchandra* v. *Daulu* (1925) 27 Bom. L.R. 38, 86 I.C. 126, ('25) A.B. 176.

Subsequent registration.—It matters not that the deed was registered after the suit, if the deed was executed before the filing of the suit (*v*). This is because under sec. 47 of the Registration Act, 1908, a deed operates from date of execution and not from date of registration.

(14) Right before suit.—When the rule is applied to a transfer *pendente lite*, it will not affect a right existing before the suit. If a puisne mortgagee sues for sale on his mortgage the property will be sold subject to the rights of the prior mortgagee (*w*). A sale in pursuance of a decree on a mortgage executed before suit is not affected by *lis pendens* (*x*).

Illustration.

A mortgages property first to *B*, and then to *C*. *C* sues *A* on his mortgage and pending the suit *A* sells the property to *B*. The sale having been made *pendente lite* is subject to the decree in *C*'s suit. But *A*'s right under his prior mortgage is not affected : *Lachmin Narain* v. *Koteshar* (1880) 2 All. 826.

A resale by the vendee during a suit for pre-emption is affected by the rule of *lis pendens*, even though the sale be to the original vendor (*y*), but if the purchaser has a superior right of pre-emption that right will not be affected (*z*). If the purchaser has an equal right of pre-emption the proper procedure is to divide the property between the two pre-emptors equally (*a*). But the Lahore High Court considers that if the purchaser has an equal right of pre-emption the purchase is not affected by the doctrine of *lis pendens* (*b*).

A mortgagee who has an express power of sale without the intervention of the Court does not lose his remedy on the mortgagor filing a suit for redemption (*c*).

(*t*) *Nallakumara Goundan* v. *Pappayi Ammal* (1945) A.M. 219.

(*u*) *Natesa Chettiar* v. *Subbunarayana* (1945) A.M. 91.

(*v*) *Venkataramana Reddi* v. *Rangia Chetti* (1922) 41 Mad. L.J. 399, 70 I.C. 212, ('22) A.M. 249 dissenting from *Tilakdhari* v. *Gour Narain* (1920) 5 Pat. L.J. 715, 59 I.C. 290, ('21) A.P. 150 ; *Veerakutty* v. *Ramaswami* (1916) 32 I.C. 31 ; *Guru Basappa* v. *Santhappa* (1925) 48 Mad. L.J. 496, 87 I.C. 568, ('25) A.M. 710.

(*w*) *Kanti Ram* v. *Kutubuddin* (1895) 22 Cal. 33 ; *Lachmin Narain* v. *Koteshar Nath* (1878) 2 All. 826 ; *Venkatarama Aiyar* v. *Rangiyan Chetty* (1924) 46 Mad. L.J. 258, 77 I.C. 504, ('24) A.M. 449 F.B.

(*x*) *Chinnaswami* v. *Darmalinga* (1932) 63 Mad. L.J. 394, 139 I.C. 309, ('32) A.M. 566 ; *Suramma Nayuralu* v. *Surayya* (1934) 67 Mad. L.J. 812, 155 I.C. 612, ('34) A.M. 585 ; *Annapurna Dasee* v. *Sarat Chandra* (1942) A.C. 394, 46 C.W.N. 355.

(*y*) *Bhikhi Mal* v. *Debi Sahai* (1925) 47 All. 923, 89 I.C. 219, ('26) A.A. 179 ; *Kehar Singh* v. *Jahangir* (1925) 47 All. 625, 88 I.C. 761, ('25) A.A. 487 ; *Durga Prosad* v. *Gangadin* (1925) 88 I.C. 202, ('25) A.A. 502 ; *Kedar Nath* v. *Bankey Behari Lal* (1911) 11 I.C. 645.

(*z*) *Malik Singh* v. *Shiam Lal* (1929) 27 All. L.J. 537, 118 I.C. 43, ('29) A.A. 440 ; *Mahmud Khan* v. *Khuda Bakhsh* (1908) P. R. 26 ; *Shariff Hussain* v. *Nur Shah* (1929) 123 I.C. 124, ('29) A. L. 569 ; *Bhag* v. *Ujagar* (1931) 22 Panj. L.R. 283, 135 I.C. 48, ('31) A.L. 485.

(*a*) *Bachan Singh* v. *Bigai Singh* (1926) 48 All. 221, 90 I.C. 238 ('26) A.A. 180.

(*b*) *Mool Chand* v. *Ganga Jal* (1930) 11 Lah. 258, 132 I.C. 369, ('30) A.L. 356 F.B.

(*c*) *Ramakrishna* v. *The Official Assignee of Madras* (1922) 45 Mad. 774, 69 I.C. 407, ('22) A.M. 390 ; *Jagjivan* v. *Shridhar* (1878) 2 Bom. 252.

S. 52 In *Anundo Moyee* v. *Dhonendro Chunder* (d) the defendant purchased property in execution of a money decree against the mortgagor while a suit for foreclosure was pending but the Privy Council held that as the property had been attached in execution proceedings before the execution of the mortgage, the defendant held by title paramount and was not affected by *lis pendens*. In this case, however, the property was in the mofussil and the decree was a decree for sale made by the Supreme Court at Calcutta in its equity jurisdiction, and as equity acts *in personam* the decree was in substance a decree that the parties should concur in conveying and selling the property to the purchaser. The Court had no jurisdiction over the property and therefore the suit could not operate as a *lis pendens*. Otherwise the principle of *Motilal* v. *Karrabuldin* (e) would have applied, for in that case it was held that an attachment before suit does not prevent the operation of the doctrine of *lis pendens*.

(15) Section 52 excludes section 41.—See note under the same heading under sec. 41. On the same principle a purchaser *pendente lite* who makes improvements cannot, it is submitted, claim the benefit of sec. 51. The point was raised but not decided in the undernoted case (f).

(16) British Court.—A suit in a foreign Court cannot operate as a *lis pendens* (g). The section does not apply unless the suit is pending in a British Court, *i.e.*, a Court exercising jurisdiction in British India or a Court established without British India under the Foreign Jurisdiction Order in Council. The Privy Council is not a foreign Court for it exercises jurisdiction in British India (h). The Court must also be a Court having jurisdiction, *i.e.*, competency to try the suit (i). A High Court is under the Letters Patent empowered to try a suit for land in the mofussil if part of the land is within the local limits of its jurisdiction and leave of the Court has been obtained. In such a case a mortgage suit for land partly situate in the mofussil and filed in the High Court will operate as a *lis pendens* (j). But a suit on a mortgage of land in the mofussil tried in the Supreme Court at Calcutta in its equity jurisdiction, did not constitute a *lis pendens*, as the Court had no jurisdiction over the land and its decree was *in personam* and did not affect title to immoveable property (k). Similarly, when a Hindu widow gave a lease of land in the mofussil while an equity suit against her husband's executor was pending in the Supreme Court at Calcutta, the lease was not affected by the doctrine of *lis pendens* as the Supreme Court had no jurisdiction over land in the mofussil (l). If the Court has jurisdiction, it matters not that under sec. 15 of the Code of Civil Procedure the suit should have been filed in a Court of lower grade (m).

(17) Moveables.—The doctrine of *lis pendens* does not apply to moveables (n). If ornaments are pledged pending a suit for their recovery, the pledgee does not take subject to the decree (o).

(18) The right to immoveable property must be directly and specifically in question.—It is of the essence of the rule of *lis pendens* that a right to immoveable

(d) (1872) 14 M.I.A. 101, 8 Beng. L.R. 122 P.C.

(e) (1898) 25 Cal. 179, 24 I.A. 170.

(f) *Motichand* v. *British India Corporation* (1932) 30 All. L.J. 54, 136 I.C. 78, ('32) A.A. 210.

(g) *Palani Chetti* v. *Subramanyan Chetti* (1896) 19 Mad. 257.

(h) *Bowles* v. *Bowles* (1884) 8 Bom. 571.

(i) *Ali Shah* v. *Husain Bakhsh* (1879) 1 All. 588; *Nathu Singh* v. *Anandrao* (1940) 186 I.C. 688, 40 A.N. 185; *Kurusinga* v. *Narasinha* (1938) A.B. 121, (1937) Bom. 895, 39 Bom. L. R. 1287, 174 I.C. 116.

(j) *Kiernander* v. *Benimadhab* (1931) 58 Cal. 598, 134 I.C. 561, ('31) A.C. 763.

(k) *Anundo Moyee* v. *Dhonendro Chunder* (1872) 14 M.I.A. 101, 8 Beng. L.R. 122 P.C.

(l) *Bissonath* v. *Radha Kristo* (1869) 11 W.R. 554.

(m) *Tangor Majhi* v. *Jaladhari* (1909) 14 Cal. W.N. 322, 5 I.C. 691.

(n) *Govind Baba* v. *Jijibai* (1912) 36 Bom. 189, 13 I.C. 849; *Wigram* v. *Buckley* (1894) 3 Ch. 483.

(o) *Govind Baba* v. *Jijibai, supra.* But see *Talari Kevali* v. *Visvanathan* (1915) 16 Mad. L.T. 158, 25 I.C. 138.

property is directly and specifically in question in the suit (*p*). Therefore when the disputes for money, where no property is in dispute, is referred to arbitration and an award is made creating a charge for payment of the amount and a judgment is passed on such an award the doctrine of *lis pendens* does not apply (*q*). Not only must the right to immoveable property be directly and specifically in question in the suit, but the description of the property in the pleadings must be sufficient to identify the property (*r*). On the other hand, it is not sufficient to specify the property if the right to it is not directly in issue. Thus when a Hindu widow sued her stepson for maintenance, and merely specified the items of property in his possession it was held that the suit did not operate as *lis pendens* (*s*). But where the widow not only specified the property, but claimed that her maintenance should be charged upon it, it was held that the suit did operate as *lis pendens* (*t*). The doctrine is not applicable in favour of a third party. Where the only point which arises for decision in the suit was whether a deed of settlement was true or false, it cannot be said that any right to immoveable property was in question, and therefore sec. 52 cannot apply. Nor can it be invoked by a party who was not a party to the suit (*u*). A suit for a declaration of a charge upon specific immoveable property falls within the purview of this section (*v*).

The property transferred or dealt with must be property actually in litigation (*w*). Thus if *A* files a suit against *B* to establish a right of pre-emption in respect of a purchase by *B* of property *X*, and *B* during the pendency of the suit acquires property *Y* by gift from another co-sharer and so himself becomes a co-sharer not liable to be pre-empted, no question of *lis pendens* can arise, for the property in suit has not been transferred. See para. (ix) *infra* 'Suit for pre-emption.'

(*i*) *Suit in which no right to immoveable property is in question.*—Suits in which no right to immoveable property is in question are outside the scope of the section. Such suits are suits for debt or damages where the claim is limited to a money demand (*x*), or a suit for the recovery of specific moveables (*y*), or a suit for an account (*z*), or a suit for rent of an agricultural holding (*a*), or an application for a personal decree under O. 34, r. 6, to the Code of Civil Procedure, 1908, when the net sale proceeds are insufficient to satisfy the mortgage decree (*b*). A transfer of immoveable property during a suit for debt or damages may, however, be attacked under sec. 53 as a fraud on creditors. *A* sues *B* for debt. During the pendency of the suit *B* makes a gift of his immoveable property to *C* in order to put it out of the reach of *A* and other creditors. The transfer by gift is not subject to *lis pendens*, but it may be attacked as a fraud on creditors under sec. 53.

(*ii*) *Suit for maintenance.*—A suit by a Hindu wife for maintenance against her husband is a personal suit, and a purchaser from the husband during the pendency of the

(*p*) *Jaynal Abedin* v. *Hyderali Khan* (1928) 55 Cal. 701, 111 I.C. 340, ('28) A.C. 441 citing *Ex parte Thornton* (1867) 3 Ch. 178; *Maung Ta Pan* v. *Maung po Thaw* (1910) 8 I.C. 1208; *Shanmughasundaram* v. *Parvathi Ammal* (1945) A.M. 454.

(*q*) *Abdul Ghaffar* v. *Ishtiaq Ali* (1943) A.O. 354, (1944) 19 Luck. 1 (1943) O.W.N. 261, 210 I.C. 326.

(*r*) *Lokenath Sahu* v. *Achitananda* (1912) 15 Cal. L.J. 391, 2 I.C. 85; *Wali Bandi* v. *Tabeya Bibi* (1919) 41 All. 534, 50 I.C. 919.

(*s*) *Manika Gramani* v. *Ellappa* (1896) 19 Mad. 271.

(*t*) *Doss Thimmana* v. *Krishna* (1906) 29 Mad. 508; *Krishna Patter* v. *Sinnaponnu* (1914) 25 I.C. 759; *Seetharamanujacharyulu* v. *Venkatasubbamma* (1930) 54 Mad. 132, 127 I.C. 809, ('30) A.M. 824.

(*u*) *Shanmugh Samudram* v. *Parvathi Ammal* (1945) A.M. 454.

(*v*) *Sudhamoyee* v. *Jessore Loan Company* (1945) A.C. 322.

(*w*) *Hans Nath* v. *Ragho Prasad* (1932) 59 I.A. 138, 54 All. 189, 136 I.C. 402, ('32) A.PC. 57; *Thakardas* v. *Jaikishna* (1938) A.L. 448, 40 P.L.R. 763.

(*x*) *Laxaman* v. *Ramchandra* (1932) 34 Bom. L.R. 117, 139 I.C. 610, ('32) A.B. 201; *Abdul Gaffur* v. *Ishaqali* (1943) A.O. 354, (1943) O.W.N. 261, 210 I.C. 326.

(*y*) *Govind Baba* v. *Jijibai* (1912) 36 Bom. 189, 13 I.C. 849.

(*z*) *Kasumunnissa* v. *Nilratna* (1881) 8 Cal. 79.

(*a*) *Bahadur Singh* v. *Nari Mollani* (1926) A.C. 279.

(*b*) *Thakur Badri Singh* v. *Hazari Singh* (1930) 5 Luck. 626, 125 I.C. 162, ('30) A.O. 92.

S. 52

suit is not affected by the rule of *lis pendens* (c). But the doctrine of *lis pendens* applies to a suit for maintenance by a Hindu *widow* in which she claims to have her maintenance made a charge on specific immoveable property mentioned in the plaint and a decree is passed creating a charge on such property (d).

(*iii*) *Creditor's suit against heirs.*—A creditor's suit against an heir in his representative capacity to recover a debt out of the assets of a deceased debtor does not create a charge so as to affect with *lis pendens* a mortgagee of the heir (e). A transfer pending a suit by a Mahomedan woman for dower claiming a charge on her husband's property generally is not affected by *lis pendens* (f). This is because the specific property transferred is not in suit. But a transfer by an heir pending an administration suit by a Mahomedan widow to recover her dower debt out of immoveable property left by her husband and her share in his estate is affected by *lis pendens*, if a decree is passed in the suit creating a charge on the property for payment of the dower (g).

(*iv*) *Administration suit.*—A suit for the administration of the estate of a deceased person may be brought by a creditor, or an heir, or a residuary legatee under the will of the deceased. The suit again may be brought *against* an *heir* in possession of the estate or against the executor or administrator of the estate of the deceased. The general rule as regards administration suits was thus stated by the Privy Council in *Chutterput Singh* v. *Maharaj Bahadoor* (h) :—

> "When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of the administration. In fact, the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after the liabilities of the estate, including the expenses of administration, have been satisfied."

The above passage was quoted by the High Court of Calcutta (i) in an administration suit by a creditor against the heirs of the deceased, of which the facts are stated in ill. (1) below.

As to administration suits against an executor or administrator, the rule followed by the High Court of Rangoon (j) is as follows:—

> "Where a creditor or one of the next-of-kin institutes an administration action against an executor or administrator, the mere institution of the action or obtaining of mere administration decree does not ordinarily deprive the executor or administrator of the general power to dispose of assets, unless and until the plaintiff has obtained an order appointing a *receiver* of the estate or at least an *injunction* restraining the executor or administrator from exercising the powers vested in the executor or administrator."

(c) *Rattamma* v. *Seshachalam* (1927) 52 Mad. L.J. 520, 101 I.C. 806, ('27) A.M. 502; *Official Receiver* v. *Subbamma* (1927) 99 I.C. 564, ('27) A.M. 408; *Gangabai* v. *Pagubai* (1939) A.B. 403, 41 Bom. L.R. 815, 185 I.C. 87.

(d) *Seetharamanuacharyulu* v. *Venktasubhamma* (1930) 54 Mad. 132, 127 I. C. 809, ('30) A.M. 824; *Ramchandra* v. *Kamlabai* (1944) A.B. 191; *Heranya Bhusan* v. *Gouri Dutt* (1943) A.C. 227, 76 C.L.J. 191, 208 I.C. 75; *Kallawa* v. *Parappa* (1946) A.B. 207.

(e) *Ram Dhun Dhur* v. *Mohesh Chunder* (1882) 9 Cal. 406.

(f) *Abdul Rahman* v. *Inayati Bibi* (1931) 130 I.C. 113, ('31) A.O. 63.

(g) *Bazayet Hossein* v. *Dooli Chund* (1878 4 Cal. 402, 5 I.A. 211.

(h) (1904) 32 Cal. 198, 218 P.C. 32 I. A. 1, 16.

(i) *Bepin Krishna* v. *Byomkesh* (1924) 51 Cal. 1033, 84 I.C. 880, ('25) A. C. 395; *Syad Bazayet Hossein* v. *Dooli Chund*, *Mahomed Wajid* v. *Tayyuban* (1878) 5 I. A. 211, 4 Cal. 402.

(j) *Lee Lim Ma Hock* v. *Saw Ma Hone* (1924) 2 Rang. 4, 79 I.C. 729, ('24) A. R. 221; *Ma Kin* v. *Ma Bein* (1927) 5 Rang. 266, 103 I. C. 264, ('27) A. R. 186; *A. L. A. R. Chetty Firm* v. *Maung Thwe* (1923) 74 I.C. 54, ('23) A.R. 69.

S. 52

A transfer, therefore, by an executor or administrator pending the suit, has been held not to be subject to the rule of *lis pendens*. If the case is governed by sec. 307 of the Indian Succession Act, 1925 (sec. 90 of the Probate and Administration Act, 1881), the administrator may not transfer any immoveable property without the previous permission of the Court by which the letters of administration were granted; a transfer without such permission is voidable under the same section at the instance of any other person interested in the property (*k*). *Chutterput Singh* v. *Maharaj Bahadoor*, mentioned above, was applied by the Judicial Committee in a later case (*l*). The suit in that case was to ascertain and administer the trust under a deed. A decree was passed in the suit declaring one of the parties entitled to a one-sixth share in the surplus income and that the trustees should have their costs out of the trust property. The beneficiary thereupon mortgaged his share. Under a later order in the suit part of the property was sold to realise the trustees' costs. It was held that the mortgagee's rights were subject to the sale, and the mortgage was consequently not an incumbrance upon the title of the purchasers. In delivering the judgment of the Board, Viscount Summer said: "The principle laid down in *Chutterput Singh* v. *Maharaj Bahadoor* applies equally to the suit now in question as to the case of a suit for the administration of the estate of a deceased person, which was the matter then before their Lordships."

Illustrations.

(1) *A* lends money to *B* on a pledge of jewels. *B* dies intestate leaving three sons. *A* sues the sons for repayment of the loan, for sale of the jewels, and, if necessary, for administration of *B*'s estate. In April 1919 a decree is passed for sale of the jewels with liberty to apply for an administration order in case there is a deficit on the sale. The jewels are sold and there is a deficit. *A* applies for an administration order. On the 2nd July 1920 a preliminary decree is made for the administration of the estate. During the pendency of the suit some of the properties forming part of *B*'s estate are mortgaged by his sons. The mortgages subsequent to the 2nd July 1920 are subject to *lis pendens*. The mortgages before that date are not subject to *lis pendens*. As to these mortgages the Court said that a transfer of property could not be subject to the rule of *lis pendens* unless the specific property was mentioned in the pleadings and the right to such property was directly and specifically in question, and that these conditions were not present in the case. The Court also observed that it could not be said merely because there was a general prayer that if it became necessary an order for administration should be made that there was a right to immoveable property directly and specifically in question in the suit: *Bepinkrihsna* v. *Byomkesh* (1924) 51 Cal. 1033, 84 I.C. 880, ('25) A. C. 395.

(2) *A*, an heir of the intestate, filed a general administration suit against another heir in possession of the estate, and the Court made a preliminary decree for the administration of the estate. So far there was no *lis pendens*. But in the course of proceedings before the Commissioner a plot of land in the possession of *B* was claimed as a part of the estate and the Commissioner reported in favour of the claim. After the report *B* sold the land. The sale was subject to *lis pendens* as the Commissioner's report put the right to the land specifically in question: *K. Y. Chettyar Firm* v. *Jamila* (1930) 7 Rang. 734, 121 I. C. 792, ('30) A. R. 132.

(*v*) *Suit for cancellation of deed of trust.*—A suit for the cancellation of a deed of trust and for reconveyance of the immoveable property specified in the deed is within the rule of *lis pendens* (*m*), but a suit in which the only question was whether a deed of settlement was true or false, is not a suit within the rule (*n*).

(*k*) See in this connection *Ma Chit Su* v. *National Bank of India Ltd.* (1925) 30 Cal. W. N., 769, 91 I.C. 432, ('25) A. PC. 261.

(*l*) *Puran Chand Nahatta* v. *Monmotha Nath Mukherjee* (1928) 55 Cal. 532, 55 I. A. 61, 64, 108 I.C. 342, ('28) A. PC. 38.

(*m*) *Bhola Nath* v. *Bhutnath* (1925) 40 Cal. L. J. 393, 84 I. C. 490, ('25) A. C. 229.

(*n*) *Shanmugha Samudram* v. *Parvati* (1945) A.M. 454.

S. 52 *(vi) Suit for specific performance.*—The rule of *lis pendens* is applicable to suits for specific performance of contracts to transfer immoveable property *(o)*.

Illustration.

A was in possession of land as tenant of *B*. But *B* on the 8th February 1907 agreed to grant a permanent lease of the same land to *C*. *C* sued for specific performance of the agreement of lease, and while this suit was pending against him, *B* sold the land to *A*. The suit was decreed and *C*'s title as permanent lessee related back to the 8th February 1907. The sale to *A* was subject to *C*'s decree, and *C* as assignee of the reversion was entitled to recover rent from *A* from that date: *Jahar Lal* v. *Bhupendra Nath* (1922) 49, Cal. 495, 67 I. C. 108, ('22) A. C. 412.

(vii) Suit on mortgage.—The rule applies to suits on mortgages *(p)*; but a suit which is based on a mortgage and in which a money decree is given is not, as long as the decree stands unreversed, a suit in which a right to immoveable property is directly and specifically in question *(q)*. A lessee from a mortgagor during the pendency of a suit to enforce the mortgage is not entitled to resist the claim for possession of the auction purchaser at the sale in execution of the decree on the mortgage *(r)*; but where the Agra Tenancy Act, 1926, 3 of 1926, applies he can only be evicted under the provisions of that Act *(s)*. A payment of rent by a lessee to a mortgagor on a lease granted pending the mortgagee's suit to enforce the mortgage is not binding on the mortgagee *(t)*. A puisne mortgagee who purchases the equity of redemption during the pendency of foreclosure proceedings by a prior mortgagee is affected by *lis pendens*. If he does not redeem the prior mortgagee, the foreclosure decree may be executed against him *(u)*. In a case before the Act an application to file an award directing the sale of mortgaged property was held to operate as a *lis pendens*. *(v)*

A suit to enforce contribution to a mortgage debt under sec. 82 of this Act constitutes a *lis pendens* and the purchaser of the property pending the suit will be subject to the right of contribution decreed against it *(w)*.

(viii) Suit for partition.—A partition suit operates as *lis pendens* with the result that the purchaser of an undivided share pending the suit takes only that property which is allotted on partition to his vendor *(x)*. A contrary decision in Calcutta proceeds on

---

(o) *Jahar Lal Bhutra* v. *Bhupendra Nath* (1922) 49 Cal. 495, 67 I.C. 108, ('22) A. C. 412; *Mati Lall Pal* v. *Preo Lall* (1908) 13 Cal. W. N. 226, 3 I. C. 696; *Vedachari* v. *Narasimha* (1924) 45 Mad. L. J. 825, 76 I. C. 793. ('24) A. M. 307; *Bhaskar* v. *Shankar* (1924) 26 Bom. L.R. 418, 80 I.C. 453, ('24) A.B. 467; *Pancham* v. *Kandhai* (1934) 148 I.C. 653, ('34) A.A. 713.

(p) *Faiyaz Husain* v. *Prag Narain* (1907) 29 All. 339, 34 I. A. 102; *Shib Chandra* v. *Lachmi Narain* (1929) 51 All. 686, 56 I. A. 339, 119 I. C. 612, ('29) A. PC. 243; *Tinoodhan* v. *Trailokya* (1913) 17 Cal. W.N. 413 18 I. C. 177; *Parvathi Ammal* v. *Govinda Raja* (1924) 45 Mad. L. J. 682, 76 I.C. 896, ('24) A. M. 359; *Saiyid Zahid Ali* v. *Mst. Sadar Begam* (1910) 13 O. C. 50, 5 I. C. 800; *Durga Prasad* v. *Madho* (1908) 8 Cal. L. J. 153; *Dammar Singh* v. *Nazir-ud-din* (1889) A. W. N., 91; *Sital Prasad* v. *M. Md. Maranwatyar Khan* (1934) 149 I.C. 187, ('34) A.A. 972; *Radhey Lal* v. *Ram Lal* (1935) 152 I. C. 1018, ('35) A. O. 49.

(q) *Chatterput Singh* v. *Maharaj Bahadur* (1904) 32 Cal. 198 P. C.

(r) *Nisar Husain* v. *Sundar Lal* (1928) 50 All. 202, 104 I.C. 292, ('27) A.A. 657; *Madan Mohan Singh* v. *Raj Kishori* (1917) 21 Cal. W.N. 88, 17 I.C. 1; *Nageshar Tewari* v. *Gudar Singh* (1927) 2 Luck. 659, 103 I.C. 474, ('27) A.O. 603; *Thakur Prasad* v. *Gaya Sahu* (1898) 20 All. 340; *Ramasami* v. *Govinda* (1916) 31 Mad. L. J. 839, 38 I. C. 1; *Girdharlal* v. *Liladhar* (1931) 33 Bom. L. R. 1123, 134 I. C. 1223, ('31) A.B. 539.

(s) *Aziz Fatima* v. *Mukund Lal* (1932) 30 All. L.J. 572, 139 I.C. 166, ('32) A.A. 480.

(t) *Kiran Chandra* v. *Dutt* (1925) 29 Cal. W. N. 94, 85 I. C. 522, ('25) A. C. 251.

(u) *Ram Charan* v. *Parmeshwar Din* (1933) 55 All. 235, 1933 All. L. J. 118, 144 I. C. 70, ('33) A. A. 201.

(v) *Pranjivan* v. *Baju* (1880) 4 Bom. 34.

(w) *Baldeo Sahai* v. *Baij Nath* (1892) 13 All. 371.

(x) *Jogendra Nath* v. *Debendra Nath* (1898) 26 Cal. 127; *Jogendra* v. *Fulkumari* (1899) 27 Cal. 77; *Basappa* v. *Bhimangowda* (1928) 52 Bom. 208, 108 I. C. 17, ('28) A. B. 65; *Nand Kishore* v. *Lallu* (1930) 28 All. L. J. 1286, 132 I. C. 333, ('31) A. A. 45; *Chandan* v. *Fakirgir* (1915) 27 I.C. 940; *Khemchand* v. *Mulchand* (1934) 148 I.C. 731, ('34) A. L. 457.

an erroneous view of the word contentious (*y*). In that case, two defendants granted a lease for seven years of one of the properties pending a suit for partition and the plaintiff to whom the property was allotted by the decree was held to be bound by the lease. This was erroneous and contrary to the principle that any dealing with the property during the pendency of the suit should be without prejudice to the rights of the parties. In a later case the Calcutta High Court held that if co-sharers mortgage their interests pending a partition suit the mortgage is subject to, and the purchaser at the sale under the mortgage will be bound by, all the proceedings in the partition suit (*z*). Again in another case (*a*) the same High Court applied the rule of *lis pendens* to a partition suit. A member of an undivided Hindu family consisting of six sons and a mother governed by the Bengal school, sued for partition. One of the sons sold his share to a stranger during the pendency of the suit. On partition the mother's inchoate right to a share ripened into an absolute right and the vendee was therefore entitled only to a seventh share. The mother's right only accrues when the property is partitioned. Therefore when a mortgagee obtained a preliminary decree for sale before the partition suit was filed, and then purchased the property, the purchase was of the interest of all parties and the mother could not claim a share, for no partition had been effected (*b*). When *A* mortgaged property pending a partition suit between him and *B*, the mortgage was effective as to the share allotted to *A* but void as to the share allotted to *B* (*c*).

(*ix*) *Suit for pre-emption.*—A suit for pre-emption involves a right to specific immoveable property and is therefore within the section (*d*). No dealing with the property after a pre-emption suit has been filed can affect the rights of the plaintiff (*e*). See note (14) above, "Right before suit."

Illustration.

A sells land to *B* in respect of which *C* has a right of pre-emption. *C* files a suit to pre-empt the land, against *A* and *B*. A week after the institution of the suit *B* resells the land to *A*, and files a written statement that *C* has no cause of action. The resale was *pendente lite* and could not affect *C*'s rights. *C*'s suit was decreed: *Kahar Singh* v. *Jahangir Singh* (1925) 47 All. 625, 88 I.C. 761, ('25) A. A. 487.

The customary right of pre-emption according to the decisions of the Allahabad High Court (*f*) must subsist up to the date of the decree and this rule has received statutory recognition in sec. 19 of the Agra Pre-emption Act 2 of 1922. Accordingly an acquisition by the defendant, by gift, during a pre-emption suit, of a share in the mahal will defeat the plaintiff pre-emptor's suit (*g*). In *Hans Nath* v. *Ragho Prasad* (*h*) the

(*y*) *Shaik Khan Ali* v. *Pestonji* (1896) 1 Cal. W. N. 62; *Ramchandra* v. *Jaideo* (1928) 109 I. C. 566, ('28) A. N. 198.

(*z*) *Jogendra Nath* v. *Debendra Nath*, *supra.*

(*a*) *Jogendra* v. *Fulkumari*, *supra.*

(*b*) *Buldeodas* v. *Sarojini Dasi* (1930) 57 Cal. 597, 126 I.C. 408, ('29) A.C. 697; *Jamuna Devi* v. *Mangal Das* (1946) A.P. 306.

(*c*) *Rangaswami* v. *Sundarapandia* (1928) 110 I.C. 548, ('28) A.M. 635.

(*d*) *Madho Singh* v. *Skinner* (1941) A.L. 433, 43 P.L.R. 587, 197 I.C. 227.

(*e*) *Ghasitey* v. *Gobind* (1908) 30 All. 467; *Kamta Prasad* v. *Ram Jag* (1914) 36 All. 60, 22 I. C. 266; distinguishing *Manpal* v. *Sahib Ram* (1905) 27 All. 544; *Asa Singh* v. *Naubat* (1921) 19 All. L. J. 143, 61 I. C. 34, ('21) A. A. 105; *Kahar Singh* v. *Jahangir Singh* (1925) 47 All. 625, 88 I.C. 761, ('25) A. A. 487; *Bhikhi Mal* v. *Debi Sahai* (1925) 47 All. 923, 89 I.C. 219, ('26) A.A. 179; *Bachan Singh* v. *Bijai Singh* (1926) 48 All. 221, 90 I. C. 236, ('26) A. A. 180; *Hazara Singh* v. *Dube Khan* (1922) 3 Lah. 264, 69 I.C. 698, ('22) A.L. 403; *Bhagwan* v. *Nanak Chand* (1927) 49 All. 516, 100 I.C. 666, ('27) A. A. 336; *Harnam Singh* v. *Jiwan* (1906) P. R. 7; *Prabhi* v. *Hamira* (1919) 1 Lah. L. J. 209; *Kedar Nath* v. *Bankey Behari* (1911) 11 I.C. 645; *Ram Shankar* v. *Nanik Prasad* (1914) 17 O. C. 150, 24 I. C. 32; *Kubra Singh* v. *Khudaija* (1917) 20 O. C. 13, 38 I. C. 582; *Bhagirathi* v. *Raj Kishore* (1930) 28 All. L. J. 766, 122 I.C. 887, ('30) A.A. 354; *Sheikh Salamat Ali* v. *Nur Muhammad* (1934) 9 Luck. 475, 149 I.C. 258, ('34) A.O. 303; *Mohammad Sadiq* v. *Ghasi Ram* (1946) A.L. 322.

(*f*) *Baldeo Misir* v. *Ram Lagan* (1923) 45 All. 709, 77 I.C. 694, ('24) A. A. 82.

(*g*) *Ram Saran* v. *Bhagwat Prasad* (1929) 51 All. 411, 113 I. C. 442, ('29) A. A. 53 F.B.; *Hans Nath* v. *Ragho Prasad* (1932) 59 I. A. 138, 54 All. 189, 136 I. C. 402, ('32) A. PC. 57.

(*h*) (1932) 59 I. A. 138, 54 All. 189, 136 I. C. 402, ('32) A. PC. 57.

S. 52

Privy Council pointed out that the doctrine of *lis pendens* is limited to a dealing with the immoveable property actually in suit and therefore does not apply to the acquisition by a party of a different property to establish a status of co-sharer not liable to be pre-empted. The Agra Pre-emption Act 2 of 1922 has been amended by U.P. Act of 1929, sec. 5, of which enacts that a right of pre-emption cannot be defeated by a gift subsequent to suit.

(*x*) *Suit for rent*.—A suit for rent is primarily a suit for money and does not constitute a *lis pendens*, for no right to immoveable property is directly and specially in question. This is so even when, as between a zemindar and a patnidar or between a patnidar and a darpatnidar, the decree for rent is a charge on the property. For a suit for rent cannot be regarded as a suit to claim a charge on specific property (*i*).

(*xi*) *Award proceedings*.—Where a private award creates a charge for maintenance, the presentation of an application to file the award must be regarded as a plaint and the commencement of a *lis pendens* (*j*).

(18) Lease by a mortgagor.—As already stated a lessee from a mortgagor, on a lease granted pending the mortgagee's suit for sale, is not entitled to resist a claim for possession by the auction purchaser at the Court sale (*k*). In some cases it has been held that yearly leases by a mortgagor in possession are not within the rule as they are not prejudicial to the mortgagee's security (*l*). A mortgagor in possession has now a statutory power to lease under sec. 65A and it is submitted that a lease granted by a mortgagor under this statutory power pending a suit by the mortgagee would be subject to the rules of *lis pendens*, for otherwise it would convert the mortgagee's estate into one expectant on the term created by the lease. But where it was found that such rights could not be affected, it was held that the lease was not invalid (*m*).

(19) Misdescription.—A misdescription of the land in the pleadings will prevent the operation of the doctrine of *lis pendens* (*n*); but not if in spite of the misdescription the land is sufficiently identified (*o*). An alienee who is aware of the identity of the property will be affected by *lis pendens* in spite of the misdescription (*p*).

(20) Transferred or otherwise dealt with.—The word "transferred" refers to sales, mortgages, leases and exchanges. But the meaning of the words "otherwise dealt with" is not so clear. They would probably include such transactions as a release or a surrender. They have been held to include a contract of sale (*q*) and a partition between co-defendants (*r*). They also apply to any collusive decree (*s*) or compromise (*t*) by which the title of a party is affected during the pendency of a suit, for the principle underlying the section is that a litigating party is exempted from taking notice of a title acquired during the litigation. The principle of the section has even been applied when in execution of a decree for an injunction to remove an obstruction to a passage,

---

(*i*) *Jaynal Abedin* v. *Hyderali Khan* (1928) 55 Cal. 701, 111 I.C. 340, ('28) A.C. 441; *Dhirendra Nath* v. *Charusashi* (1926) 90 I. C. 431, ('26) A. C. 191.

(*j*) *Kallawa* v. *Parappa* (1946) A.B. 207.

(*k*) *Nisar Husain* v. *Sundar Lal* (1928) 50 All. 202, 104 I.C. 292, ('27) A.A. 657; *Madan Mohan Singh* v. *Raj Kishori* (1917) 21 Cal. W. N. 88, 17 I. C. 1; *Nageshar Tewari* v. *Gudar Singh* (1928) 2 Luck. 659, 103 I. C. 474, ('27) A. O. 603.

(*l*) *Subbaraju* v. *Seetharamaraju* (1916) 39 Mad, 283, 28 I.C. 232, following *Radhika* v. *Radhamani*, (1884) 7 Mad. 96, 99; *Ram Dayal* v. *Asghur* (1930) 126 I. C. 28, ('30) A. A. 289.

(*m*) *Ram Chunder* v. *Maharaj Kunwar* (1939) A.A. 611.

(*n*) *Lokenath Sahu* v. *Achitananda Das* (1909) 15 Cal. L. J. 391, 2 I.C. 85; *Wali Bandi* v. *Tabeya Bibi* (1919) 41 All. 534, 50 I. C. 919.

(*o*) *Lokenath Sahu* v. *Achitananda*, *supra*; *Venkatrama* v. *Elumalai* (1923) 44 Mad. L. J. 357, 72 I. C. 464, ('23) A. M. 442; *Periamurugappa* v. *Manicka* (1925) 49 Mad. L. J. 68, 87 I. C. 213, ('26) A.M. 50.

(*p*) *Bepin Krishna* v. *Priya Brata* (1921) 26 Cal. W. N. 36, 66 I. C. 345, ('21) A. C. 730.

(*q*) *Kubra Bibi* v. *Khudaija* (1917) 20 O. C. 12, 88 I. C. 582.

(*r*) *Ishwar* v. *Dattu* (1913) 37 Bom. 427, 19 I. C. 885.

(*s*) *Harnam Singh* v. *Jiwan* (1906) P. R. 7.

(*t*) *Hazara Singh* v. *Bube Khan* (1922) 3 Lah. 264, 69 I. C. 696, ('22) A. L. 403.

it is found that another obstruction has also been erected after the suit was filed. This other obstruction was also removed in execution, so that the plaintiff should not be compelled to file another suit (*u*). An adoption, however, stands on a different footing and cannot be treated as a dealing with property *pendente lite* (*v*). An admission before a Sub-Registrar of execution of a sale deed is not a dealing with property (*w*). S. 52

(21) Involuntary alienations.—*Court sales.*—Section 52 is limited by sec. 2 (d), and, strictly speaking, does not apply to Court sales. Some old cases do so limit the application of the rule (*x*). But it is now settled law that though the section itself may not apply to involuntary alienations, the principle of *lis pendens* applies to such alienation. This is the effect of three Privy Council cases (*y*), and of an overwhelming mass of authority both before and after the pronouncements of the Privy Council (*z*). But a sale by the Official Receiver of the property of the insolvent is a private sale and is governed by sec. 52 (*a*).

Illustrations.

(1) *A* has mortgaged property to *B*. *B* sues *A* on the mortgage and obtains a decree for sale. While *B*'s suit is pending a third person obtains a money decree against *A* and the property is sold in execution of the money decree and purchased by *C*. *C*'s purchase is subject to *lis pendens*. In fact, he is the representative in interest of the judgment debtor *A*, and *B*'s decree can be executed against him: *Radha Madhub Holdar* v. *Monohur* (1888) 15 Cal. 756, 15 I. A. 97.

(2) *A* is a tenant on *B*'s land. *B* mortgages the land to *C*. *C* sues *B* on the mortgage and obtains a decree for sale. *A* purchases the land at the sale on *B*'s decree. While this mortgage suit was pending, *D* purchased the land at a sale in execution of a money decree against *B*. *D* then sues *A* for rent, but as *D*'s purchase was during the pendency of *B*'s suit *A* is entitled to shew that his tenancy has merged in his higher title as proprietor: *Raj Kishen* v. *Radha Madhub* (1874) 21 W. R. 349.

Sales for recovery of taxes.—As to sales for the recovery of land revenue or other taxes there is a conflict of decisions. Sales for the recovery of land revenue under sec. 13 of

(*u*) *Narain Singh* v. *Imam Din* (1934) 154 I.C. 724, ('34) A. L. 978.

(*v*) *Rambhat* v. *Lakshman* (1881) 5 Bom. 630.

(*w*) *Rafiuddin* v. *Brijmohan* (1913) 21 I. C. 602.

(*x*) *Nuffur Merdha* v. *Ram Lall* (1871) 15 W. R. 308; *Ali Shah* v. *Husain* (1878) 1 All. 588, 590; *Lalu Mulji* v. *Kashibai* (1886) 10 Bom. 400; *Chunder Nath* v. *Nilakant* (1881) 8 Cal. 690.

(*y*) *Nilakant* v. *Suresh* (1885) 12 Cal. 414, 12 I. A. 171 reversing *Chunder Nath* v. *Nilkant, supra*; *Radhamadhub Holdar* v. *Monohur* (1888) 15 Cal. 756, 15 I. A. 97: *Moti Lal* v. *Karrabuldin* (1897) 25 Cal. 179, 24 I. A. 170.

(*z*) *Raj Kishen Mookerjee* v. *Radha Madhub* (1874) 21 W. R. 349; *Ravji* v. *Krishnaji* (1875) 11 Bom. H. C. 139; *Lala Kali Prosad* v. *Buli* (1878) 4 Cal. 789; *Parvati* v. *Kisan Singh* (1882) 6 Bom. 567; *Jharoo* v. *Raj Chunder* (1885) 12 Cal. 299; *Gobind Chunder* v. *Guru Churn* (1888) 15 Cal. 94, 97; *Kunhi Umah* v. *Amed* (1891) 14 Mad. 491; *Har Shankar* v. *Shev Govind* (1899) 26 Cal. 966; *Shyama Churn* v. *Ananda Chandra* (1898) 3 Cal. W. N. 323; *Sukhdeo* v. *Jamna* (1901) 23 All. 60; *Byramji* v. *Chunilal* (1902) 27 Bom. 266; *Dinonath* v. *Shama Bibi* (1901) 28 Cal. 23; *Raj Kishore* v. *Jadu Nath* (1906) 11 Cal. W. N. 323; *Tincodhun* v. *Trilokya* (1913) 17 Cal. W. N. 413, 18 I. C. 177; *Mansingh* v. *Amantaka* (1915) 26 I. C. 879; *Manjeshwara* v. *Vasudeva* (1918) 40 Mad. 458, 40 I.C. 826; *Pethu Ayyar* v. *Sankaranarayana* (1917) 40 Mad. 955, 38 I. C. 778; *Vedachari* v. *Narasimha* (1924) 76 I. C. 793, ('24) A. M. 307; *Bhaskar* v. *Shankar* (1924) 26 Bom. L. R. 418, 80 I. C. 453, ('24) A. B. 467; *Mirza Abid* v. *Munnoo Bibi* (1927) 2 Luck. 496, 102 I. C. 72, ('27) A. O. 261; *Chettyar K. Y. Firm* v. *Jamila Bibi* (1929) 7 Rang. 734, 121 I. C. 792, ('30) A. R. 132; *Seetharamanujacharyulu* v. *Venkatasubbamma* (1930) 54 Mad. 132, 127 I.C. 809, ('30) A. M. 824; *Matilal Pal* v. *Preo Lall* (1908) 13 Cal. W. N. 226, 3. I.C. 696; *Maharaj Bahadur* v. *Surendra Narain* (1914) 19 Cal. W. N. 152, 28 I.C. 898; *Venkatrama* v. *Rangiah* (1928) 46 Mad. L. J. 258, 77 I. C. 504, ('28) A. M. 449; *Mst. Ramdulari* v. *Upendra* (1925) 4 Pat. 619, 90 I. C. 251, ('25) A. P. 148; *Mulkh Raj* v. *Nanak* (1933) 140 I. C. 534, ('33) A. L. 10; *Ghulam Mohammad* v. *Sansar Chand* (1933) 141 I.C. 448, ('33) A.L. 171. *Mohammad Sadiq* v. *Ghasi Ram* (1946) A. L. 322; *Renuka Bala* v. *Nagendra Nath* (1939) A.C. 656, 69 C.L.J. 371, 43 C.W.N. 668, 185 I.C. 518; *Lalit Mohan* v. *Hardat Rai* (1939) A. L. 146, 41 P.L.R. [illegible].

(*a*) *Kulandaivelu* v. *[illegible]* (1949) A. M. [illegible].

S. 52

the Bengal Land Revenue Sales Act, Beng. Act 11 of 1859, have been held to be subject to the rule of *lis pendens* (*b*), and the Patna High Court has said that there is no distinction between execution sales and sales for the realisation of Government revenue (*c*). On the other hand the view of the Rangoon High Court is that it would be a dangerous extension of the doctrine to apply it to sales for the recovery of Government taxes and local rates (*d*). The Madras High Court has applied *lis pendens* to sales for the recovery of income tax (*e*) and abkari dues (*f*), but not to revenue sales which enforce a paramount claim of the Crown (*g*). The Bombay High Court has applied the rule to a sale of the property of an absconding offender under sec. 88 of the Code of Criminal Procedure, 1898 (*h*).

If property is sold for arrears of Government revenue while proceedings in the execution of a money decree are pending, the rule cannot apply, for no right to immoveable property is in issue in the suit (*i*).

Insolvency.—The doctrine of *lis pendens* does not apply when the defendant becomes *insolvent* during the pendency of a suit and the estate vests in the Official Assignee or Official Receiver, as the case may be. In such a case there is no transfer (*j*). The Official Assignee must be joined as a party under O. 22, r. 10 of the Code of Civil Procedure, otherwise he is not bound (*k*).

Attachment.—An attachment creates no lien or charge on the property attached, and so an execution purchaser who buys the property after the suit is filed is not protected merely because he had attached the property before the suit was filed (*l*). It is submitted that the *obiter dicta* in *Anantapadmanabhaswami* v. *Official Receiver* (*m*) have not altered the law as to the effect of an attachment.

(22) Lis pendens in the same suit.—In a case from Bombay (*n*) Jenkins, C.J., said that the doctrine "does not defeat a purchaser under a decree or order for sale when the *lis pendens* is the very suit in which that decree or order is passed." In that case a house which belonged to a joint family consisting of an adult and two minors was mortgaged by the adult member. The mortgagee got a decree for sale against all three and sold the house while an appeal by the minor members was pending. The Court of appeal dismissed the suit as against the minors holding that their interests were not affected. Nevertheless the Court held that the auction purchaser was not affected by *lis pendens* and dissented from a judgment of Phear, J. (*o*). This is on the principle that bona fide purchasers at sales by a Court having jurisdiction are not affected by a subsequent reversal of the decision (*p*). It is on this same principle that restitution cannot be ordered under sec. 144 of the Code of Civil Procedure against a bona fide

(*b*) *Har Shankar* v. *Shev Govind* (1899) 26 Cal. 966; *Bhawani Koer* v. *Mathura Prasad* (1907) 7 Cal. L. J. 1; *Mahomed* v. *Hem Chandra* (1909) 10 Cal. L. J. 590, 4 I. C. 731.

(*c*) *Mathura Prasad* v. *Desai Sahu* (1922) 1 Pat. 287, 290, 65 I.C. 325, ('22) A. P. 542.

(*d*) *R.M.V.V.M. Chettyar Firm* v. *M. Subramaniam* (1927) 5 Rang. 458, 105 I. C. 258, ('27) A.R. 289; *Abdur Rauf Chowdry* v. *N. P. L. S. P. Chettyar Firm* (1929) 7 Rang. 113, 116, 117 I.C. 575, ('29) A.R. 175.

(*e*) *Kadir Mohideen* v. *Muthu Krishna* (1903) 26 Mad. 230.

(*f*) *Thammayya* v. *Ramanna* (1926) 51 Mad. L. J. 475, 98 I.C. 201, ('26) A.M. 1161.

(*g*) *Kadir Mohideen* v. *Muthu Krishna*, *supra*; *Thammayya* v. *Ramanna*, *supra*.

(*h*) *Narayan* v. *Govind* (1929) 31 Bom. L. R. 845, 116 I.C. 271, ('29) A.B 200.

(*i*) *Mahadeo Saran* v. *Thakur Prasad* (1909) 14 Cal. W.N. 677, 6 I.C. 40.

(*j*) *Indian Cotton Co.* v. *Ram Charan Lal* (1939) 183 I.C. 97, (1939) A. N. 128.

(*k*) *Punithavelu* v. *Bhashyam* (1902) 25 Mad. 406; *Subramania* v. *Ramakrishna* (1922) 42 Mad. L. J. 426, 70 I.C. 357, ('22) A.M. 335.

(*l*) *Motilal* v. *Karrabuldin* (1897) 25 Cal. 179, 24 I. A. 170; *Kinhi* v. *Ahmed* (1891) 14 Mad. 491; *Byramji* v. *Chunilal* (1902) 27 Bom. 266.

(*m*) (1933) 60 I.A. 167, 174-175, 37 Cal. W. N. 553, 142 I.C. 552, ('33) A.P.C. 134.

(*n*) *Shivlal* v. *Shambhuprasad* (1905) 29 Bom. 435, 447.

(*o*) *Indurjeet Kooer* v. *Mst. Pootee* (1873) 19 W. R. 197.

(*p*) *Nawab Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1887) 10 All. 166, 15 I. A. 12.

purchaser for value at a sale held by a Court having jurisdiction (*q*). In a Calcutta case (*r*) a darputnidar filed a suit to prevent a Court sale of a putni. The Privy Council held that the putni was not saleable; but before that decision was given the putni had been sold. The Court held that as the *lis pendens* was a different suit to that in which the sale had been ordered, the doctrine applied, and the sale was set aside.

(23) Authority of the Court.—A transfer during the pendency of the suit may be authorized by the Court, and the sanction of the Court will accept it from the rule of *lis pendens*. The sanction must be of the Court in which the suit is pending (*s*).

Illustration.

A company had mortgaged its property by first mortgage to *A*, and by second mortgage to *B*. *A* filed a suit to enforce his mortgage in the High Court of Bombay making *B* a party. While that suit was pending the company went into liquidation. The Liquidator with the sanction of the District Court of Poona borrowed a sum of Rs. 20,000 from *A* charged on the assets of the company. *A* obtained a decree on his mortgage and brought the property to sale. The sale proceeds left a surplus of Rs. 81,000 after paying *A*'s mortgage. *A* then claimed to be paid the Rs. 20,000 in priority to *B* as the charge was a dealing with the authority of the Court. The High Court held that he could not do so as the case was not an exception to the rule of *lis pendens*, for the authority of the District Court of Poona could not affect orders in a suit pending in the High Court: *Motilal Shivlal* v. *Poona Cotton and Silk Manufacturing Co.* (1917) 19 Bom. L.R. 602, 41 I. C. 246.

(23A) Sale under O. 21, r. 83 of the Civil Procedure Code.—*Lis pendens* does not apply to sales under this rule (*t*).

(24) Lis pendens in the Civil Procedure Code.—The rule of *lis pendens* is recognised in O. 21, r. 102 of the Code of Civil Procedure, which does not allow a transferee *pendente lite* of the judgment-debtor to make a claim in execution proceedings. But this bar will not apply if the transferee has a title to possession irrespective of his purchase. This occurs when the purchaser *pendente lite* is subrogated to the rights of a usufructuary mortgagee by redemption of a usufructuary mortgage of a date before the suit (*u*).

Under O. 22, r. 10, an alienee *pendente lite* may be joined as a party. The plaintiff is not bound to make him a party (*v*); and the alienee has no absolute right to be joined as a party (*w*). But the Court has a discretion in the matter which must be judicially exercised (*x*), and an alienee will ordinarily be joined as a party to enable him to protect his interests (*y*). When an assignee *lite pendente* is joined as a party the suit is not a new suit, but the same suit continues by or against him and if he is made a party in an appeal he cannot raise any defence which his assignor could not have put forward (*z*). Instances in which an assignee *pendente lite* has been joined as a party will be found cited in the notes to O. 22, r. 10, in Mulla's Civil Procedure Code. Whether joined as a party or not an assignee *pendente lite* of a right in immoveable property is bound by the decree.

(*q*) *Piari Lal* v. *Hanif-un-Nisa* (1916) 38 All. 240, 34 I.C. 303.

(*r*) *Moharaj Bahadur Singh* v. *Surendra Narain* (1915) 19 Cal. W.N. 152, 28 I.C. 898.

(*s*) *Motilal Shivlal* v. *Poona Cotton and Silk Manufacturing Co.* (1917) 19 Bom. L.R. 602, 41 I.C. 246; *Ma Chit Su* v. *National Bank of India* (1925) 30 Cal. W. N. 769, 91 I.C. 432, ('25), A.PC. 261, 263.

(*t*) *Lauka Ram* v. *Sunder Gopala* (1941) A.M. 395, (1940) 2 M.L.J. 1036, 52 M.L.W. 862, (1941) M.W.N. 66, 195 I.C. 212.

(*u*) *Mst. Fatima* v. *Raza Ali* (1927) Luck. 269, 99 I. C. 219, ('26) A. O. 610.

(*v*) *Umamoyi* v. *Tarini Prasad* (1867) 7. W. R. 225; *Gulabchand* v. *Dhondi* (1875) 11 Bom. H. C. 64; *Dammar Singh* v. *Nasiruddin* (1889) A.W.N. 91.

(*w*) *Lakshan* v. *Nikunjamoni* (1923) 27 Cal. W. N. 755, 80 I. C. 538, ('24) A.C. 188.

(*x*) *Veeraraghava* v. *Subba Reddi* (1920) 43 Mad. 37, 53 I. C. 428.

(*y*) *Commercial Bank of India* v. *Saiyid Saheb* (1901) 24 Mad. 292.

(*z*) *Chunni Lal* v. *Abdul Ali* (1901) 23 All. 331.

Ss. 52, 53

After the decree the transferee *pendente lite* if not joined as a party, is under sec. 47 of the Code of Civil Procedure, a representative of the judgment debtor in all matters relating to the execution, discharge or satisfaction of the decree (*a*). In a Bombay case (*b*) the plaintiff obtained a decree for partition against his brother, who however sold part of the property which was the subject of the suit *pendente lite*. The purchasers were not made parties to the suit, and after the decree the plaintiff filed a fresh suit against the purchasers to recover possession of his share. The Court held that the purchasers were not entitled to plead sec. 47 as a bar to a second suit by the decree-holder and that sec. 52 applied to forbid their doing so. In another Bombay case (*c*), the decree was for a personal injunction restraining the judgment debtor from interfering with the rights of the decree-holder as owner of an immoveable property. The rule of law is that the decree-holder cannot execute the decree against a purchaser from the judgment debtor as an injunction does not run with the land (*d*). Nevertheless the Court in execution proceedings granted an injunction against the purchaser as he was a purchaser *pendente lite*.

(25) Estoppel.—A party may be estopped from raising the plea of *lis pendens*. *A*, in execution of a decree against *B*, brought *B*'s property to sale and purchased it. At *B*'s instance the sale was set aside. *A* filed an appeal against the order setting aside the sale, and pending the appeal *B* sold the property to *C*. *C* deposited the amount of the decree in Court. *A* withdrew this amount in full satisfaction of his decree. *A* having elected to take the money was estopped from pleading that the sale to *C* was subject to *lis pendens* (*e*). Having taken the money he could no longer claim the land. This is on the principle that when a litigant has two remedies which are alternative his adoption of one bars the other (*f*).

53. (1) *Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.*

Fraudulent transfer.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(*a*) *Lalji Mal* v. *Nand Kishore* (1897) 19 All. 332; *Sheo Narain* v. *Chunni Lal* (1900) 22 All. 243.

(*b*) *Basappa* v. *Bhimangowda* (1928) 52 Bom. 208, 108 I.C. 17, ('28) A.B. 65.

(*c*) *Krishnabai* v. *Sawlaram* (1927) 51 Bom. 37, 100 I.C. 582, ('27) A.B. 93 followed in *Amritlal* v. *Kantilal* (1931) 33 Bom. L.R. 206, 133 I.C. 244, ('31) A.B. 280.

(*d*) *Dhayabhai* v. *Bapalal* (1902) 26 Bom. 140; *Vithal* v. *Sakaram* (1899) 1 Bom. L.R. 854.

(*e*) *Manjat Rai* v. *Dalk Chand* (1933) 55 All. 735, 1933 All. L.J. 1426, 147 I.C. 932, ('33) A.A. 579.

(*f*) *Baikuntha Nath Dey* v. *Salimulla* (1906) 12 Cal. W.N. 596, 6 Cal. L.J. 547; *Scarf* v. *Jardine* (1882) 7 A.C. 345.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. S. 53

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

(1) Amendment.—Before the amending Act of 1929 the section was as follows:—

"Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration or co-owners or other persons having an interest in such property or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration."

The section has been remodelled. The first paragraph of the old section referred both to transfers which were in fraud of other transferees and to transfers made with intent to defeat and delay creditors. These two cases have now been separated, sub-section (1) referring to creditors, and sub-section (2) to other transferees. This division eliminates two difficulties in the construction of the old section. The first difficulty was that the third paragraph was inappropriate to the case where a subsequent transferee for consideration sought to displace a prior transferee without consideration. The second difficulty arose out of the words "may be presumed." According to English cases on the Statute 27 Eliz. c. 4 if a person who had made a voluntary gift or settlement of land afterwards sold it to another, the conveyance put the voluntary gift or settlement out of the way, even though the purchaser had notice of it, and operated as a conveyance of the estate which the transferor had before the voluntary gift or settlement (*g*). These cases were followed by Couch, C.J., in *Judah* v. *Abdool* (*h*) before the Transfer of Property Act was enacted; and even after the Act, Sale, J., in *Joshua* v. *Alliance Bank of Simla* (*i*) held that the words "may be presumed" in the second paragraph should be construed in accordance with cases decided under the Elizabethan Statute as equivalent to "shall be presumed." On the other hand, with reference to transfers to defeat and delay creditors the words have always been construed by the Courts according to their literal meaning as defined in sec. 4 of the Indian Evidence Act. This inconsistency has been removed by the division of the section into two parts and the enactment of a special provision in the last paragraph of the second sub-section for cases of a conflict between a transfer without consideration and a subsequent transfer with consideration.

The second paragraph of the old section enacted the presumption which as regards transfers in fraud of subsequent transferees was supposed to represent the statutory presumption of fraud which was held to arise out of 27 Eliz. c. 4. The rule was settled by Lord Ellenborough's judgment in *Doed* v. *Manning* (*j*); but in that very judgment

(*g*) *Doed Otley* v. *Manning* (1807) 9 East. 59; *Twyne's* case (1601) 3 Co. Rep. 80, 1 S. L. C., 13th Ed. 1, 27; *Doed Newman* v. *Rusham* (1852) 17 Q. B. 724; *Townsend* v. *Windham* (1750) 2 Ves. 1, 10.

(*h*) (1874) 22 W. R. 60.

(*i*) (1895) 22 Cal. 185.

(*j*) (1807) 9 East. 59, 71.

9

s. 53 Lord Ellenborough said—"And we cannot but say, as at present advised, but considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for a valuable consideration without notice of the prior conveyance." Again in *Buckle* v. *Mitchell* (*k*) Grant, M.R., said—"It must, I conceive, be assumed, that the Statute of the 27th of Elizabeth has now received this construction, that a voluntary settlement, however free from actual fraud, is by the operation of that Statute deemed fraudulent and void against a subsequent purchaser for a valuable consideration even when the purchase had been made with notice of the prior voluntary settlement. I have great difficulty to persuade myself, that the words of the Statute warranted, or that the purpose of it required such a construction; for it is not easy to conceive, how a purchaser can be defrauded by a settlement of which he has notice, before he makes his purchase." In *Rosher* v. *Williams* (*l*), Malins, V.C., said—"I concur with the view expressed by Sir William Grant in *Buckle* v. *Mitchell* (*m*) and acquiesced in by other Judges, that the law that a man who has executed a voluntary settlement is enabled under the Statute of the 27 Eliz. to sell the estate just as if he had done nothing is highly unreasonable." The Legislature eventually gave effect to this consensus of judicial opinion in the Voluntary Conveyances Act, 1893 (56 and 57 Vict. c. 21). Section 2 of that Act provided that a voluntary conveyance "if in fact made bona fide and without any fraudulent intent, shall not hereafter be deemed fraudulent or covinous within the meaning of the Act, 27 Eliz. c. 4 by reason of any subsequent purchase for a value." This provision has now been replaced by sec. 173 (2) of the Law of Property Act, 1925.

In India the application of the statutory presumption of fraud to cases under sec. 53 was disapproved by Jenkins, C.J., in *Bai Cooverbai* v. *Mahomed* (*n*). Following this decision and the course of legislation in England the second paragraph of the old section has been omitted, and for it has been substituted the last paragraph of sub-section (2) of the new section which refers only to competition between transfers with and transfers without consideration and closely follows sec. 173 (2) of the Law of Property Act, 1925.

The onus of proof when the transfer is alleged to be in fraud of creditors has been left to the general law of evidence.

The third paragraph of the old section was inappropriate to cases of conflict between a voluntary transfer and a transfer for consideration. It has therefore been reproduced in sub-section (1) of the new section with reference to transfers to defeat or delay creditors.

The word "prior" in the old section has been omitted. It was unnecessary, for in the absence of a special contract or reservation a transferor cannot prejudice the rights of his transferee by any subsequent dealing with the property. This is already enacted in sec. 48.

The words "or co-owners or other persons having an interest therein" have also been omitted as superfluous. A co-owner cannot be affected by a transfer unless he has given his consent. An attempt was made to give effect to the word co-owner in an Allahabad case (*o*). A sharer in a village sued to pre-empt a sale of certain plots of land in the village. The vendor made a gift of a small share in the village to the vendee, which gave him an equal pre-emptive right and under sec. 19 of the Agra Tenancy Act defeated the suit. It was contended that the gift was voidable under sec. 53, but the Court held that the section could not apply as the pre-emptor, though a sharer in the village was not a co-owner in the particular plots sold. A person having an interest in such property must necessarily

(*k*) (1812) 18 Ves. 100.

(*l*) (1875) L.R. 20 Eq. 210, 218.

(*m*) (1812) 18 Ves. 100.

(*n*) (1905) 7 Bom. L.R. 267.

(*o*) *Kunwar Nihal Singh* v. *Chanda Kunwar* (1925) 47 All. 424, 86 I.C. 741, ('25) A.A. 358.

persons having an interest at the time of the transfer (*p*), but even so these words are superfluous. A lessee or a mortgagee has a real right which cannot be affected by a subsequent transfer. An alienation by a member of a joint and undivided Hindu family in excess of his powers would be voidable under Hindu law. S. 53

The third and fourth paragraphs of sub-section (1) are new and do not correspond with any part of the old section.

The amended section has evidently been modelled on secs. 172 and 173 of the Law of Property Act, 1925, which are as follows:—

> "172. (1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
>
> (2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.
>
> 173. (1) Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.
>
> (2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance was made after the twenty-eighth day of June, eighteen hundred and ninety-three (*q*)."

(1A) Whether the amended section has retrospective effect.—The section is not specified in sec. 63 of Act 20 of 1929 as one of the sections which shall not have retrospective effect. But in the undernoted case (*r*), it was assumed that it is not retrospective.

(2) History of the section.—The law enacted in this section dates back to two statutes of Elizabeth. Sub-section (1) referring to conveyances in fraud of creditors is derived from 13 Eliz. c. 5. Sub-section (2) referring to conveyances in fraud of subsequent transferees is derived from 27 Eliz. c. 4.

As to creditors—the statute 13 Eliz. c. 5 was enacted in 1571 and was entitled an Act against fraudulent deeds, gifts, alienations, etc. (*s*). The preamble and sec. 1 were as follows:—

> "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well as lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to

(*p*) *Vasudeo* v. *Janardhan* (1915) 39 Bom. 507, 29 I. C. 497.

(*q*) The date of the passing of the Voluntary Conveyances Act, 1893.

(*r*) *Shantilal* v. *Manilal* (1932) 56 Bom. 595, 34 Bom. L.R. 862, 139 I.C. 820, ('32) A.B. 496.

(*s*) Chitty's Statutes, Vol. 2, p. 728.

S. 53

the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without which no commonwealth or civil society can be maintained or continued.

1. Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect: any pretence, colour, feigned consideration, expressing of use, or any other matter *or thing to the contrary notwithstanding.*"

Section 5 was a provision saving bona fide purchases for consideration without notice.

The statute 13 Eliz. c. 5 applied in the Presidency towns (*t*), and its principle was applied by the Privy Council in a case from the mofussil (*u*). It was repealed and in substance re-enacted in India by the Transfer of Property Act and in England by the Law of Property Act, 1925.

The chief differences between that statute and sec. 53 of the Transfer of Property Act are (1) the statute applies to goods as well as to land, while the section applies to immoveable property only; and (2) the statute refers to feigned and covinous conveyances and to feigned consideration, so that it includes not only transfers that are fraudulent under sec. 53, but also benami or colourable deeds which are not transfers at all and being inoperative *ab initio* do not require to be set aside (*v*). In *Twyne*'s case (*w*) which is the leading case on the statute, the debtor secretly executed a deed transfering the whole of his property while a suit against him was pending, but himself remained in possession. This was a case of a benami transfer and in English law this is expressed by saying that the transferee was a bare trustee.

As to purchasers—the statute 27 Eliz. c. 4 was entitled an "Act against covinous and fraudulent conveyances" (*x*) and was passed in 1584. Section 2 of the statute was as follows:—

2. For the remedy of which inconveniences and for the avoiding of such fraudulent, feigned and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements and hereditaments: Be it enacted, that all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses of, in or out of any lands, tenements or other hereditaments whatsoever had or made at any time heretofore, sithence the beginning of the Queen's Majesty's reign, that now is, or at any time hereafter to be had or made, for the intent and

(*t*) *Bhagwant* v. *Kedari* (1901) 25 Bom. 202, 208.
(*u*) *Abdool Hye* v. *Mir Mohammed* (1883) 10 Cal. 616, 11 I.A. 10.
(*v*) *Petherpermal* v. *Munigndi* (1908) 35 Cal. 551, 35 I.A. 98.
(*w*) (1601) 3 Co. Rep. 80, 1 S.L.C. 13th Ed. 1 27.
(*x*) Chitty's Statutes Vol. 2, p. 733.

of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase, in fee-simple, fee-tail, for life, lives, or years, the same lands, tenements and hereditaments or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered or limited in use, or to defraud or deceive such as have, or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them which have purchased or shall hereafter so purchase for money, or other good consideration, the same lands, tenements or hereditaments or any part or parcel thereof or any rent, profit or commodity in or out of the same, to be utterly void, frustrate and of none effect, any pretence, colour, feigned consideration or expressing of any use or uses to the contrary notwithstanding.

The statute applied in the Presidency towns (*y*), but was repealed and in substance re-enacted in India by the Transfer of Property Act, and in England by the Law of Property Act, 1925.

As already stated (*z*), the statute was construed as enacting an absolute presumption that a mere voluntary settlement becomes fraudulent and void when followed by a transfer for valuable consideration. This English rule which was followed in some cases in India (*a*) was abolished by the Voluntary Conveyances Act, 1893 (*b*), now replaced by sec. 173 of the Law of Property Act, 1925, which corresponds to sec. 53 (2) of this Act.

The principle of sec. 53 has been adopted in the Punjab where the Transfer of Property Act is not in force (*c*), and was also followed in Bombay before the Act was extended to that Presidency (*d*).

(3) Transfer.—The transfers referred to in this section are transfers binding between the parties, but voidable in the circumstances stated in the section (*e*). The transfer is valid until it is set aside, and must not be confused with benami or colourable transfers which are merely sham transfers and not meant to operate between the parties (*f*). In collusive or benami transactions there is no transfer, but the property is merely put in a false name and generally for the purpose of defrauding creditors. As observed by Sir Lawrence Jenkins in *Mina Kumari* v. *Bijoy Singh* (*g*) the difference is distinct though it is often slurred (*h*). Such colourable or sham deeds do not require to

(*y*) *Judah* v. *Abdool* (1874) 22 W.R. 60; *Azim-un-nissa* v. *Clement Dale* (1872) 6 Mad. H.C. 455; *Bhagwant* v. *Kedari* (1901) 25 Bom. 202, 208.

(*z*) See note *supra*—"Amendment."

(*a*) *Judah* v. *Abdool*, *supra*; *Joshua* v. *Alliance Bank of Simla* (1895) 22 Cal. 185—dissented from in *Bai Cooverbai* v. *Mahomed* (1905) 7 Bom. L. R. 267.

(*b*) 56 and 57 Vict. c. 21.

(*c*) *Lakhmi Narain* v. *Tara Singh* (1901) P.R. 6; *Champo* v. *Shankar Das* (1912) P.R. 74, 14 I.C. 232; *Ibrahim* v. *Jiwan Das* (1924) 75 I.C. 1043, ('24) A.L. 707; *Mohammad Ishaq* v. *Mohammad Yusaf* (1927) 8 Lah. 544, 101 I.C. 172, ('27) A.L. 420; *Tapassi* v. *Raja Ram* (1930) 115 I. C. 417, ('30) A.L. 136; *Chatru Mal* v. *Mt. Majidan* (1934) 15 Lah. 849, 150 I.C. 888, ('34) A. L. 460; *Gobind Ram* v. *Chhogmal* (1934) 152 I.C. 472, ('34) A.L. 161.

(*d*) *Rangilbhai* v. *Vinayak* (1887) 11 Bom. 666; *Motilal Ravichand* v. *Utam Jagjivandas* (1889) 13 Bom. 484. See also *Musadee Mahomed* v. *Meerza Ally Mahomed* (1854) 6 M.I.A. 27 and *Suba Bibi* v. *Balgobind* (1881) 8 All. 178.

(*e*) *Krishna Kumar* v. *Jai Krishna* (1917) 21 Cal. W.N. 401, 29 I.C. 690; *Bhagwan Lal* v. *Rajendra* (1923) 77 I.C. 1, ('23) A.P. 564, 567; *Krishna Bai* v. *Debi Singh* (1923) 71 I.C. 409, ('23) A.N. 195.

(*f*) *Budhermal* v. *Verharam* (1946) A.S. 78.

(*g*) (1916) 44 Cal. 662, 44 I.A. 72.

(*h*) See for instance *Velchand* v. *Sitaram* (1925) 27 Bom. L.R. 205, 86 I.C. 873, ('25) A.B. 287; *China Mal* v. *Gul Ahmad* (1923) 5 Lah. L.J. 826, 73 I.C. 719, ('23) A.L. 478.

S. 53

be set aside (*i*), for the real title is all along with the transferor (*j*). They are outside the scope of the section (*k*), although they were included in the Elizabethan statute (*l*).

Wakf.—A deed of wakf executed as a devise to put property out of the reach of creditors has been held to be a transfer to which the section applies, the Court observing that sec. 53 does not infringe any rule of Mahomedan law, for under that law no person can make a wakf of his entire property without making arrangement for the payment of his debts (*m*). In such a case it is immaterial that the transfer is valid under the Mahomedan law (*n*).

Surrender.—A surrender of a life-estate has been held to be a transfer under this section (*o*).

Relinquishment.—Relinquishment by one coparcener in favour of another coparcener cannot strictly be said to be a transfer within the meaning of this section (*p*).

Collusive award.—The principle of the section has been extended to a collusive award and decree (*q*), although sec. 2 (d) excludes transfers by operation of law from the scope of the Act (*r*). The Lahore High Court has applied the principle of the section to a collusive award on the ground that, while sec. 2 (d) is a technical provision which does not bind the Courts in the Punjab, where the Act is not in force, yet the principle of sec. 53 should be followed as a rule of justice, equity and good conscience (*s*).

(3A) Deed of appointment.—The exercise of a power of appointment under a settlement is a voluntary transfer and the appointment will be set aside if made for the purpose of defeating or delaying creditors (*t*).

(4) Voidable.—As stated above the section does not refer to benami transfers, *i.e.*, to transfers that are colourable or void. The transfers referred to in the section are transfers in fraud of creditors which are valid until they are avoided, and which are voidable at the option of any creditor defrauded, defeated or delayed. See cases cited under footnote (*d*), *supra*. If the creditor sues to avoid the transfer he must file a representative suit on behalf of all the creditors. See note *infra* "Creditor's suit." But he may manifest an intention to avoid the transaction otherwise than by filing a suit, *e.g.*, by attaching the property transferred. In *Oakes* v. *Turquand and Harding* (*u*), the House of Lords said that voidable transactions may be avoided by any open or unequivocal declaration of an intention to avoid them. Accordingly in a Madras case (*v*) Wallis, C.J., said—"I am of opinion that it is open to the judgment-creditor by

(*i*) *Petherpermal* v. *Muniandi* (1908) 35 Cal. 551, 35 I.A. 98; *Swaminatha* v. *Rukmani* (1920) 55 I.C. 766; *Alagappa* v. *Dasappa* (1913) 24 Mad. L. J. 293, 18 I. C. 332; *Saraswati* v. *Mahabir* (1928) 109 I. C. 272, ('28) A.A. 476; *Parkash Narain* v. *Raja Birendra Bikram Singh* (1931) 7 Luck. 131, 133 I.C. 51, ('31) A.O. 333.

(*j*) *Sheo Gobind Koeri* v. *Ram Asray Singh* (1938) 180 I.C. 615, (1939) A.P. 5.

(*k*) *Parbhu Nath* v. *Sarju Prasad* (1940) A.A. 407, (1940) All. 542, (1940) A.L.J. 470, 190 I.C. 337; *Jagadamba Pande* v. *Ram Khilawat* (1942) A.A. 344, (1942) A.L.J. 309, 203 I.C. 81; *Jamnabai* v. *Dattatreya* (1936) A.B. 160, 60 Bom. 226, 38 Bom. L.R. 251, 162 I.C. 260.

(*l*) See note *supra* "History of the section."

(*m*) *Ahmad Husain* v. *Kallu* (1929) 27 All. L.J. 460, 117 I.C. 97, ('29) A.A. 277; *Bismillah Begam* v. *Tahsin Ali Khan* (1930) 52 All. 710, 124 I. C. 722, ('30) A. A. 462; *Mohamed Ali* v. *Bismillah Begum* (1930) 33 Bom. L. R. 155, 35 Cal. W. N. 324, 128 I.C. 647, ('30) A.PC. 255; *Har Prasad* v. *Mohammad Usman* (1943) A.A. 2 (1942) A.L.J. 645, 205 I.C. 30.

(*n*) See *Har Prasad* v. *Mahomed Usman*. See *supra*.

(*o*) *Natha* v. *Dhunbaiji* (1899) 23 Bom. 1. Cf.; *Sadhashiv* v. *Trimbak* (1899) 23 Bom. 146; *Shivu Shidda* v. *Lakhmichand* (1939) A.B. 496, 41 Bom. L.R. 1007; *Jyoti Prasad* v. *Bhargava* (1946) All. 341.

(*p*) *Sunderlal* v. *Gursaran* (1938) A.O. 65.

(*q*) *Akramunnissa Bibi* v. *Mustafa-un-nissa Bibi* (1929) 51 All. 595, 116 I.C. 445, ('29) A.A. 238.

(*r*) *Ramanathum* v. *Unniammal* (1942) A.M. 632.

(*s*) *Chattru Mal* v. *Mt. Majidan* (1934) 13 Lah. 849, 150 I.C. 888, ('34) A.L. 460.

(*t*) *Joshua* v. *Alliance Bank of Simla* (1895) 22 Cal. 185.

(*u*) (1867) L.R. 2 H.L. 325.

(*v*) *Ramaswami Chettiar* v. *Mallappa Reddiar* (1920) 43 Mad. 760, 59 I.C. 947, [F.B.]; *Narratan Lal* v. *Stephen* (1922) 68 I.C. 369, ('22) A.P. 572.

virtue of sec. 53 of the Transfer of Property Act to attach as the property of the judgment-debtor property which has been fraudulently transferred to the claimant with intent to defeat or delay creditors. If he knows of the transfer when he applies for attachment, the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under O. 21, r. 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid." In a case from Allahabad (*w*) a creditor sued to recover his debt from his debtor and joined as parties persons to whom the debtor had transferred his property by gift but claimed no relief against the donees and they were "exempted" from the suit. In execution of his decree against the debtor he attached the property transferred. The donees objected to the attachment and the Court held that the creditor was barred by O. 2, r. 2, and by the principle of *res judicata* from pleading that the gift was voidable under sec. 53. The Court said, that the creditor had the option of accepting the transaction or avoiding it—once he decided to do one thing he lost the other option and could not be allowed to reprobate what he had approbated.

(5) Creditors.—The term creditor is correlative to debtor and signifies a person to whom a debt, that is a liquidated or specific sum of money is due. In its ordinary acceptation the term implies a person who has lent money or sold goods to another which has remained unpaid. It includes not only those who have proved their claim and obtained a decree and are designated judgment-creditors but also ordinary creditors who have still a claim to prove (*x*). A Mahomedan wife is a creditor in respect of her dower debt (*y*) and a genuine gift by a Mahomedan to his wife in lieu of dower, even if it is a preference over other creditors, is not hit by the section (*z*), and so is a deserted Hindu wife in respect of her claim for maintenance (*a*). But a Hindu wife is not a creditor if she is not entitled to separate maintenance (*b*). Under the statute of Elizabeth it was held that a volunteer under a voluntary bond is as much entitled to protection as a creditor for value (*c*). A person claiming only an unliquidated sum for damages for tort or breach of contract is not a creditor. An auction-purchaser who is not a decree-holder would not be a creditor entitled to take the benefit of the section (*d*).

(6) Subsequent creditors.—The term creditor includes not only creditors at the time of the assignment but also those who subsequently become creditors (*e*). With reference to the statute 13 Eliz. c. 5 Lord Hardwick said—"It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement; to make it fraudulent; for if a man does it with a view to his being indebted at a future time it is equally fraudulent, and ought to be set aside" (*f*). A man who contemplates going into trade cannot on the eve of his doing so, take the bulk of his

(*w*) *Sachitanand* v. *Radhapat* (1928) 26 All. L.J. 524, 116 I.C. 86, ('28) A.A. 234.

(*x*) *Ishwar* v. *Devar* (1903) 27 Bom. 146; *China Mal* v. *Gul Ahmad* (1923) 5 Lah. L. J. 435, 73 I.C. 719, ('23) A.L. 478; *Reese River Silver Mining Co.* v. *Atwell* (1869) 7 Eq. 347; *Faiz Ali* v. *Harkuar* (1923) 77 I.C. 50, ('23) A. N. 334; *Gamu* v. *Nathu* (1926) 96 I.C. 356, ('26) A.N. 494.

(*y*) *Suba Bibi* v. *Balgobind* (1886) 8 All. 178; *Bibi Saira* v. *Bibi Suliman* (1921) 63 I.C. 111, ('21) A.P. 395; *Umrao Singh* v. *Kaniz Fatima* (1901) A.W.N. 67; *Mst. Amina Bibi* v. *Shaikh Muhmmad Ibrahim* (1929) 4 Luck. 343, 114 I.C. 504, ('29) A.O. 520.

(*z*) *Mt. Kulsum Bibi* v. *Shiam Sunderlal* (1936) A.A. 600, (1936) A.L.J. 1027, 164 I.C. 515; *Rameshwar Nath* v. *Mt. Aftab Begam* (1936) A.A. 803, (1936) A.L.J. 966, 166 I.C. 56; *Bansidhar* v. *Nawal Jahan* (1938) A.O. 44; *Mt. Rasina Khatun* v. *Mt. Abida Khatun* (1937) A.A. 39; *Faqir Bux* v. *Thakur Prasad* (1941) A.O. 457.

(*a*) *Meenakshi Ammal* v. *Ammini Ammal* (1927) 101 I.C. 610, ('27) A.M. 657.

(*b*) *Brij Raj* v. *Ram Dayal* (1932) 7 Lah. 411, 135 I.C. 369, ('32) A.O. 40.

(*c*) *Adames* v. *Hallett* (1868) L.R. 6 Eq. 468.

(*d*) *Bai Hakimbu* v. *Dayabhai Rugnath* (1939) A.B. 508, 41 Bom. L.R. 1104, 185 I.C. 655.

(*e*) *Hooseinbhai* v. *Haji Esmail* (1903) 5 Bom. L.R. 255; *Thomas Pillai* v. *Muthuraman Chettiar* (1910) 33 Mad. 205, 4 I.C. 301; *Ram Chand* v. *Mathura Chand* (1921) 19 All. L.J. 299, 60 I.C. 896, ('21) A.A. 296; *Rajagopala Chetty* v. *Sivagami* (1924) M.W.N. 869, 82 I. C. 945 ('24) A. M. 779; *Ram Das* v. *Debu* (1930) 28 All. L.J. 1278, 128 I.C. 436, ('30) A.A. 610; *Murli Motiram* v. *Rewachand* (1946) A.S. 137.

(*f*) *Stileman* v. *Ashdown* (1743) 2 Atk. 477, 480.

S. 53. property out of the reach of those who may become his creditors (*g*). But a voluntary settlement made *bona fide* by a person who has ample means outside it to pay his present debts, is not void because it is found afterwards to defeat or delay future creditors (*h*).

Illustrations.

(1) A man of extravagant and dissolute habits was persuaded to reform and make a settlement of his property on his wife and children. He subsequently relapsed and incurred debts. The settlement was held not to be voidable by the subsequent creditors: *Ebrahim* v. *Foolbai* (1902) 26 Bom. 577.

(2) *A* obtained a decree against *B* for the possession of certain properties and mesne profits estimated at Rs. 10,000. *B*, a month later, executed a deed of trust settling all the property of which he was then possessed on his wife and children. The settlement was voidable under sec. 53 : *Nauratan Lal* v. *Stephen* (1922) 68 I.C. 369, ('22) A.P. 572.

The distinction between the two illustrations is that in the first the settlor was not in debt at the time of the settlement and the creditors were subsequent creditors, while in the second, the settlor was in embarrassed circumstances at the time of the settlement and a present creditor was defeated.

(7) Immoveable property.—The section does not apply to moveable property (*i*) but the principle of the section was extended to a case of an assignment of a decree when a considerable part of the consideration was secretly reserved for the benefit of the assignor (*j*). The statute 13 Eliz. c. 5 included moveable property. The principle of the Elizabethan Statute was applied to a transfer of moveable property by the Privy Council (*k*) and the Rangoon High Court has applied sec. 53 to moveables as a rule of justice, equity and good conscience (*l*).

(8) Defeat or delay creditors.—Both this section and section 1 of the Elizabethan Statute say "creditors" and not "creditor." The intention must be to defeat or delay creditors generally, and not to perfer one creditor to another (*m*). With reference to the statute of Elizabeth Jessel, M.R., said in *Middleton* v. *Pollock* (*n*)—"The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor." This was followed by the Privy Council in *Musahar Sahu* v. *Hakim Lal* (*o*), where the following passage occurs in the judgment of Lord Wrenbury—"As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be

(*g*) *Mackay* v. *Douglas* (1872) 14 Eq. 106; *Re Butterworth, Ex parte Russell* (1882) 19 Ch. D. 588; *Mohammad Ishaq* v. *Mohammad Yusaf* (1927) 8 Lah. 544, 101 I.C. 172, ('27) A.L. 420.

(*h*) *In re Lane Fox, Ex parte Gimblett* (1900) 2 B. 508; *Sadashiv* v. *Trimbak* (1899) 23 Bom. 146, 156.

(*i*) *Chidambaram* v. *Sami Aiyar* (1907) 30 Mad. 6, but see *Motilal* v. *Kashibai* (1938) A.N. 249.

(*j*) *Chidambaram* v. *Srinivasa* (1914) 37 Mad. 227, 23 I.C. 714 P.C.

(*k*) *Abdool Hye* v. *Mir Mohamed* (1883) 10 Cal. 616, 11 I.A. 10.

(*l*) *Ah Foon* v. *Hoe Lai Pat* (1932) 9 Rang. 614, 135 I.C. 651, ('32) A.R. 13.

(*m*) *Bhagwant* v. *Kedari* (1901) 25 Bom. 202; *Amarchand* v. *Gokul* (1908) 5 Bom. L.R. 142.

(*n*) (1876) 2 Ch. D. 104, 108; *Glegg* v. *Bromley* (1912) 3 K.B. 474; *In re Lloyds Furniture Palace Ld.* (1925) 1 Ch. 858.

(*o*) (1915) 43 Cal. 521, 43 I.A. 104, 32 I.C. 343 P.C. affirming *Hakim Lal* v. *Mooshahar Sahu* (1907) 34 Cal. 999; *Solema Bibi* v. *Hafez Mahammad Hossein* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.C. 836; *Ma Pwa May* v. *S. R. M. M. A. Chettyar Firm* (1929) 7 Rang. 624, 56 I.A. 379, ('29) A.PC. 279; *Labhu Ram* v. *Charnu* (1929) 11 Lah. L.J. 251, 116 I.C. 317, ('29) A.L. 409; *Atmaram* v. *Dayaram* (1929) 115 I.C. 330, ('29) A.S. 94; *Mst. Amina Bibi* v. *Shaikh Muhammad Ibrahim* (1929) 4 Luck. 343, 114 I.C. 504, ('29) A.O. 520; *Thakur Badri* v. *Hazari Singh* (1930) 5 Luck 625, 125 I.C. 163, ('30) A.O. 93; *Kalu* v. *Randhir* (1918) 21 O.C. 97, 46 I.C. 330; *Uttamrao* v. *Gangaram* (1932) 136 I.C. 237, ('32) A.N. 33; *Tan San Mai* v. *U Kya Zin* (1933) 145 I.C. 330, ('33) A.R. 162; *Narayana* v. *Official Receiver* (1934) 150 I.C. 339 ('34) A.M. 294.

insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C.B., in *In re Moroney* (*p*), where he says— The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. Now, it follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property (although the effect of it, or even the intent of the debtor in making it, may be to defeat an expected execution of another creditor) is not a fraud within the statute; because notwithstanding such an act, the entire property remains available for the creditors, or some or one of them, and as the statute gives no right of rateable distribution the right of the creditors by such act is not invaded, or affected. The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument, which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton* v. *Pollock* (*q*). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy."

This case is now the leading case in India on the question of preference, and the facts of it are sufficiently remarkable, for the debtor filed an affidavit that he did not intend to transfer his properties and nevertheless transferred them during the pendency of the suit to another creditor in satisfaction of another debt. The first creditor was grossly deceived, but his case was not within the section, for as Sir Lawrence Jenkins said in delivering the judgment of the Board in *Mina Kumari* v. *Bijoy Singh* (*r*), "A debtor, for all that is contained in sec. 53 of the Transfer of Property Act, may pay his debts in any order he pleases and prefer any creditor he chooses." A debtor may therefore convey property to any creditor in satisfaction of the debt due to him even though the transfer is effected to avoid an impending execution by another creditor (*s*).

Illustrations.

(1) *A* was a creditor of *B* and in December 1900 filed a suit to recover his debt. During the pendency of the suit in January 1901 he applied for an attachment before judgment of certain properties of *B*. In February *B* filed an affidavit that he had no intention of alienating his properties and the application of *A* was accordingly dismissed. Nevertheless in September *B* sold the properties to another creditor. The sale defeated *A* but as it was for adequate consideration and in satisfaction of a genuine debt, and as the debtor reserved no benefit for himself, it was a case of one creditor being preferred to the detriment of another and the sale was not voidable under sec. 53: *Musahur Sahu* v. *Hakim Lal* (1915) 43 Cal. 521 43 I. A. 104, 32 I.C. 343 P. C.

(*p*) (1887) L.R. 21 Ir. 27.

(*q*) (1876) 2 Ch. 104. *Mila* v. *Mangal Ram* (1938) A.L. 156, 179 I.C. 257; *Faqir Bux* v. *Thakur Prasad* (1941) A.O. 457.

(*r*) (1916) 44 Cal. 662, 44 I. A. 72, 40 I.C. 242, ('16) A.PC. 238; *Mst. Amina Bibi* v. *Shaikh Muhammad Ibrahim* (1929) 4 Luck. 343, 114 I.C. 504, ('29) A. O. 520; *Palamalai Mudaliyar* v. *South Indian Export Co.* (1910) 33 Mad. 334, 5 I.C. 38; *Muthiah Chetty* v. *Palaniappa Chetty* (1922) 45 Mad. 90, 70 I.C. 432, ('22) A.M. 447 reversed on a different point in *Muthiah Chetti* v. *Palaniappa Chetti* (1928) 51 Mad. 349, 55 I.A. 256, 109 I.C. 826, ('28) A.PC. 139; *Kalu* v. *Randhir* (1918) 21 O.C. 97, 46 I.C. 390; *Chettiar Firm* v. *Chettiar Firm* (1937) A.R. 581.

(*s*) *Mina Kumari* v. *Bijoy Singh* (1916) 44 Cal. 662, 44 I.A. 72, 40 I.C. 242, ('16) A.PC. 238; *Mahammad-u-nissa Begum* v. *Bachelor* (1905) 29 Bom. 428; *Rash Mohan* v. *Kristodas* (1918) 22 Cal. W. N. 982, 47 I.C 412; *V.P.L. Firm* v. *E.K.S. M. Chettyar Firm* (1933) 146 I.C. 954, ('33) A.R. 169; *Daya Ram* v. *Nadir Chand* (1934) ('34) A.L. 818; *Mahadeo Lal Jwala Prasad* v. *Mt. Bibi Maniran* (1933) 12 Pat. 297, 145 I.C. 213, ('33) A. P. 281 (transfer in satisfaction of dower debt); *Mt. Amirti* v. *Lakhmi Chand* (1934) 154 I.C. 979, ('34) A.L. 706; *Maung San Gyaw* v. *Maung Kyaw* (1937) A.R. 471; *Motilal* v. *Kashibai* (1938) A. N. 249.

S. 53

(2) *A* obtained a decree for his debt against a debtor *B*. In execution of the decree the debtor's property was attached on the 23rd August and sold to *C*. Before the attachment on the 13th July, *B* had sold the property to a relation *D* in part satisfaction of a debt due to her. *B* of set purpose gave preference to a creditor with whom he was connected by family ties but this was not fraudulent under the section, for a debtor may pay his debts in any order he pleases and prefer any creditor he chooses if no question of bankruptcy is involved. *D* was therefore entitled to possession of the property as against *C* : *Mina Kumari* v. *Bijoy Singh* (1916) 44 Cal. 662 44 I.A. 72, 40 I.C. 242 P. C.; *Jagoba* v. *Anandrao* (1936) 167 I. C. 449, (1937) A. N. 9; *Gharboya Bhimji* v. *Deodatta Behari* (1937) Nag. 452, 172 I. C. 289 (1937) A. N. 400; *Ram Ratan* v. *Akhtari Begam* (1939) 14 Luck. 621, 181 I. C. 181 (1939) A. O. 230.

(3) A creditor obtained a money decree against a Mahomedan. A week later in order to defeat the decree-holder the judgment debtor transferred his property to his wife for her dower. As a dower debt was due to the wife at the time of the transfer the case was one of preference and the transfer was not voidable : *Khodija Bibi* v. *Shah Muhammad Zahir* (1901) All. W. N. 64 ; *Mst. Amina Bibi* v. *Shaikh Muhammad Ibrahim* (1929) 4 Luck. 343, 114 I. C. 504, ('29) A. O. 520. *Kasturchand* v. *Mt. Wazir Begum* (1937) Nag. 291, 167 I. C. 48, (1937) A. N. I. and the other cases (*t*) *supra*.

Even in a case before the Act the Allahabad High Court held that a genuine sale for good and valid consideration to one creditor, even if effected to defeat and delay another creditor, apart from cases in which either insolvency or bankruptcy is involved, is not voidable (*u*).

But the debtor must not reserve any benefit for himself (*v*). If the debtor sells property to another creditor to discharge the debt due to him and the price realized is considerably in excess of the debt discharged (*w*), or if a fictitious debt is included in the consideration (*x*) this would be evidence of an intent to defraud creditors generally. In the case of a fictitious debt the money is retained by the transferee for the benefit of the debtor. Again if more property is sold than is necessary the conversion of land into cash enables the debtor to keep property out of the reach of the creditors (*y*). Mere inadequacy of the consideration may not by itself be sufficient to make the transaction voidable (*z*).

Illustration.

A, a trader at Jubbulpore, was in embarrassed circumstances. He purchased a stamp paper at Agra and secretly executed a usufructuary mortgage of all his property to his uncle *B*, the consideration being a fictitious book debt. One of the terms of the mortgage was that *B* should out of the usufruct pay allowances to the wife and children of *A*. The mortgage was voidable under sec. 53, for it put all *A*'s property out of the reach of his creditors and reserved a benefit for *A*. Moreover the secrecy with which the transaction was effected was evidence of fraudulent intention : *Ghansam Das* v. *Uma Pershad* (1919) 21 Bom. L. R. 472, 50 I.C. 264 P.C.

(*t*) *Mt. Kulsum Bibi* v. *Shiam Sunderlal* (1936) A. A. 600, (1936) A. L. J. 1027, 164 I.C. 515 ; *Rameshwar Nath* v. *Mt. Aftab Begum* (1936) A. A. 803, (1936) A. L. J. 966, 166, I.C. 56 ; *Bansidhar* v. *Nawal Jahan* (1938) A. O. 44, *Mt. Ramzan Khatun* v. *Mt. Abidu Khahim* (1937) A. A. 39 ; *Faqir Bux* v. *Thakur Prasad* (1941) A. O. 457.

(*u*) *Suba Bibi* v. *Balgobind Das* (1886) 8 All. 178 citing *Wood* v. *Dixie* (1845) 7 Q.B. 892.

(*v*) *Bai Hakimbu* v. *Dayabhai Rugnath* (1939) A.B. 508, 41 Bom. L.R. 1104, 185 I.C. 655.

(*w*) *Hanifa Bibi* v. *Punnamma* (1907) 17 Mad. L. J. 11 ; *Visvanada* v. *Raja Venkata* (1927) Mad. W. N. 1, 99 I.C. 709, ('27) A. M. 278 ; cf. *Chidambaram* v. *Sami* (1907) 30 Mad. 6 on app ; *Chidambaram* v. *Srinivasa* (1914) 37 Mad. 227, 23 I.C. 714 P.C.

(*x*) *Narayana* v. *Viraraghavan* (1900) 23 Mad. 184 ; *Hanifa Bibi* v. *Punnamma*, *supra*.

(*y*) *Alagappa* v. *Dasappa* (1913) 24 Mad. L. J. 293, 18 I.C. 322 ; *Palamalai* v. *South Indian Export Co.* (1910) 33 Mad. 334, 5 I.C. 33 ; *Gani* v. *Sitaram* (1924) 79 I.C. 625, ('24) A. N. 318.

(*z*) *Kedarwati* v. *Radhey Lal* (1937) 170 I.C. 353, (1937) A.P. 609.

The question whether a transfer was made with intent to defeat or delay creditors is a mixed question of law and fact, and an erroneous view of the law will vitiate a finding of fact (*a*). In a Madras case (*b*) the lower Court had found that the husband had sold property in order to defeat his wife's claim for arrears of maintenance. On appeal it was urged that there was other property sufficient to satisfy the wife's claim. The High Court said that in view of the finding of the lower Court it was unnecessary to consider this contention. It is submitted that this is incorrect and that the High Court should have considered all the facts and decided the issue as one of law. In another case (*c*) it was said that the Court should consider whether the other property of the debtor was of sufficient amount and easily available.

If there is no question of preference, an intention to defeat creditors generally may be inferred from an intention to defeat a particular creditor (*d*).

(9) No presumption of fraud.—The old section enacted a presumption of an intention to defeat or delay creditors when the transfer was made gratuitously, *i.e.*, without consideration or for a grossly inadequate consideration (*e*). The omission of this presumption is in accord with the course of decisions in English law (*f*). In *Spirett* v. *Willows* (*g*) Lord Westbury had said that a voluntary settlement which had the effect of defeating or delaying creditors existing at the date of the settlement is presumed to have been made with that intent, but that if the creditors were subsequent creditors it was necessary to prove either express intent to delay, hinder or defraud creditors or that the settlement reduced the settlor to a state of insolvency. Again in *Freeman* v. *Pope* (*h*) Lord Hatherley had said that it was not necessary to prove any actual intention to defeat or delay creditors where the facts were such as to shew that the necessary consequence of what was done was to defeat or delay them. But in *Ex parte Mercer, Re Wise* (*i*) Lord Esher said that this was a " monstrous proposition " for " if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it is to ask one to find that to be a fact which one really believes to be untrue in fact." This case was cited with approval by the Court of Appeal in *In re Holland, Gregg* v. *Holland* (*j*), where Vaughan Williams, L.J., said—" I think that in each case you must look at the whole of the circumstances surrounding the execution of the conveyance, and then ask yourself the question whether the conveyance was in fact executed with the intent to defeat and delay creditors." This is the rule that had been laid down in *Thompson* v. *Webster* (*k*) by Kindersley, V.C., in the following terms—" It is not necessary, in order to set aside a voluntary deed, that the settlor should be actually in a state of insolvency. The principle now established is this. The language of the Act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder or delay creditors, the Court is to decide in each particular case, whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement was to defeat, hinder or delay his creditors."

(*a*) *Ishan Chunder* v. *Bishu* (1897) 24 Cal. 825; *Amina Bibi* v. *Mohammad Ibrahim* (1928) 5 O.W.N. 1077, 114 I.C. 501.

(*b*) *Meenakshi Ammal* v. *Ammani Ammal* (1927) 101 I.C. 610, ('27) A. M. 657.

(*c*) *Gopichand* v. *Jodhraj* (1929) 116 I.C. 815, ('29) A. A. 458.

(*d*) See for instance *Fakira* v. *Majho* (1917) 2 Pat. L.J. 546, 40 I.C. 685; *Mula Ram* v. *Jiwanda* (1923) 4 Lah. 211, 72 I.C. 452, ('23) A. L. 423; *Akramunnissa Bibi* v. *Mustafunnissa Bibi* (1929) 51 All. 595, 116 I.C. 445, ('29) A. A. 238; *R. R. O. O. Chettyar Firm* v. *Ma Sein Yin* (1927) 5 Rang. 583, 105 I.C. 582, ('28) A. R. 1.

(*e*) *Mahammad Ishaq* v. *Mahammad Yusaf* (1927) 8 Lah. 544, 101 I.C. 172, ('27) A. L. 420.

(*f*) *Maung Than* v. *U. Po* (1934) ('34) A.P. 252.

(*g*) (1864) 3 DeG. J. & Sm. 293, 302; cf. *Ebrahimbhai* v. *Fulbai* (1902) 26 Bom. 577; *Mahammad Ishaq* v. *Mahammad Yusaf*, *supra*.

(*h*) (1870) 5 Ch. App. 538.

(*i*) (1886) 17 Q. B. D. 290, 298.

(*j*) (1902) 2 Ch. 360, 372.

(*k*) (1859) 4 Drew. 628, 632; *Godfrey* v. *Poole* (1888) 13 App Cas. 497.

S. 53

Illustration.

A captain of a merchant ship married a lady in Hongkong in May. In the following October he received by the same post news that he had been left a legacy of £500, and that another lady had filed a suit for damages for breach of promise of marriage. The captain immediately executed a voluntary settlement of the £500 on his wife and children. The suit ended in an award of £500 for damages and the captain was declared bankrupt. Had the case been governed by the old section 53 of the Transfer of Property Act, there would have been a presumption that the voluntary settlement was in fraud of creditors. But under the English law which corresponds with the present section, the Court finding that the captain had no debts at the time of the settlement and could not have foreseen vindictive damages accepted his word that the settlement was made bona fide: *Ex parte Mercer, In re Wise* (1886), 17 Q.B.D. 290.

The Privy Council in a case from Nagpur proceeded on the same principle. A debtor executed a usufructuary mortgage of all his property to his uncle at a time when his creditors had filed suits for the recovery of their debts. The creditors attached the property and the mortgagee's claim to release the property from attachment was dismissed. The mortgagee then sued to establish his title. The suit was decreed by the District Judge but dismissed by the Judicial Commissioner. On appeal the Privy Council in a judgment delivered by Mr. Ameer Ali said—"The District Judge rightly threw on the plaintiff the onus of establishing that the transaction was entered into in good faith. In dealing with the case, however, he seems to have fallen into an error. He took each fact which militated against the bona fides of the mortgage separated from the rest of the facts and proceeded to demonstrate that it was quite consistent with good faith and by this process he arrived at the conclusion to which their Lordships have referred. The course adopted by the District Judge was patently erroneous; for in a case like the present it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole (*l*)." This case appears to have been, decided under sec. 53 for the judgment stressed the fact that a benefit was reserved for the debtor as the mortgagee covenanted to pay out of the usufruct allowances to members of the debtor's family. But even if the case was one of a benami or colourable transaction, the rule of evidence would be the same. The onus was on the transferee in this case to prove the bona fides of the transaction, as he was suing to establish his title. If, however, a creditor were suing to impeach a transfer the onus would be on him to prove that it was in fraud of creditors as it would be if he were impeaching a benami transfer (*m*).

Under the general law, if creditors sue to avoid a transfer the burden of proving that it is a fraud on the creditors rests on them (*n*). But as pointed out by the Privy Council in *Mina Kumari* v. *Bijoy Singh* (*o*) however suspicious a transaction may be, the Court's decision must rest not upon suspicion, but on legal grounds established by legal testimony. The burden initially lies on the creditors to make out a case under this section, but when they have proved facts which are sufficiently to show *prima facie* that the intention of the debtor was to defeat or delay the creditors, it is for the debtor to meet the case and to explain the facts (*p*).

The present section leaves the question of intention to be determined according to the general law of evidence. But according to that law a man is presumed to intend the natural consequences of his acts and fraud must necessarily be proved by circumstantial

(*l*) *Ghunsham* v. *Uma Pershad* (1919) 21 Bom. L. R. 472, 50 I.C. 264 P. C.

(*m*) *Maniklal* v. *Bijoy Singh* (1921) 25 Cal. W. N. 409, 62 I.C. 356, ('21) A. PC. 69.

(*n*) *Sharfuniya* v. *Pasha Saheb* (1928) 112 I.C. 228, ('28) A. M. 793.

(*o*) (1916) 44 Cal. 662, 44 I.A. 72, 40 I.C. 242, ('16) A. PC. 238; *Sreemanchunder Dey* v. *Gopaulchunder* (1866) 11 M. I. A. 28, 43; *Maniklal* v. *Bijoy Singh* (1921) 25 Cal. W. N. 409, 62 I.C. 356, ('21) A. PC. 69.

(*p*) *Har Prasad* v. *Mahomed Usman* (1943) A.A., 2; *Narasimhamurti* v. *Maharajah of Pittapur* (1941) A.M. 690.

evidence (q). Therefore even under the new section it would be evidence of a fraudulent intention if a debtor made a voluntary settlement, or a transfer for a grossly inadequate consideration without reserving sufficient property for the payment of his debts; so also if he put all his property out of the reach of those who might become his creditors before embarking on a hazardous enterprise. But every such case would depend upon its own circumstances and in all cases it is a question of fact whether the transaction is bona fide or a contrivance to defraud creditors (r). S. 53

The facts which militate against the bona fides of a transaction and whose cumulative effect is proof of fraud are many and various. Secrecy is a badge of fraud (s), while notoriety rebuts a presumption of fraud (t). A gift by a Hindu father of ancestral property to his grandchildren, with the assent of the son who had received consideration by payment of his debts, though made to screen the property from subsequent creditors is not fraudulent. The Privy Council said: "That it was intended to save the ancestral property from being wasted by the vices and extravagance of Udey Narain (the son) is openly avowed on the face of the deed. But such an intention is not fraudulent. It may be carried into effect by honest means. And people who mean to effect such a design by fraud are not likely to put it in the forefront of an instrument which must be registered, which may easily be discovered by persons interested to inquire about the property, and to which attention is likely to be drawn by the consequent mutation of names after public notice and a change of management" (u). It is some evidence of fraud that a time-barred debt is set up as part of the consideration for the transfer; but though this is an element to be taken into consideration it is not so strongly suggestive of fraud as the fact that the debt never existed (v). It is evidence of a fraudulent intention that the transferor is in embarrassed circumstances and the transaction is between relations (w), or that the transfer was a mere cloak for retaining a benefit for the transferor (x). But these are all facts to be considered along with other circumstances of the case (y). The mere fact that debts are due from the transferor is not also sufficient to establish a fraudulent intention (z). In *Muthiah Chetti* v. *Palaniappa Chetti* (a) the Privy Council held that a mortgage executed by a debtor to a relation in discharge of bona fide debts was a piece of family policy not contrary to law although it was effected during the pendency of a suit by another creditor. When there were no present debts a sale to a daughter was upheld against subsequent creditors and payment of consideration was presumed (b).

Illustrations.

(1) *A* sued *B* for debt. *B* obtained an adjournment and during the adjournment sold her land to her sister *C*. *B* allowed the suit to be decreed *ex parte* and when *A* attached the land *C* objected that it was hers. *B* professed to have sold the land to a

(q) *Mothoora Pandey* v. *Ram Ruchya* (1869) 11 W. R. 482; *Syed Md. Haidar* v. *Prince Safdar Jah* (1938) A.O. 230.

(r) *Chidambaram Chettiar* v. *Sami Aiyar* (1907) 30 Mad. 6 on app. *Chidambaram* v. *Srinivasa* (1914) 37 Mad. 227, 23 I.C. 714 P.C. citing *Corlett* v. *Radcliffe* (1862) 14 Moo. P. C. 121.

(s) *Twyne's* case (1601) 3 Co. Rep. 80, 1 Sm. L.C. 13th Ed., p. 1.

(t) *Leonard* v. *Baker* (1813) 1 M. & W. Sel. 251. ("the transaction as to the assignment was perfectly notorious").

(u) *Rai Bishen Chand* v. *Mst. Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164, 174.

(v) *Hanifa Bibi* v. *Punnamma* (1907) 17 Mad. L.J. 11; *Motumal* v. *Manghomal* (1930) 127 I.C. 701, ('30) A. S. 234.

(w) *Ghansham* v. *Uma Parshad* (1919) 21 Bom. L.R. 472, 50 I.C. 264 P.C.; *Bhagwant* v. *Kedari* (1901) 25 Bom. 202; *Natha* v. *Dhunbaiji* (1899) 23 Bom. 1; *Nandaramdas* v. *Zulikka Bibi* (1948) A.M. 531, (1948) 2 M.L.J. 1, 56 M.L.W. 583; *Umrao Begum.* v. *Rahmat Ilahi* (1939) A.L. 439, 41 P.L.R. 373.

(x) *Natha* v. *Maganchand* (1903) 27 Bom. 322; *Ramasamia* v. *Adinarayana* (1897) 20 Mad. 465; *Subraya* v. *Perumal* (1918) 43 I.C. 956; *Alton* v. *Barrington* (1869) 4 Ch. App. 622; *Ex parte Games, Re Bamford* (1879) 12 Ch. D. 314 C.A.; *In re Fasey Ex parte Trustees* (1923) 2 Ch. 1.

(y) *Jagat Kishore* v. *Kulakamini Dasya* (1941) A.C. 233, 72 C.L.J. 420, 197 I.C. 50.

(z) *Ratan Chand* v. *Kishen Chand* (1936) A.L. 136.

(a) (1928) 51 Mad. 349, 55 I.A. 256, 109 I.C. 626, ('28) A. PC. 139.

(b) *Maung Din* v. *Ma Hnin Me* (1925) 3 Rang. 71, 89 I.C. 436, ('25) A.R. 227.

S. 53 raise money to pay a debt but no demand had been made for payment of the debt and *B* was not solely liable for its payment. The sale was held to be voidable as in fraud of creditors: *R. R. O. O. Chettyar Firm* v. *Ma Sein Yin* (1927) 5 Rang. 588, 105 I.C. 582, ('28) A.R. 1.

(2) A creditor had obtained a decree against a widow who has a life-interest in property left to her by her husband. The widow in order to put the property out of the reach of the creditor surrendered her interest to her son. The surrender was voidable under this section: *Natha* v. *Dhunbaiji* (1899) 23 Bom. 1.

(3) *A* being in embarrassed circumstances wished to convert his property into cash so as to conceal it from his creditors. *B* being aware of *A*'s object assisted him by purchasing the property. The sale was voidable under this section: *Palamalai Mudaliyar* v. *The South Indian Export Co.* (1910) 33 Mad. 334, 5. I.C. 33.

Under Hindu law debts take precedence over a right of maintenance, and under the old section a gift by a Hindu of all his property to his wife, and children was set aside when he became insolvent a few years later (*c*). Such a gift, leaving nothing for the payment of present debts would no boubt be voidable also under the present section. But where a Hindu made a settlement of one sixth of his property on his wife after providing for the payment of family debts the settlement was held not to be voidable by subsequent creditors (*d*).

(10) Partition.—The section has been applied to cases of partition (*e*). A partition is not actually a transfer of property but is analogous to an exchange. Mookerjee, J., in a Calcutta case (*f*) said that partition signifies "the surrender of a portion of a joint right in exchange for a similar right from the co-sharer." Spencer, J., in a Madras case (*g*) said that a partition "effects a change in the mode of enjoyment of property but is not an act of conveying property from one living person to another." But the preponderance of authority is in favour of a partition being treated as a transfer for the purposes of sec. 53. The correct view, it is submitted, is that a partition is not a transfer and therefore not strictly within this section but the principle of the section applies to a fraudulent partition. Where the object of the partition is not merely to give a sharer his rightful share in the family property, but to effect the partition in such a way that such sharer would be able to defeat the creditors, *i.e.* to say, to allot to him properties which the creditors would not be able to touch and which he would be able to keep for himself, it is clearly a transaction which fulfils the requirements of this section (*h*). A reference to arbitration which led to an award and decree for partition by which the father received an allowance in lieu of his share in the family property was held not to be voidable under this section as there were no debts at the time of the reference and the object was not to defeat creditors but to safeguard the interest of a minor son (*i*). A partition which does not provide for the payment of a Hindu father's debt is *mala fide* and may be avoided by a creditor in proceedings in executition of a decree against the father (*j*). But a partition of joint family property between a Hindu father and his son is not voidable under sec. 53, if it is made to avoid

(*c*) *Sunder Singh* v. *Ram Nath* (1926) 7 Lah. 12, 93 I.C. 1013, ('26) A.L. 167.

(*d*) *Mst. Raj Kuer* v. *Din Dayal* (1931) 8 O.W.N. 499, 135 I.C. 895, ('31) A.O. 325.

(*e*) *Vinayak* v. *Moreshwar* (1944) A.N. 44 F.B.; *Firm Schwebo* v. *Subbiah* (1944) A.M. 381.

(*f*) *Aitabannessa Bibi* v. *Safatullah Mia* (1916) 43 Cal. 504, 509, 31 I.C. 189; *Rasa Goundan* v. *Arunachala* (1923) 44 Mad. L.J. 513, 72 I.C. 978, ('23). A.M. 577. See also *Suhashini Poddar* v. *Sreenath Chakravarty* (1945) 49 C.W.N. 769 and *Khirode Sundari* v. *Chunilal* (1945) 49 C.W.N. 779.

(*g*) *Indoji Jethaji* v. *Kothapalli* (1919) 54 I.C. 146.

(*h*) *Vinayak* v. *Moreshwar* (1944) A.N. 44 F.B.

(*i*) *Shantilal* v. *Munshilal* (1932) 56 Bom. 595, 34 Bom. L. R. 862, 139 I.C. 820, ('32) A.B. 498.

(*j*) *Balusami Ayyar, In re* (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735 [F.B.].

attachment by a creditor of the father (*k*). There is nothing fraudulent in the son exercising his right of partition to save his share of the property (*l*). S. 53

(10A) Assignment between partners.—Under the Statute of Elizabeth an assignment by an outgoing partner of his share to the continuing partner in consideration of a covenant for the payment of the partnership debts when both the partners and the partnership were insolvent was set aside as calculated to delay the creditors both of the partnership and of the partners (*m*).

(11) Transferee in good faith and for consideration.—The meaning of the second paragraph of sub-section (1) is that if a person acquires property for value and in good faith, that is without being a party to any design on the part of the transferor to defeat or delay creditors, his rights will not be affected by the section although the transferor's intention may have been fraudulent (*n*). In a judgment approved by the Privy Council (*o*) the Madras High Court said that both under the Statute 13 Eliz. c. 5 and under sec. 53 of the Transfer of Property Act "good faith as well as consideration is made, in terms, an essential condition of the validity of the transfer." The judgment quotes a passage from *Twyne's* case (*p*) where Lord Coke said "a good consideration doth not suffice if it be not also bona fide." There are many Indian decisions to the same effect (*q*). If the transferee is aware of the fraudulent intention of the transferor and aids and abets it the transfer is voidable (*r*). The knowledge and intention of the transferee are the determining factors (*s*). If the vendor's intention was to convert his immoveable property into cash so as to put it out of the reach of his creditors and the vendee was aware of that intention, the sale would be voidable although the consideration was paid (*t*). But if the vendee was not a party to the fraud the sale would be valid (*u*), even if the vendee were aware of an impending execution (*v*). A debtor created a charge on two houses for the maintenance of his son's wife in pursuance of an ante-nuptial agreement. But although the evidence showed that his intention was to defraud his creditors, the charge was not set aside as there was no proof that his daughter-in-law was a party to the fraud (*w*). But in a case where the wife was a party to the fraud and the celebration of the marriage was part of a scheme to protect the property against creditors, the consideration of marriage was held to be insufficient to support the settlement (*x*). In a case from Allahabad (*y*) the first wife of a Mahomedan filed a suit for dower. Five days later the husband transferred his property to his second wife for her dower. The

(*k*) *Krishnasami* v. *Ramasami* (1899) 22 Mad. 519; *Kameswaramma* v. *Venkata Subba Row* (1915) 38 Mad. 1120, 24 I.C. 474; *Chottelal* v. *Seth Lakmichand* (1926) 94 I.C. 282, ('26) A.N. 355; *Gaya Prasad* v. *Murlidhar* (1928) 50 All. 137, 104 I.C. 406, ('27) A. A. 714.

(*l*) See *Schwebo* v. *Subbiah*, *supra*.

(*m*) *Re Edwards-Wood, Ex parte Mayou* (1865) 4 DeG. J. & Sm. 664.

(*n*) *Ishan Chunder* v. *Bishu Sirdar* (1897) 24 Cal. 825 citing *Wood* v. *Dixie* (1845) 7 Q.B. 892. See also *Amarnath* v. *Dwarka Das* (1945) A.A. 42, (1944) All. 737, 219 I.C. 27.

(*o*) *Chidambaram Chettiar* v. *Srinivasa Sastrial* (1914) 37 Mad. 227, 23 I.C. 714 P.C. On appeal from *Chidambaram Chettiar* v. *Sami Aiyar* (1907) 30 Mad. 6, 10.

(*p*) (1601) 3 Co. Rep. 80, 82a, 1 S.L.C. 13th Ed. 1.

(*q*) *Bhagwant* v. *Kedari* (1901) 25 Bom. 202, 226-227; *Palamalai Mudaliyar* v. *South Indian Export Co.* (1910) 33 Mad. 34, 4 I.C. 509; *Fakira* v. *Majho* (1917) 2 Pat. L.J. 546, 40 I.C. 685; *Aftabuddin* v. *Basanta* (1918) 22 Cal. W.N. 427, 45 I.C. 441; *Kamini* v. *Hira Lal* (1919) 23 Cal. W.N. 769, 51 I.C. 736; *Bhikabhai* v. *Panachand* (1919) 43 Bom. 707, 52 I.C. 682.

(*r*) *Mula Ram* v. *Jiwanda* (1923) 4 Lah. 211, 72 I.C. 452, ('23) A.L. 423.

(*s*) *Ibrahim* v. *Jiwandas* (1924) 75 I.C. 1043, ('24) A.L. 707; *Daulat Ram* v. *Ghulam Fatima* (1926) 89 I.C. 953, ('26) A.L. 25.

(*t*) *Alagappa* v. *Dasappa* (1913) 24 Mad. L.J. 293, 18 I.C. 332.

(*u*) *Natha* v. *Maganchand* (1903) 27 Bom. 322; *Ramasamia Pillai* v. *Adinarayana Pillai* (1897) 20 Mad. 465; *Vinayak* v. *Kaniram* (1926) 92 I.C. 810, ('26) A.N. 293.

(*v*) *Ishan Chunder* v. *Bishu Sirdar* (1897) 24 Cal. 825; *Muhammad-un-nissa* v. *Bachelor* (1905) 29 Bom. 428, 434; *Ah Foon* v. *Hoe Lai Pat* (1932) 9 Rang. 614, 135 I.C. 641, ('32) A.R. 13.

(*w*) *Hassan Abbas* v. *Razia Begam* (1911) 12 I.C. 401; *In re Reis, Ex parte Clough* (1902) 2 K. B. 769.

(*x*) *Bulmer* v. *Hunter* (1869) L.R. 8 Eq. 46.

(*y*) *Hamidunnissa* v. *Nasirunnissa* (1909) 31 All. 170, 1 I.C. 863.

S. 53 Court said that the transfer was voidable if the second wife combined with her husband with the improper object of defeating the first wife's claim. It is submitted, however, that the second wife was a creditor for her dower and that her primary object must have been to secure her own dower and the case was merely one of preference.

A preference of one creditor to another, even though fraudulent in the law of bankruptcy, is not fraudulent under this section. A creditor is a transferee in good faith if the transfer is made in satisfaction of his debt even though he is aware that proceedings have been taken by another creditor for the recovery of his debt, for his primary object is to protect himself and not to defeat other creditors (*z*). Therefore if a transfer is to a creditor in satisfaction of a pre-existing debt, no question of good faith arises (*a*).

A transferee who has constructive notice of a fraud is not a transferee in good faith. In a Madras case (*b*), the creditor *A* had obtained a decree against his debtor *B*, and attached *B*'s property. *B* had previously sold the property to *C*, who preferred an objection to the attachment which was allowed. *C* then sold it to *D* who purchased on the faith of the order allowing *C*'s objection. *A* filed a suit and obtained a declaration that the sale to *C* was in fraud of creditors. The Court also held that *D* was not a transferee in good faith. He had seen the order on *C*'s objection which showed that title would be decided in the suit which *A* was to file; and yet he made no inquiry of *A*.

It appears from the case last cited that the protection extends to an innocent purchaser from a transferee who was a party to a fraud on creditors. Decisions under the statute of Elizabeth support this conclusion. When a man in debt executed a deed of gift of his furniture in favour of his wife, who a fortnight after a creditor's decree, granted a bill of sale of the furniture in favour of a person who took for value and without notice the Court held that though the wife's title was subject to defeasance on a creditor's suit under 13 Eliz. c. 5 as being a fraud on creditors, yet the title of the bona fide purchaser for value under the bill of sale was a valid one (*c*). There is an apparently contrary decision in Allahabad (*d*), but in that case the original transfer was collusive and fictitious so that there was no title to convey to the second transferee. In a subsequent Allahabad case (*e*) the creditor was held to be estopped, as his omission to impeach the first transfer enabled the transferee to make a second transfer.

Onus.—The onus of proving want of good faith in the transferee is on the creditor who impugns the transaction (*f*). But if fraud is established the onus of proving his good faith is shifted to the transferee (*g*). The issues in a suit to set aside a sale under sec. 53 are therefore.—

(1) Was the transfer made with intent to defeat and delay creditors.

(2) If so, was the purchaser a transferee in good faith and for consideration.

The onus of proving the first issue lies on the creditors; and if that be established the onus of proving the second issue will be on the transferee (*h*).

(*z*) *Marwadi Samnaji* v. *Sripathi* (1927) 101 I.C. 568, ('27) A.M. 1144; *Musahar Sahu* v. *Hakim Lal* (1915) 43 Cal. 521, 43 I.A. 104, 32 I.C. 343; *Natha* v. *Maganchand* (1903) 27 Bom. 322.

(*a*) *Gobind Ram* v. *Chhogmal* (1934) 152 I.C. 472, ('34) A.L. 161.

(*b*) *Kunhu Pothanassiar* v. *Raru Nair* (1923) 46 Mad. 478, 72 I.C. 727, ('23) A.M. 558.

(*c*) *Harrods Ltd.* v. *Stanton* (1923) 1 K.B. 516; *Halifax Joint Stock Banking Co.* v. *Gledhill* (1891) 1 Ch. 31; *Frin Man Singh* v. *B. N. Sinha* (1940) A.L. 198, 191 I.C. 639.

(*d*) *Basti Begam* v. *Banarsi Prasad* (1907) 30 All. 297.

(*e*) *Phagoo* v. *Tulshi* (1930) 125 I.C. 506, ('30) A.A. 488.

(*f*) *Daulat Ram* v. *Ghulam Fatima* (1926) 89 I.C. 953, ('26) A.L. 25; *Ram Ditta* v. *Official Receiver* (1934) 147 I.C. 1026, ('34) A.L. 365.

(*g*) *Woomesh Chunder* v. *Gooroodoss Roy* (1872) 17 W.R. 9 P.C.; *Amarchand* v. *Gokul* (1903) 5 Bom. L.R. 142; *Mohideen* v. *Muhammad Mustappah* (1930) 126 I.C. 604, ('30) A.M. 665; *N.S.P.R.M.S.P. Firm* v. *Allaudin* (1933) 148 I.C. 539, ('33) A. R. 191.

(*h*) *Amarchand* v. *Gokul* (1903) 5 Bom. L.R. 142.

If the transferee proves that he paid the fair value of the property the Court will lean towards holding that he acted bona fide (*i*). **S. 53**

(12) Consideration.—This word is used in the same sense as in the Indian Contract Act and therefore excludes natural love and affection. Transfers for natural love and affection are dealt with as transfers without consideration (*j*). A time-barred debt is consideration under this section, but the inclusion of a time-barred debt in the consideration might be treated as some evidence of a fraudulent intention (*k*). A dower debt is a valid consideration under this section (*l*). In a curious case from Madras a man who was heavily indebted transferred all his property to the childern of his first wife in consideration of her relations allowing him to marry a second wife and it was held that this was valid considertion, and that the transfer was not a fraud on creditors (*m*).

The amended section makes no mention of gross inadequacy of consideration. Under the old section gross inadequacy of consideration raised a presumption of fraud. Under the new section it would still be evidence of fraud to be considered with the other circumstances of the case. Gross inadequacy of consideration is treated as indicative of fraud in sec. 28 (a) of the Specific Relief Act. But no presumption of fraud arises from mere inadequacy of consideration (*n*). In English law intent to defraud may be presumed if the consideration is entirely inadequate (*o*), but the Court will not as a general rule inquire if the consideration is equivalent (*p*).

If the debtor sells or mortgages his property, and the consideration stated is in excess of what is paid, or if the vendee or mortgagee is a creditor and the consideration stated is in excess of the debt, with an understanding that the excess is to be retained for the benefit of the debtor, and that the transaction is to be a shield against creditors, the sale or mortgage is voidable under this section.

To what extent voidable.—There is no equity in favour of a party to a fraud and the whole transfer is voidable, and not voidable only as to the excess. A transaction which is intended to defeat or delay creditors cannot be good in part and bad in part (*q*). The only exception is where the transferee utilizes the consideration paid for the discharge of a prior encumbrance and so becomes entitled by subrogation (*r*). When the transfer

(*i*) *Amarchand* v. *Gokul*, *supra*; *Ah Foon* v. *Hoe Lai Pat* (1932) 9 Rang. 614, 135 I.C. 641, ('32) A.R. 13.

(*j*) *Mohammad Ishaq* v. *Mohammad Yusuf* (1927) 8 Lah. 544, 101 I.C. 172, ('27) A.L. 420; *Sukhpal Kuar* v. *Dasu* (1920) 58 I.C. 165.

(*k*) *Motumal* v. *Manghomal* (1930) 127 I.C. 701, ('30) A.S. 284; *Hanifa Bibi* v. *Punnamma* (1907) 17 Mad. L.J. 11.

(*l*) *Khodija Bibi* v. *Shah Mohammad Zahir* (1901) All. W. N. 64; *Mst. Amina Bibi* v. *Shah Muhammad Ibrahim* (1929) 4 Luck. 343, 114 I.C. 504, ('29) A.O. 520; *Bibi Saira* v. *Bibi Suliman* (1921) 63 I.C. 111.

(*m*) *Kapini Goundan* v. *Saranganapani* (1916) Mad. W.N. 288, 34 I.C. 744.

(*n*) *Doma* v. *Govind* (1924) 76 I.C. 635, ('24) A.N. 124; *Banwari Lal* v. *Bhag Mal* (1931) 131 I.C. 301, ('31) A.L. 213; *O.M.O. Chettiar Firm* v. *Ma Mai Jain* (1936) 167 I.C. 599, (1937) A.R. 51.

(*o*) *Mattews* v. *Feaver* (1786) 1 Cox Eq. Cas. 278; *Goldsmith* v. *Russell* (1855) DeG.M. & G. 547.

(*p*) *Thompson* v. *Webster* (1859) 4 DeG. & J. 600.

(*q*) *Chidambaram* v. *Sami Aiyar* (1907) 30 Mad. 6; *Palaniappa* v. *Official Receiver* (1915) 25 I.C. 948; *Bhikabhai Muljibhai* v. *Panachand* (1919) 43 Bom. 707, 52 I.C. 682; *Visvananda Reddi* v. *Venkata Reddi* (1927) Mad. W. N. 1, 99 I.C. 709, ('27) A.M. 278 distinguishing *Krishna Kumar* v. *Joy Krishna* (1916) 21 Cal. W.N. 401, 29 I.C. 690; *Rajabahadur Mudaliar* v. *Thiruvengada Mudaliar* (1928) 106 I.C. 651, ('28) A. M. 20; *Sama Row* v. *Doraisami Chettiar* (1913) 24 Mad. L.J. 266, 18 I.C. 768; *Mula Ram* v. *Jiwanda Ram* (1923) 4 Lah. 211, 72 I.C. 452, ('23) A.L. 423; *Madan Gopal* v. *Lehori Mal Janki* (1931) 12 Lah. 194, 130 I.C. 62, ('30) A.L. 1027; *Appalaraju* v. *Krishnamurthy* (1931) 135 I.C. 582, ('32) A.M. 182; *Janki Das* v. *Gulzar* (1932) 12 Lah. 763, 131 I.C. 383, ('32) A.L. 174; *Warayam Singh* v. *Thakar Das* (1935) 16 Lah. 680, 158 I.C. 254, ('35) A. L. 404; *Muthuvasu Chettiar* v. *Velu Muruga Nadar* (1939) A.M. 745.

(*r*) *Palamalai Mudaliyar* v. *The South Indian Export Co.* (1910) 33 Mad. 384, 5 I.C. 33; *Ammachukutty* v. *Ammakutty Haji* (1915) 29 I.C. 583; *Subroya Goundan* v. *Perumal Chettiar* (1918) 48 I.C. 956; *Viswanatha Reddi* v. *Raja Venkata Reddi* (1927) 99 I.C. 709, ('27) A.M. 278; *Gangamma* v. *Veerappa* (1931) 131 I.C. 833, ('31) A.M. 513; *N.S.P.R.M.S.P. Firm* v. *Allaudin* (1933) 143 I.C. 580, ('33) A.R. 191.

S. 53

is not voidable as a fraud on creditors, but is only a preference to one creditor, effect will be given to the deed to the extent to which it is supported by consideration (*s*).

(13) Insolvency.—The provisions of sub-section (1) saving the law of insolvency were inserted by the Amending Act of 1929, and correspond to a similar provision in section 172 of the Law of Property Act, 1925.

The object of the law of insolvency is to provide for an equal distribution of assets among the creditors, and its provisions are therefore more stringent. A preference to one creditor which would be valid under sec. 53 of the Transfer of Property Act would, if the debtor were adjudged insolvent within three months, be deemed fraudulent under sec. 56 of the Presidency-towns Insolvency Act, 1909, or sec. 54 of the Provincial Insolvency Act, 1920. Similarly a voluntary transfer may be set aside under those Acts if the transferor is adjudged insolvent within two years, although it may not offend against sec. 53 of the Transfer of Property Act. Again a transfer by a debtor of all his property to a particular creditor is not necessarily voidable under this section (*t*); but under the Insolvency Acts it may operate as a fraudulent transfer or a fraudulent preference. The cases of fraudulent preference falling under the Insolvency Acts must be distinguished from those falling under this section (*u*).

Illustration.

A debtor owed money to a relation *A*, who, knowing that the debtor was insolvent, and that another creditor *B* was pressing for payment required the debtor to secure his debt by a mortgage. This he was perfectly entitled to do for a preference to one creditor is not voidable under sec. 53 of the Transfer of Property Act even though no assets are left for other creditors. But if the debtor had been adjudged insolvent within three months of the mortgage, the mortgage would have been voidable as against the Official Receiver : *Rash Mohan* v. *Kristodas* (1918) 22 Cal. W. N. 982, 47 I.C. 412.

An assignment of all his property to trustees for the benefit of his creditors is an act of insolvency on the part of the assignor (*v*).

Insolvency Courts have jurisdiction to decide questions of title both under sec. 7 of the Presidency-towns Insolvency Act 3 of 1909, and under sec. 4 of the Provincial Insolvency Act 5 of 1920. Hence these Courts have jurisdiction to decide whether a transaction is voidable under sec. 53 of the Transfer of Property Act on application made by the Official Assignee (*w*), or the Official Receiver (*x*) as the case may be. This jurisdiction is not exclusive and in some cases the Court of Insolvency would decline to exercise jurisdic-

(*s*) *Loorthi Odayar* v. *Gopalasami Iyer* (1924) 46 Mad. L. J. 125, 80 I.C. 147, ('24) A.M. 450; *Rajani Kumar* v. *Gour Kishore* (1908) 35 Cal. 1061; *Chinai Pitchiah* v. *Pedakotiah* (1913) 36 Mad. 29, 11 I.C. 868.

(*t*) *Venkanna* v. *Official Receiver, Rajmahundry* (1935) 68 Mad. L.J. 57, 157 I.C. 559, ('35) A.M. 250; *Alton* v. *Harrison* (1869) L.R. 4 Ch. 622.

(*u*) *Narsinhamurti* v. *Maharaja of Pittapur* (1941) A.M. 690, (1941) 2 M.L.J. 99, 54 M.L.W. 76, (1941) M.W. N. 513.

(*v*) *Karsandas* v. *Maganlal* (1902) 26 Bom. 476, 484; *Lalchand* v. *Hussinio* (1927) 97 I.C. 257, ('27) A.S. 78; *Dutton* v. *Morrison* (1810) 17 Ves. 193.

(*w*) *Jnanendra Bala Debi* v. *Offical Assignee of Calcutta* (1925) 30 Cal. W.N. 346, 93 I.C. 834, ('26) A.C. 597; *Ex parte Butters* (1880) 14 Ch. D. 265.

(*x*) *Anwar Khan* v. *Muhammad Khan* (1929) 51 All. 550, 118 I.C. 819, ('29) A.A. 105 F.B.; *Shikri Prasad* v. *Asis Ali* (1922) 44 All. 71, 63 I.C. 601, ('22) A.A. 196; *Hari Chand Rai* v. *Mati Ram* (1926) 48 All. 414, 94 I.C. 429, ('26) A.A. 470; *Chittammal* v. *Ponnuswami Naicker* (1926) 49 Mad. 762, 92 I.C. 578, ('23) A.M. 868; *Fool Kumari Dasi* v. *Khirod Chandra Das Gupta* (1927) 31 Cal. W. N. 502, 102 I.C. 115, ('27) A.C. 474; *Shree Shree Radha Krishna Thakur* v. *The Official Receiver* (1932) 59 Cal. 1235, 56 Cal. L.J. 446, 36 Cal. W.N. 492, 139 I.C. 828, ('32) A.C. 642; *Official Receiver* v. *Subbayya* (1933) 64 Mad. L.J. 297, 146 I.C. 580, ('33) A. M. 527; *Ram Ditta* v. *Official Receiver* (1934) 147 I.C. 1026, ('34) A.L. 365.

tion and leave the matter to be determined in a regular suit (*y*). It has also been held that the Insolvency Courts are the only Courts having jurisdiction to avoid a transfer in preference of a creditor or as not being a transfer in good faith and for value and executed within two years of the date of adjudication, and that no such question can be raised in a Court of ordinary civil jurisdiction (*z*). This, however, does not accord with English law and the correctness of these decisions is very doubtful. The subject is fully discussed in Mulla's Law of Insolvency at pp. 48, 49 and 51.

(14) Creditor's suit.—A creditor's suit to avoid a transfer must be a suit on behalf not only of himself, but of the whole body of creditors (*a*). This is because the debtor might otherwise be exposed to a multiplicity of suits by each and every creditor. A creditor may not approbate and reprobate, for if he has sought to make the transferee liable as a universal donee under sec. 128 of this Act, he may not afterwards impugn the gift as a gratuitous transfer with intent to defeat and delay creditors (*b*). The fact that the creditors have been paid off since the date of the transfer is immaterial (*c*).

English law allows a creditor if he can prove that he is a creditor to sue on his own behalf alone, and he may obtain an order declaring the deed void against creditors. But the Court will not give consequential directions for satisfaction of his debt, unless he is in a position to levy execution against the property (*d*). This exception has been followed in some Indian cases where an attachment of property has been discharged at the instance of a fraudulent transferee, and the decree-holder has been allowed to sue on his own account alone under O. 21, r. 63, to establish his right to enforce his decree against the property (*e*). The express direction in the fourth paragraph of the section has the effect of overruling these cases (*f*); but this has been overlooked in some subsequent decisions (*g*).

The representative suit would be under O. 1, r. 8 of the Code of Civil Procedure and the title of the suit would be—

A.B. on behalf of himself, and all other creditors of *C.D.* .. *Plaintiff*

vs.

C.D. .. .. *Defendant.*

The decree would be in the form of the Code of Civil Procedure, 1908, Schedule I, Appendix D (13), declaring the transfer void as against the plaintiff and all other creditors, if any, of the defendant. The Privy Council have observed that an issue under sec. 53 cannot be raised and no decree for setting aside transfers under that section can be passed except in a suit properly constituted for that purpose (*h*).

(*y*) *Ex parte Price* (1882) 21 Ch.D. 553; *Radha Krishna* v. *Official Receiver* (1932) 59 Cal. 1185, 139 I.C. 823, ('32) A.C. 642.

(*z*) *Official Assignee of Bombay* v. *Sundarachari* (1927) 50 Mad. 776, 102 I.C. 702, ('27) A.M. 684 (case under Presidency-towns Insolvency Act); *Official Receiver* v. *Palaniswami Chetti* (1925) 48 Mad. 750, 88 I.C. 934, ('25) A.M. 1051; *Shahzada Begum* v. *Gokul Chand* (1927) 2 Luck. 651, 105 I.C. 50, ('27) A.O. 357; *Kaniz Fatima* v. *Narain Singh* (1927) 49 All. 71, 98 I.C. 1001, ('27) A.A. 66; *Mariappa Pillai* v. *Raman Chettiyar* (1919) 42 Mad. 322, 52 I.C. 519; *Hiralal* v. *Fattehchand* (1934) 15[illegible] I.C. 1026, ('34) A.N. 271. See also *Sh[illegible] Prasad* v. *Aziz Ali* (1922) 44 All. 71, [illegible] I.C. 601, ('22) A.A. 196.

(*a*) *Burjorji* v. *Dhunbai* (1892) 16 Bom. 1; *Ishwar* v. *Devar* (1903) 27 Bom. 146; *Hakim Lal* v. *Mooshahur Sahu* (1907) 34 Cal. 999; *Ekkari Ghose* v. *Sideshwar Ghose* (1936) A.C. 783.

(*b*) *Sachitanand* v. *Ra[illegible]pat* (1928) 26 All. L.J. 524, 116 I.C. 8[illegible], ('28) A.A. 234; *Sarju Singh* v. *[illegible]iam Sunder* (1934) 153 I.C. 674, ('34) A.A. 948.

(*c*) *Deokali* v. *Ramdevi* (1941) A.R. 76.

(*d*) *Reese River Silver Mining Co.* v. *Atwell* (1869) L.R. 7 Eq. 347.

(*e*) *Pokker* v. *Kunhamad* (1919) 42 Mad. 143, 51 I.C. 714; *Sri Thakurji* v. *Narsingh Narain* (1921) 6 Pat. L.J. 48, 63 I.C. 788, ('21) A.P. 53; *China Mal* v. *Gul Ahmad* (1923) 5 Lah. L.J. 435, 73 I.C. 719, ('23) A.L. 478; *Loknath* v. *Thakur Das* (1923) 71 I.C. 20; *R.R.O.O. Chettyar Firm* v. *Ma Sein Yin* (1927) 5 Rang. 588, 105 I.C. 582, ('28) A.R. 1.

(*f*) *Rahimtulla* v. *Rasulkhan* (1933) 145 I.C. 357, ('33) A.N. 169.

(*g*) *Radhika Mohan Gope* v. *Hari Basht Saha* (1933) 37 Cal. W.N. 1141, 57 Cal. L.J. 399, 146 I.C. 1010, ('33) A.C. 812; *U. Maung Nge* v. *P.L.S.P. Chettyar Firm* (1934) 152 I.C. 506, ('34) A.R. 200.

(*h*) *Chutterput Singh* v. *Maharaj Bahadoor* (1905) 32 Cal. 198, 32 I.A. 1, 15; *Maung Tun Thein* v. *Maung Sin* (1934) 12 Rang. 670, 153 I.C. 942, ('34) A.R. 332; *A.K.A.C.T.V. Chidambaram* v. *R.M.A.R.S. Firm* (1934) 12 Rang. 666, 152 I.C. 665, ('34) A.R. 302; *Modina Bibi* v. *Ismail Durga Association* (1940) A.M. 780, (1940) Mad. 808, (1940) 1 M.L.J. 678, 51 M.L.W. 608, (1940) M.W.N. 461; *Girraj* v. *Sukkatha Prasad* (1938) A.O. 33.

S. 53

But although a creditor cannot sue on behalf of himself alone, yet he is not obliged to defend a suit on behalf of the whole body of creditors (*i*). The Madras High Court at one time took a different view (*j*). The defendant creditor had attached property in execution of a decree for debt, but it had been fraudulently sold by the judgment-debtor to the plaintiff. The plaintiff's objection to the attachment was dismissed, and he then sued for a declaration of his title. The Court held that the defendant could not resist the claim as he had failed to have the sale (which was voidable at his option) declared to be void. These cases were, however, overruled by a Full Bench of the same High Court in *Ramaswami Chettiar* v. *Mallappa Reddiar* (*k*), where Wallis, C.J., explained that a transaction voidable at the option of a creditor may be avoided by an unequivocal declaration of an intention to avoid it, and that an attachment by a creditor was an exercise by him of his option to avoid the transfer; the learned judge held that sec. 53 may be pleaded as a personal defence by an attaching creditor, although he has not himself filed a representative suit to avoid the transfer. Other High Courts have also decided the point in the same way (*l*).

Illustration.

A sells property to *B* in fraud of creditors. Creditor *C* attaches the property in execution of a decree against *A*. *B* objects to the attachment and *C* maintains his right to attach and *B*'s objection is dismissed. *B* then sues for a declaration of his right to the property. *C* may plead in defence that the transfer to *B* was in fraud of creditors: *Ramaswami Chettiar* v. *Mallappa Reddiar* (1920) 43 Mad. 760, 59 I.C. 947 F.B.

(15) Limitation.—A creditor's suit to avoid the transaction does not affect the validity of the transaction as between the parties to it and so art. 91 of the Limitation Act is not applicable (*m*). The suit is governed by art. 120, and the period of limitation is six years from the time when the right to sue accrues (*n*). In a Madras case (*o*) the judges differed as to whether the right to sue accrues when the creditor exercises the option to avoid the transaction, or when he becomes aware of the facts which entitle him to relief. In *Abdulla Khan* v. *Purshottam* (*p*) the Bombay High Court held that the right to sue accrues to the plaintiff only when he decides to exercise the option given to him by sec. 53 to challenge the transfer and to seek to recover his dues out of the property transferred.

(16) Sub-section (2)—Subsequent transferees.—The second sub-section refers to the case when a subsequent transfer is in competition with a prior transfer without consideration. A bona fide transferee even from a fraudulent transferee is protected (*q*). The voluntary transfer is not displaced unless it is fraudulent, and whether it is fraudulent or not is purely a question of fact. The subsequent transfer for consideration does not of itself create a presumption that the voluntary transfer which preceded it was fraudulent. This is an important departure from the section as it stood before the

(*i*) *Bai Hakimbu* v. *Dayabhai Rugnath* (1939) A.B. 508, 41 Bom. L.R. 1104, 185 I.C. 6·5; *Kosuru Adamma* v. *Chevuru Subbamma* (1942) A.M. 714.

(*j*) *Palaniandi* v. *Appavu* (1916) 30 Mad. L.J. 565, 34 I.C. 778; *Subramania* v. *Muthia Chettiar* (1918) 41 Mad. 612, 48 I.C. 651 F.B.

(*k*) (1920) 43 Mad. 760, 59 I.C. 947 F.B.

(*l*) *Abdul Kader* v. *Ali Mia* (1912) 16 Cal. W.N. 717, 14 I.C. 715; *Ram Chand* v. *Mathura Chand* (1921) 19 All. L.J. 299, 60 I.C. 896, ('21) A.A. 298; *Thansukhdas* v. *Jhango* (1920) 54 I.C. 798; *Lallu Singh* v. *Chandra Sen* (1934) 56 All. 624, (1934) All. L.J. 1, 147 I.C. 937, ('34) A.A. 155. *See also Bai Hakimbu* v. *Dayabhai*, *supra*; *Ramaswami* v. *Lakshmana* (1936) A.M. 408, (1936) M.W.N. 361, 161 I.C. 1008.

(*m*) *Pachamuthu* v. *Chinnappan* (1887) 10 Mad. 213.

(*n*) *Narasimham* v. *Nara*[illegible] *Rao* (1926) 92 I.C. 405, ('26) A.M. [illegible] *Venkateswara Aiyar* v. *Somasundar*[illegible]18) Mad. W.N. 244, 44 I.C. 551; *Lal* [illegible] v. *Jai Chand* (1931) 12 Lah. 262, 130 I.C. 778, ('31) A.L. 70; *Parkash Narain* v. *Raja Birendra* (1931) 132 I.C. 51, ('31) A.O. 333.

(*o*) *Narasimham* v. *N*[illegible]*yana Rao*, *supra*.

(*p*) *Abdulla Khan* v. *P*[illegible] (1944) K.B. 267.

(*q*) *Fris Man Singh* v. *B. N. Sinha* (1940) A.L. 198.

Amending Act of 1929. The reason for this change has already been explained in note (1) "Amendment," *supra*. Even before the law was changed in England by the Voluntary Conveyances Act, 1893, it was held that a voluntary endowment for charity is not defeated by a subsequent conveyance for valuable consideration (*r*).

A subsequent transferee whose title dates before the 1st day of April 1930 (*s*) would, it is submitted, be entitled to the presumption in the old section that a prior voluntary conveyance was fraudulent.

An auction purchaser at a Court sale is a person who steps in by operation of law and is not a subsequent transferee within the meaning of this section (*t*).

Part performance.

53A. *Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,*

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

(1) Whether s. 53A is retrospective.—The section is not one of the sections specified in sec. 63 of the Amending Act 20 of 1929 as not having retrospective effect. But there is a conflict of decisions on the point. In some cases it has been held that it is not

(*r*) *Newcastle upon Tyne Corporation* v. *Attorney General* (1845) 12 Cl. and Fin. 402 H.L.; *Ramsay* v. *Gilchrist* (1892) A.C. 412.

(*s*) The date when the amending Act 20 of 1929 came into force.

(*t*) *Vasudeo* v. *Janardhan* (1918) 42 Bom. 507, 20 I.C. 497; *Asudhat* v. *Punjab* (1919) 53 I.C. 205.

S. 53A

retrospective (*u*), and in others that it is retrospective (*v*). In considering whether the section has retrospective effect or not, the question is to be considered only in reference to the circumstances which bring the provisions thereof into effect, that is to say, to the filing of the suit. It is not the date of the making of the contract; but the date on which the suit is filed, that is relevant for the purpose. In this sense it has retrospective effect. Thus it applies to suits filed after 1 April 1930, although the transaction may be of an earlier date (*w*).

(2) Amendment.—This section is new. It was inserted by the Transfer of Property (Amendment) Act 20 of 1929. It is an importation in a somewhat restricted form of the English equity of part performance explained in the case of *Maddison* v. *Alderson* (*x*), and applied by the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (*y*).

(3) Old law.—Before the enactment of the section, three similar equities were administered by the Courts in India. These were—

(1) the equity in *Maddison* v. *Alderson*, that is, the equity of part performance,
(2) the equity in *Walsh* v. *Lonsdale* (*z*), and
(3) the fiduciary capacity of the vendor.

The first equity was the genesis of the section. That will be discussed first (pp. 256-265); then the section (pp. 265-270); and lastly the two other equities which subsequent decisions of the Privy Council (*a*) have extinguished.

(3A) Application of section to leases.—The section applies to leases (*b*). But sec. 53A does not in terms apply to the Punjab (*c*).

Equity of part performance.

(4) Origin of the equitable doctrine of part performance.—Section 4 of the Statute of Frauds (*d*) provided that no action shall be brought to *charge* any person upon

(*u*) *Kanji & Moolji Bros.* v. *Shanmugam* (1932) 56 Mad. 169, 63 Mad. L.J. 587, 139 I.C. 870, ('32) A.M. 734; *Muktesvar* v. *Barakar Coal Co.* (1934) 152 I.C. 498 ('34) A.P. 546; *Gauri Shankar* v. *Gopal Das* (1934) 151 I.C. 388, ('34) A.P. 701; *Cooverji Plumber* v. *Vasant, etc., Society Ld.* (1934) 36 Bom. L.R. 1245, 154 I.C. 583, ('35) A.B. 91; *Ramkrishna Jha* v. *Jainandan Jha* (1935) 157 I.C. 98, ('35) A.P. 291; *Dingapada Karnakar* v. *Nrishinghchandra Nandi Chaudhri* (1935) 62 Cal. 472, 39 Cal. W.N. 416; *Muthuswami* v. *Loganatha* ('35) A.M. 404; *Janki* v. *Kanhaiyalal* (1935) 159 I.C. 316, (1936) A.O. 102; *Ramji Lal* v. *Secretary of State* (1936) 162 I.C. 712, (1936) A.O. 306; *Hari Prasad* v. *Hanmantrao* (1936) Nag. 115, 170 I.C. 554, (1937) A.N. 74; *Jogadamba Prasad* v. *Anandi Nath* (1938) 17 Pat. 460, 176 I.C. 273 (1938) A.P. 33; *Baldeo Singh* v. *Muhammad Akhtar* (1939) 184 I.C. 504, (1939) A.P. 488; *Mahalakshmi* v. *Venkatreddi* (1944) A.M. 556; *Katereddi* v. *Shivram Reddi* (1936) A.M. 916, 71 M.L.J. 639, 166 I.C. 535; *Kana Kanma* v. *Krishnamma* (1943) A.M. 445, (1943) Mad. 831, (1943) M.L.J. 335, 56 M.L.W. 244, 208 I.C. 250; *Palingundla* v. *Geddam* (1945) A.M. 171.

(*v*) *Sulleman* v. *Patell* (1933) 35 Bom. L. R. 722, 145 I.C. 557, ('33) A.B. 381; *Gajadhar Misir* v. *Bechan Chamar* (1934) 153 I.C. 717, ('34) A.A. 768; *Hormusji* v. *Maneklal* (1944) A.B. 105; *Khubsa Sukhra* v. *Laharsai* (1936) I.C. 957, (1936) A.N. 254; *Tika Rao* v. *Hari Rao* (1940) 19 Pat. 752, (1940) A.P. 385, 189 I.C. 513; *Madan Mohan* v. *Sriniwas Prasad* (1943) 22 Pat. 332, 211 I.C. 96, (1943) A.P. 363.

(*w*) *Ko Po Mo* v. *Maung Lu Khin* (1937) A.R. 402; *Daw Yi* v. *Jhaung Po Saung* (1938) 182 I.C. 651, (1939) A.R. 175. See also *Balaram Jairam* v. *Kewalram* (1940) I.C. 881, (1940) A.N. 396; *J. G. Wakefield* v. *Sayeeda Khatoon* (1936) 15 Pat. 460, 176 I.C. 278, (1937) A.P. 337; *Jagad Bhusan* v. *Panna Lal* (1941) A.C. 287, on appeal *Bhupal Chandra* v. *Jagad Bhusan* (1943) A.C. 344; *Ashutosh* v. *Nalina-Kshya* (1937) A.C. 467; *Mahomed Hushen* v. *Jamini Nath* (1938) A.C. 97, (1938) 1 Cal. 607, 42 C.W.N. 38, 176 I.C. 41; *Rustomji* v. *Bai Mati* (1940) A.B. 90, (1940) Bom. 50, 41 Bom. L.R. 1310, 187 I.C. 27; *Shyam Sunder Lal* v. *Din Shah* (1937) A.A. 10; *Serajul Haque* v. *Dwendra Mohan* (1941) A.C. 33, 45 C.W.N. 240, 192 I.C. 75.

(*x*) (1883) 8 App. Cas. 467.

(*y*) (1914) 42 Cal. 801, 42 I.A. 1, 28 I.C. 930.

(*z*) (1882) 21 Ch. D. 9.

(*a*) *Ariff* v. *Jadunath* (1931) 58 I.A. 91, 58 Cal. 1235, 131 I.C. 762, ('31) A.PC. 79; *Mian Pir Bux* v. *S[illegible] Mahomed Tahar* (1934) 61 I.A. 388, 6[illegible] L.J. 370, 67 Mad. L.J. 865, 36 Bom. [illegible] 1195, 1934 All. L.J. 912, 151 I.C. [illegible], ('34) A.PC. 235.

(*b*) *Shyam Sunder Lal* v. *Dur Shah* (1937) A.A. 10; *Benarasi Das* v. *Ali Mahomed* (1936) A.L. 5.

(*c*) *Kirpa Ram* v. *[illegible]shan Dass* (1944) A.L. 179

(*d*) 29 Car. 2 c 3, s. 4, now repealed as to this part, and re-enacted in s. 40 of the Law of Property Act, 1925.

any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party *to be charged* therewith or some other person thereunto by him lawfully authorised. The statute was designed to guard against fraud and to avoid the risk of perjury involved in taking parole evidence in proof of contracts. The statute did not avoid parole contracts, but only barred the legal remedies by which they might otherwise have been enforced. The contract is neither void nor voidable, but it cannot be enforced because it is incapable of proof (*e*).

The equity of part performance has been said to rest upon the principle of fraud, for "Courts of equity will not permit the statute to be made an instrument of fraud." This, however, is a summary way of stating the principle, and however true it may be where properly understood, it is not an adequate explanation either of the precise grounds or of the established limits of the equitable doctrine of part performance (*f*). The principle on which the doctrine rests is that if a man has made a bargain with another, and allowed that other to act upon it, he will have created an equity against himself which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arises (*g*). Hence it is that where a contract in relation to land has been partly performed by one party to it, the Court may enforce specific performance of it, notwithstanding the want of a sufficient memorandum in writing. Thus in *Lester* v. *Foxcroft* (*h*), specific performance of a verbal agreement to grant a lease was decreed, in spite of the Statute of Frauds, on the ground that on the faith of the contract the lessee had incurred considerable expense in pulling down an old house and in rebuilding, in terms of the agreement, and it was therefore unconscionable for the defendant to plead the statute.

The leading case on the subject is *Maddison* v. *Alderson* (*i*). In that case Lord Selborne said—" In a suit founded on such part performance, *the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not* (within the meaning of the statute) *upon the contract itself*. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parole contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

(5) What acts constitute part performance.—The following rules are well established in England and apply also to cases in India :—

(1) An act of part performance must be an act done in performance of the contract and therefore acts introductory to and previous to the agreement cannot

(*e*) *Britain* v. *Rossiter* (1879) 11 Q.B.D. 123 C.A.

(*f*) *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, 475.

(*g*) *Chaproniere* v. *Lambert* (1917) 2 Ch. 356, 361.

(*h*) (1701) 1 Colles P.C. 108, W. & T.L.C. Vol. II, 9th Ed., p. 410.

(*i*) (1883) 8 App. Cas. 467.

S. 53A

be acts of part performance (*j*). Acts preliminary to the completion of a contract such as going to view an estate (*k*), measuring an estate (*l*), employing a surveyor to value the land (*m*) or the timber thereon (*n*)—are not acts of part performance. Even an act subsequent to the contract, though done in pursuance of the contract is not an act of part performance, unless done strictly in performance of the contract (*o*). For instance, *A* agreed to give *B* a lease of certain premises, if *B* obtained a release from a third party of a right of lease claimed by that third party. *B* obtained the release for valuable consideration. Nevertheless the obtaining of the release, though done in pursuance of the agreement was not an act of part performance, but only the fulfilment of a condition precedent (*p*).

(2) The acts relied on as part performance must be unequivocally, and in their nature, referable to a contract such as that alleged, that is, they must be unequivocal and referable to no other contract than that alleged. In *Maddison* v. *Alderson* (*q*) *A* agreed to remain in *B*'s service in consideration of his leaving her an estate by will. *A*'s continuance in service was not part performance as it might have been referable to some other bounty. Professor Maitland in his work on Equity (*r*) says:—

"In order to give rise to this equitable doctrine it is, as I understand, necessary that the Court should find the parties unequivocally in a different position from that in which according to their legal rights they would be were there no contract. You find *A* letting *B* into possession and you say that this is cogent evidence of the existence of some agreement between them, and of some agreement relating to this land. Thus we get the rule that *delivery of possession* is a sufficient part performance on the part of the vendor to sustain his suit against the purchaser, and that *acceptance of possession* is a sufficient part performance on the part of the purchaser to sustain his suit against the vendor. But you must find some cogent evidence in the situation of the parties before you can receive oral evidence of the agreement. Thus put the case that *B* had paid *A* a sum of money, £1,000, and that he is ready to swear and bring plenty of witnesses to swear that he paid it as part or even as the whole of the purchase money of Blackacre which *A* had sold to him. You cannot admit this evidence; there may have been any one of a thousand causes for this payment; it is no way connected with Blackacre. So part payment, or even full payment of the price cannot be relied upon as an act of part performance so as (such is the phrase) 'to take the case out of the Statute'."

Hence, change in the possession of land is an act of part performance both of the person who gives (*s*), and of the person who takes possession (*t*). In *Morphett* v. *Jones* (*u*) Sir Thomas Plumer said—"The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms; the Court regarding what has

(*j*) *Whitbread* v. *Brockhurst* (1784) 1 Bro. C. C. 412; *Parker* v. *Smith* (1845) 1 Col. L. C. 608, 623.

(*k*) *Clerk* v. *Wright* (1727) 1 Atk. 12.

(*l*) *Pembroke* v. *Thorpe* (1740) 3 Swans. 437.

(*m*) *Cooke* v. *Jackson* (1801) 6 Ves. 12.

(*n*) *Whitchurch* v. *Wainwright* (1778) 1 Bro. C. C. 404.

(*o*) Fry on Specific performance, Ed. 6, p. 295.

(*p*) *O'Reilly* v. *Thompson* (1791) Cox C. C. Eq. Cas. 271.

(*q*) (1883) 8 App. Cas. 467.

(*r*) p. 241.

(*s*) *Morphett* v. *Jones* (1818) 1 Swans. 172, 181.

(*t*) *Pain* v. *Coombs* (1857) 1 DeG. & J. 34 C.A.

(*u*) (1818) 1 Swans. 172, 181.

S. 53A

been done as a consequence of contract or tenure." On the other hand payment of part or even the whole of the purchase money is not an act of part performance either because payment of money is an equivocal act (*v*), or because mere payment of money does not change the relative position of the parties though it may give rise to a claim to recover it back (*w*). Similarly payment of rent on an agreement of lease of premises of which possession has not been taken, is not an act of part performance (*x*). In the case of a tenant who is in possession his continued possession after the expiry of the term is in its nature equivocal for it may be referred either to the previous tenancy or to a new agreement with the landlord (*y*). But when the vendor evicted tenants of part of the property contracted to be sold, at the request of the intending purchaser, that was an act of part performance as unequivocally referring to the contract, as the purchaser had taken possession of that part of the property (*z*) ; and so also where the owner made alteration at the request of the intending lessee (*a*). The payment of an increased rent in terms of the new agreement (*b*), or the expenditure of money on permanent improvements in performance of the agreement (*c*), are acts of part performance. These are the acts referred to when the section speaks of a transferee who " continues in possession in part performance of the contract and has done some act in furtherance of the contract."

(3) An act of part performance must be the act of the party seeking to avail himself of the equity. Acts of the party sought to be charged are of no avail (*d*). Neither under sec. 53A nor under the amended sec. 49 of the Registration Act can a landlord recover rent from a defendant in possession under an unregistered lease (*e*).

In India these rules have generally been followed. Thus the Madras High Court held that mere retention of possession by a tenant after expiry of the lease was not part performance of an agreement for sale (*f*). But in two cases (*g*) the doctrine was wrongly applied to oral sales to a person in possession though there was no further act done in furtherance of the contract for sale. Payment of a reduced rent by a tenant already in possession is part performance of an agreement to grant a renewed lease at a reduced rent (*h*). The Rangoon High Court has held that the doctrine is not applicable when a mortgagee in possession continues in possession under an oral sale, for the continuance of possession could not be said to be referable to no other title (*i*). This is correct. But in other similar cases (now overruled—see note 31) the Rangoon High Court had wrongly applied the supposed equity arising out of the fiduciary capacity of the vendor. These cases are cited under note (31) 'Fiduciary Capacity of the Vendor.' Where the vendee who has been already residing in the house purchased along with her husband issues an order for extensive repairs and lets out the parts of the house to the tenants who purports to do acts which indicate that she had taken possession as owner and the taking of possession can be referred to a contract of sale, the Lucknow Court held that it must be regarded as being in pursuance of it. The section does not lay down that the contract must contain a direct covenant regarding the transference of possession. It

(*v*) *Maddison* v. *Alderson* (1883) 8 App. Cas. 467.

(*w*) *Clinan* v. *Cooke* (1802) 1 Sch. & Lef. 22, 40.

(*x*) *Chaponiere* v. *Lambert* (1917) 2 Ch. 356.

(*y*) *Wills* v. *Stradling* (1797) 3 Ves. 378, 381.

(*z*) *Daniels* v. *Trefusis* (1914) 1 Ch. 788, 789.

(*a*) *Rawlinson* v. *Ames* (1925) 1 Ch. 96, 114; *Dickinson* v. *Barrow* (1904) 2 Ch. 339.

(*b*) *Nunn* & *Fabian* (1865) L.R. 1 Ch. 35; *Miller & Aldworth Ltd.* v. *Sharp* (1899) 1 Ch. 622.

(*c*) *Lindsay* v. *Lynch* (1804) 2 Sch. & Lef. 1; *Broughton* v. *Snook* (1938) 1 Ch. 505.

(*d*) *Caton* v. *Caton* (1866) L.R. 1 Ch. 137; *Ewaz Ali* v. *Firdaus Jahan* (1944) A.O. 212.

(*e*) *In re Jambad Coal Syndicate Ltd.* (1935) 62 Cal. 294.

(*f*) *Dakshinamurthi* v. *Dhanakoti* (1925) 48 Mad. L. J. 661, 87 I.C. 552, ('25) A. M. 965.

(*g*) *Naganna* v. *Appalaraju* (1930) 129 I.C. 59, ('30) A.M. 1021; *Hussini Begum* v. *Sultani Begum* (1927) 105 I.C. 479, ('27) A.O. 465.

(*h*) *Satyaniranjan Chakravarty* v. *Habibur Sobhan* (1933) 144 I.C. 596, ('33) A.O. 293.

(*i*) *Ma Shwe Kin* v. *Ka Hee* (1924) 3 Bur. L.J. 211, 84 I.C. 514, ('24) A.R. 381.

S. 53A

only requires that possession should have been taken in part performance of the contract for transfer and same act should have been done by the transferee in furtherance of it (*j*).

(6) Mahomed Musa's case.—*Mahomed Musa*'s case (*k*) was decided by the Privy Council in 1914 and was the first case in which the Privy Council seemed to apply the equity of part performance in India. A suit to enforce a mortgage was compromised on terms that the properties should be divided between the mortgagor and two sets of mortgagees in certain shares, the mortgagees releasing their interest and the mortgagor agreeing to execute conveyances of the shares allotted to the mortgagees. The compromise was recorded in a razinama which was not registered. The decree did not recite the razinama but simply ordered that the suit be decided in terms of the razinama. No conveyance was executed by the mortgagor, but the law of India as it then stood did not render a conveyance necessary. The parties for many years acted upon the compromise and dealt with the shares allotted to them as their own. Thirty or forty years after the compromise the mortgagor's representatives filed a suit to redeem the mortgages and contended that the defendants could not rely upon the razinama as it was not registered. Lord Shaw said—"But even if a transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages." This conclusion was supported by a reference to the doctrine of part performance on the ground that "even although the razinama and decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption the actings of the parties have been such as to supply all such defects." Lord Shaw then quoted from the judgment of Lord Selbourne in *Maddison* v. *Alderson* (*l*) that the defendant is really charged upon the equities resulting from the acts done in execution of the contract and not upon the contract itself, and added that "the matter has advanced beyond the stage of contract, and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded." The compromise was of 1873 before decrees were exempted from registration. But as the judgment was based on post-contractual equities there was no express reference to the fact that the razinama was not admissible in evidence. The point, however, was taken in argument and there hardly seems any doubt that the "formal defect" referred to in the judgment means want of registration, and that the words "defective and inchoate" mean defective as not registered, and inchoate as not supplemented by a conveyance. The effect of this decision seemed to be, that, just as the doctrine of part performance in England takes a parole contract out of the Statute of Frauds, so in India, it takes a document requiring registration out of the Registration and Transfer of Property Acts. But this was a fallacy exploded some years later by the decision of the Privy Council in *Ariff* v. *Jadunath* (*m*).

(7) Ariff v. Jadunath.—In this case Lord Russell of Killowen explained that the observations of Lord Shaw in *Mahomed Musa*'s case were merely *obiter dicta*. The case began in Calcutta (*n*) and the facts were as follows:—In 1913 Ariff agreed orally to grant Jadunath a permanent lease of land at a monthly rental of Rs. 80. No lease was executed or registered, but on the faith of the agreement Jadunath went into possession and erected costly structures. In December 1918 Ariff wrote to Jadunath refusing to grant him a lease, and in 1923 sued to evict him treating him as a monthly tenant. The High Court of Calcutta held following *Mahomed Musa*'s case that the equity of part

(*j*) *Ewaz Ali* v. *Firdaus Jehan* (1944) A.O. 212.

(*k*) (1914) 42 I.A. 1, 42 Cal. 801, 28 I.C. 930.

(*l*) (1883) 8 App. Cas. 467.

(*m*) (1931) 58 I.A. 91, 58 Cal. 1235, 131 I.C. 762, ('31) A. PC. 79.

(*n*) *Ariff* v. *Jadunath* (1928) 55 Cal. 1090, 112 I.C. 865, ('29) A. PC. 101.

performance applied and dismissed Ariff's suit. This decision was reserved by the Privy Council. Their Lordships held that a permanent lease can only be made by a registered instrument as required by sec. 107 of the Transfer of Property Act, and that the doctrine of part performance cannot be applied so as to override the express provision of a statute. As to *Maddison* v. *Alderson* their Lordships said—" Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted ; but that an English doctrine affecting the provisions of an English statute (*i.e.*, the Statute of Frauds) relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect to be impossible." This decision makes it clear that the equity of part performance, which in England is only available to overcome a statutory objection to the proof of a contract, cannot in India have the effect of superseding the provisions of the Registration and Transfer of Property Acts, and of creating an interest which under those Acts can only be created by a registered instrument.

(8) S. 53A supersedes but is not inconsistent with Ariff v. Jadunath.—The section was enacted before *Ariff* v. *Jadunath* was decided but it is not inconsistent with that decision, for what cannot be done under a doctrine of equity, may yet be done by a statutory enactment. The effect of the section is to relax the strict provisions of the Registration and Transfer of Property Acts in order to allow the defence of part performance to be established. This is done for the protection of ignorant transferees who have taken possession or spent money in improvements in reliance on documents which are ineffective as transfers, or on contracts which cannot be proved for want of registration. Before discussing the section it will be convenient to set forth (1) cases not governed by the section but following *Mahomed Musa*'s case, *i.e.*, part performance under *Mahomed Musa*'s case, and (2) cases, not governed by the section but following *Ariff* v. *Jadunath*, *i.e.*, part performance under *Ariff* v. *Jadunath*.

(9) Part performance under Mahomed Musa's case.—These are cases not governed by the section and decided before *Ariff* v. *Jadunath*. Such cases generally followed *Mohamed Musa*'s case and the equitable doctrine was used to override the requirement of registration. The equity was applied to agreements and compromises effecting a transfer of land (*o*), or an exchange (*p*) or a sale (*q*), possession being given and taken but no document registered. It was also applied to an unregistered deed of partition which was followed by enjoyment of property in several shares (*r*). The Bombay High Court applied the equity in a case where by an unregistered agreement a mortgagor gave up his right of redemption in one plot and the mortgagee gave up his mortgage rights in another plot, possession being given and taken (*s*). But even in this period there were some cases which anticipated *Ariff* v. *Jadunath* and took the correct view that a doctrine of equity cannot annul a positive rule of law. Thus the Allahabad High Court in *Ram Gopal* v. *Tulsi Ram* (*t*) held that an exchange which was the result of a family arrangement reduced to the form of an unregistered document did not operate

(*o*) *Jogamma* v. *Pothanna* (1925) 48 Mad. L.J. 287, 88 I.C. 903, ('25) A.M. 763 ; *Ahmed Hassan* v. *Hassan Mahomed* (1928) 52 Bom. 693, 112 I.C. 459, ('28) A.B. 305.

(*p*) *Salamat-ul-Zamin* v. *Masha Allah Khan* (1918) 40 All. 187, 43 I.C. 645 ; followed in *Hunter* v. *Damodhar* (1924) 46 All. 759, 81 I.C. 508, ('24) A.A. 772 ; *Kunti* v. *Gajraj Tiwari* (1924) 46 All. 847, 83 I.C. 297, ('24) A.A. 826.

(*q*) *Maung Myat Tha Zan* v. *Ma Dun* (1924) 2 Rang. 285, 81 I.C. 857, ('24) A.R. 214.

(*r*) *Ahobilachariar* v. *Thulasiammal* (1927) 103 I.C. 281, ('27) A.M. 830.

(*s*) *Sandu* v. *Bhikchand* (1923) 47 Bom. 621, 75 I.C. 118, ('23) A.B. 473 ; *Dada* v. *Bahiru* (1927) 29 Bom. L.R. 1419, 105 I.C. 754, ('27) A.B. 627.

(*t*) (1929) 51 All. 79, 116 I.C. 861, ('28) A.A. 641; *Baijnath* v. *Kundan Lal* (1929) 27 All. L.J. 1134, ('29) A.A. 881.

S. 53A

to transfer title although possession had been given and taken. Similarly the Madras High Court held in *Ramanathan* v. *Ranganathan* (*u*) that the equity did not apply to an instrument of transfer of land when there was no registered deed as required by ss. 54 and 118 of the Transfer of Property Act. This case was however overruled by a Full Bench in *Vizagapatam Sugar Development Co.* v. *Mathuramareddi* (*v*).

(10) Part performance under Ariff v. Jadunath.—In cases not governed by this section but decided after *Ariff* v. *Jadunath*, that decision was followed. There are two such cases. In one case the Patna High Court held that possession under an oral lease for seven years could not validate the lease under the equity of part performance (*w*). This was on the ground that the doctrine could not be applied so as to nullify the provisions of s. 107 of the Transfer of Property Act as to the necessity for a registered instrument. In the other case (*x*) a tenant was in possession of land under a registered lease granted in 1882. In 1920 the landlord agreed to reduce the rent and the tenant paid the reduced rent for five years. The Calcutta High Court held that continuance in possession at a reduced rent was an act of part performance and that the tenant could not be evicted for failure to pay rent at the old rate. Now the agreement to reduce rent required registration so that the decision was opposed to *Ariff* v. *Jadunath*. The Court, however, considered that it was not applying the equity so as to override the Registration Act because the tenant's right to get a registered lease was subsisting at the death of the suit. This reason is unsound. The Court evidently had in mind the equity of *Walsh* v. *Lonsdale*. But this equity does not apply in India—see Note (29). If the right to get a registered lease was still subsisting the defendant should have applied to have the suit stayed and himself brought an action for specific performance.

(11) Part performance under s. 53A.—The section has been described by the Privy Council as "a partial importation into India of the English equitable doctrine of part performance" (*y*). By virtue of this section part performance does not give rise to an equity as in England, but to a statutory right. This right is more limited than the English equity in two respects, (1) the contract must be in writing, and (2) it is available only as a defence. So far as India is concerned, the section is an enactment of the rule previously prevailing. It creates rights which were not in existence before the enactment was passed (*z*).

(12) By writing.—The contract must be in writing signed by or on behalf of the person sought to be charged. This is a departure from the English law, for the doctrine is applied in England to parole contracts affecting land which are not enforceable on account of the Statute of Frauds. There seem to be two reasons for this limitation, (1) the occasion for the doctrine arises in India with reference to documents inadmissible in evidence for want of registration, and (2) the risk of perjuries if an oral contract could be set up as a defence after limitation for a suit for specific performance had expired. Hence it has been held that if the agreement to transfer is not in writing, s. 53A cannot be applied to the case (*a*). The terms of a contract must be proved by primary or secondary evidence and its terms must be proved from the contract itself and not from what

(*u*) (1917) 40 Mad. 1134, 42 I.C. 138.

(*v*) (1924) 46 Mad. 919, 76 I.C. 886, ('24) A.M. 271.

(*w*) *Aziz Ahmed* v. *Allauddin* (1933) 144 I.C. 788, ('33) A.P. 485.

(*x*) *Satyaniganjan Chakravarty* v. *Habibur Sobhan* (1933) 144 I.C. 598, ('33) A.C. 393.

(*y*) *Mian Pir Bux* v. *Sardar Mahomed Tahar* (1934) 61 I.A. 388, 60 Cal. L.J. 370, 67 Mad. L.J. 865, 36 Bom. L.R. 1195, 1934 All. L.J. 912, 151 I.C. 326 ('34) A.PC. 235.

(*z*) *Kripa Ram* v. *Bishen Dass* (1944) A.L. 179.

(*a*) *U Pu Le* v. *Oo Kim Seng* (1933) 144 I.C. 825, ('33) A.R. 136; *Ma Mya* v. *P. P. R. V. S. A. Annamalaichettyar* (1934) 151 I.C. 227, ('34) A.R. 127; *Dhanrajmal* v. *Hazarmal* (1943) A.S. 81, (1942) Kar. 518, 200 I.C. 326; *Bechardas* v. *Ahmedabad Municipality* (1941) A.B. 346; *Shravan Jayram* v. *Garbad Ukha* (1943) A.B. 406.

purports to be its quotation in another document (*b*). What is required is that the contract itself must be in writing. A writing which may refer to some part or parts of a contract which was oral is not sufficient (*c*). It is however not necessary there should be a formal agreement (*d*).

(13) Available only as a defence.—The right conferred by this section is a right only available to a defendant to protect his possession (*e*). It is limited to cases where the transferee had taken possession and against whom the transferor is debarred from enforcing any right other than that expressly provided by the contract. It is only in the case of a suit for specific performance that part performance assists a plaintiff. This is enacted in s. 27A of the Specific Relief Act, 1877. See note infra under that heading. But in other cases the words of the section do not warrant a conclusion that the plaintiff as such is necessarily debarred from the benefit of the rule. Where by the nature of the case as disclosed by pleadings or otherwise, it is apparent that the transferee comes to the Court to defend his possession against the invasion of it by the transferor, he is entitled to invoke the doctrine of part performance. Since the object of a suit under O. XXI Rule 103, Civil Procedure Code is to protect possession and the capacity in which the plaintiff comes to the Court is in reality, of defence, the plaintiff can take advantage of sec. 53A. The mere position of a party in the heading of a suit would not determine whether he is or is not entitled to the benefits of the section (*f*).

Some Indian decisions betray a misconception of the limited scope of the section. In a Bombay case (*g*) the defendant took possession under an unregistered lease for five years and vacated after sixteen months claiming to be a monthly tenant. The Court held that as the defendant had taken possession under the unregistered lease he was liable under s. 53A for the rent of the whole term and awarded damages to the plaintiff. In this case part performance was used not as a ground of defence but as a ground of attack. The cardinal principle was overlooked, *viz.*, that part performance must be the act of the person seeking to avail himself of the equity and that acts of the person sought to be charged are of no avail (*h*). In a Rangoon case (*i*) also a plaintiff was wrongly allowed to avail himself of this section. The facts when simplified are as follows:—*V* the owner sold the property by unregistered deed to *L* who took possession. *L* gave a usufructuary mortgage of the property to the plaintiff. The plaintiff sued to recover possession from the defendant who claimed to be a prior purchaser from *V*. The Court held that the plaintiff claiming under *L* had a right to possession perfected by part performance and was entitled to a declaration of that right against the defendant. In a Lahore case (*j*) a plaintiff was said to have a right under s. 53A, but the plaintiff was already in possession and the judgment probably meant that he had a right to resist dispossession.

In English law the equity of part performance is an active equity which a plaintiff in possession may enforce in an independent suit or proceeding, *e.g.*, a suit for specific

(*b*) *Harprasad* v. *Hanmantrao* (1936) Nag. 115, (1937) A.N. 74, 170 I.C. 554; *Kashi Prasad* v. *Bed Prasad* (1939) 189 I.C. 111, (1940) A.N. 113; *Firdos Jehan* v. *Mahommed Yunus* (1939) 15 Luck. 43, 184 I.C. 401, (1940) A.O. 1; *Ramjiwan* v. *Hanuman Peasad* (1940) 190 I.C. 163, (1940) A.O. 409; *Mt. Nasiban* v. *Md. Sayed* (1936) I.C. 557, (1936) A.N. 174; *Qamar Jahan Begum* v. *Bansidhar* (1941) 17 Luck. 530, 199 I.C. 35, (1942) A.O. 23; *Hormusji* v. *Maneklal* (1944) A.B. 105.

(*c*) *Maung Ohu* v. *Maung Po Kwe* (1938) 177 I.C. 977 (1938) A.R. 356.

(*d*) *Firdos Jahan* v. *Md. Yunus* (1939) 15 Luck. 43, 184 I.C. 401, (1940) A.O. 1; *Maung Po Kwe* v. *Maung Po Sein* (1937) 174 I.C. 169 (1938) A.R. 49; *Shira Khatoon* v. *Maung Pau* (1939) 182 I.C. 523, (1939) A.R. 206.

(*e*) *Raghav Rao* v. *Gopalrao* (1942) A.M. 125; *Probodh Kumar* v. *Dantmara Tea Co.* (1940) A.PC. 1, 66 I.A. 293; *Ramrao* v. *Purmanand* (1940) A.B. 281; *Kashinath* v. *Makchhed* (1939) A.A. 504; *Peary Lal* v. *Prithu Singh* (1945) A.A. 422.

(*f*) *Ewaz Ali* v. *Firdous Jehan* (1944) A.O. 212; *Probodh Kumar Das* v. *Dantmara Tea Co. Ltd.*, (1940) L.R. 66 I.A. 293, 1 (1940) 1 Cal. 250, (1940) A.PC.I. Explained.

(*g*) *Sulleman* v. *Patel* (1933) 35 Bom. L.R. 722, 145 I.C. 557, ('33) A.B. 381.

(*h*) *Caton* v. *Caton* (1866) L.R. 1 Ch. 187.

(*i*) *Mastram* v. *Ma Ohn* (1934) 154 I.C. 769, ('34) A.R. 284.

(*j*) *Kaur Ram* v. *Chaman Lal* (1934) 154 I.C. 1083, ('34) A. L. 751; *Ramchander* v. *Maharaj Kunwar* (1939) A.A. 611; *Etah Municipality* v. *Moradhwj* (1940) A.A. 340, 190 I.C. 819.

performance, or for an injunction to restrain dispossession. Before the enactment of this section there is one reported Indian decision in which the equity of part performance was enforced as an active equity and that is *Hiralal* v. *Shankar* (*k*). In that case *A* agreed to sell his land to *B*. *B* paid the price and was put in possession of the land. The contract was in writing and was lost. It was not stamped and therefore could not be proved by secondary evidence. Nevertheless as plaintiff had taken possession under the contract, his suit to compel execution of a registered conveyance was decreed. This was carrying the equity to the full length allowed by the English law. Such a case would not be covered by s. 53A.

(14) Contracts to transfer for consideration.—These words exclude gifts. A gift does not involve a contract and even before the section it was held that the doctrine of part performance has no application to gift (*l*). Moreover a gift is complete on acceptance subject to registration (*m*). In a Calcutta case (*n*) the doctrine of part performance was applied to an antenuptial gift; but the case was regarded as one of contract, the Court treating the antenuptial promise of the bride's father as becoming a binding contract when the marriage followed. In an English case (*o*) a father previous to the marriage of his daughter told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave possession of the property to the husband, handed the title deeds to him and directed the tenants to pay the rents to him. The husband thereafter expended money on the property. It was held that it was a case of a verbal agreement in consideration of marriage (which is one of the contracts rendered unenforceable by the Statute of Frauds if not in writing) but that there had been sufficient part performance to take the case out of the Statute of Frauds. This section applies to leases (*p*).

It is doubted whether the section applies to an agreement to transfer a partial interest in property such as a right to win minerals or cut timber (*q*).

(15) Any immoveable property.—The doctrine of part performance enacted in the section has no relation under any circumstances to moveable property (*r*).

(16) Ascertained with reasonable certainty.—These words also occur in sec. 21 of the Specific Relief Act. A contract the terms of which cannot be ascertained with reasonable certainty cannot be enforced.

(17) In part performance of the contract.—The second paragraph of the section adopts the English rule that an act of part performance must be unequivocably referable to the contract. See note (5) '*What acts constitute part performance.*' In a case decided directly under the section it was held that when property was agreed to be sold to a person already in possession as mortgagee, and he made a part payment of the price, he had continued in possession in part performance of the contract for sale and done an act in furtherance of the contract (*s*).

(18) Taken possession.—The section is limited to cases where the transferee is in possession under a contract to transfer immoveable property. The section is therefore available only as a defence. See note (13) *supra*.

(*k*) (1921) 45 Bom. 1170, 62 I.C. 687, ('21) A.B. 401.

(*l*) *Maung Hla Maung* v. *Maung Po Htai* (1929) 123 I.C. 142, ('29) A.R. 316; *Hiralal* v. *Gowrishankar* (1928) 30 Bom. L.R. 451, 109 I.C. 149, ('28) A.B. 250; *Hari Pada* v. *Elokeshi Devi* (1940) A.C. 254, 71 C.L.J. 144, 44 C.W.N. 357, 189 I.C. 249.

(*m*) *Kalyanasundaram* v. *Karuppa* (1927) 50 Mad. 193, 54 I.A. 89, 100 I.C. 105, ('27) A.PC. 42.

(*n*) *Pran Mohan Das* v. *Hari Mohan Das* (1928) 52 Cal. 425, 85 I.C. 793, ('28) A.C. 856.

(*o*) *Surcome* v. *Pinniger* (1853) 3 DeG.M. & G. 571.

(*p*) *Jonnada Sayi* v. *Jonnada Subbanna* (1946) A.M. 310; *Shyam Sunderlal* v. *Din Shah* (1937) A.A. 10; *Benarsi Das* v. *Ali Mahomed* (1936) A.L. 5.

(*q*) *S. N. Banerji* v. *Kuchwar Lime & Stone Co. Ltd.* (1941) A.PC. 128, 21 Pat. 243; *Traders Miners Ltd.* v. *Dhirendranath Ltd.* (1944) A.P. 261.

(*r*) *Bhabhi Dutt* v. *Ramlalbyamal* (1934) 152 I.C. 481, ('34) A.R. 303.

(*s*) *Ma Thet* v. *Ma Se Mai* (1934) 13 Rang. 17, 144 I.C. 13, ('34) A.R. 304.

(19) Has performed or is willing to perform.—The section confers no rights on a party who was not willing to perform his part of the contract. A prospective vendee who had taken possession could not resist dispossession, if he were not willing to pay the price agreed upon (*t*). S. 53A

(20) Notwithstanding that the contract though required to be registered has not been registered.—These words expressly supersede the provisions of the Registration Act. They let in agreements of lease creating a present demise though not registered. Under the proviso added to s. 49 of the Registration Act such unregistered documents are admissible as evidence of part performance. See note (33). Section 49 of the Registration Act, *infra*.

(21) Where there is an instrument of transfer.—The case of an 'instrument of transfer is put in the alternative. The amendment to sec. 49 of the Registration Act shows that the section applies although there is not a distinct and separate contract in writing. The instrument itself is treated as the contract in writing as was done by Jenkins, C.J., in *Puchha Lal* v. *Kunj Behari Lal* (*u*). An unsigned deed is not an instrument of transfer.

(22) Not completed in the manner prescribed by law.—These words have the effect of superseding the provisions not only of the Registration Act but also of the Transfer of Property Act as to registration and attestation. But the section would not apply if the instrument could not be proved for some other reason, *e.g.*, if the original is unstamped and lost so that secondary evidence is inadmissible as in *Hiralal* v. *Shankar* (*v*).

(22A) Persons claiming[3] under.—The test for determining whether the words "or any person claiming under him" (*i.e.*, the transferor) in sec. 53A apply to a Hindu reversioner is whether the acts of the deceased widow affecting the property bind the reversioner or not. If her acts bind the property, they must bind the reversioner in the same manner and to the same extent as the acts of an absolute owner would bind his heir. The reversioner may not be her heir, but is certainly her successor. He is bound by her acts which lawfully affect the property and to the extent he is so bound, he becomes a person claiming under her (*w*). But where a guardian contracts to transfer immoveable property belonging to a minor ward, sec. 53A cannot operate to bar the minor's claim to recover the properties as he is neither a transferor nor a person claiming under him (*x*). A judgment creditor who has attached the property of a judgment debtor in possession of an intended purchaser is a person "claiming under the transfer" (*y*).

(23) Expressly provided by the terms of the contract.—The transferor is not debarred from enforcing a right in respect of property which is expressly provided by the terms of the contract. So if the contract were an agreement of lease not provable because of want of registration, the lessee could not resist a demand for rent. If he did so he would be disentitled to the benefit of the section as not being willing to perform his part of the contract.

(24) Proviso to the section.—The proviso to the section saves the right of a transferee for consideration who has no notice of the contract or of its part performance. If a purchaser or lessee omits to have the deed of sale or lease registered, he will have to

(*t*) *Bechardas* v. *Ahmedabad Municipality* (1941) A.B. 346; *Suleman* v. *Patel* (1933) A.B. 381, 35 Bom. L.R. 722 not followed.

(*u*) (1913) 18 Cal. W.N. 445, 20 I.C. 868.

(*v*) (1921) 45 Bom. 1170, 62 I.C. 687, ('21) A.B. 401.

(*w*) *Balaram Jairam* v. *Kewalram* (1941) I.C. 881 (1940) A.N. 396. But see *Labhu* v. *Shiv Ram* (1939) A.L. 57, 41 P.L.R. 56; *Jagad Bhusan* v. *Panna Lal* (1941) A.C. 287, (1940) A.C. 344, S.C. on appeal (1943) 1 Cal. 56, 206 I.C. 624.

(*x*) *Sri Kakulam Subrahmanyam* v. *Kurra Subba Rao* (1944) A.M. 337.

(*y*) *Audinarayudu* v. *Mangamma* (1943) A.M. 706, 56 M.L.W. 502, (1943) 2 M.L.J. 200.

S. 53A

deliver up possession of the property to a bona fide transferee for value from the transferor who has no notice of the transaction. This was so held with reference to the doctrine of part performance before the enactment of the section (*z*).

(25) **Title.**—The section gives a defendant the right to defend his possession if he holds under an unregistered deed or contract. It does not confer title (*a*). The doctrine of part performance will not support a suit on title (*b*).

(26) **Agreements otherwise invalid.**—The section allows the doctrine of part performance to be applied to agreements which are invalid for want of registration. But if the agreement is invalid under any other law neither the section nor the doctrine of equity on which it is founded will validate that which the law says is invalid. This is illustrated by the Privy Council case of *Arseculeratne* v. *Perera* (*c*). An agreement of partnership provided that the capitalist partner "would hereby give over" a lease of a mine to be worked by the partnership. The agreement so far as it affected the lease was according to a Ceylon Ordinance "of no force or avail in law" as it was not executed before a notary public. The other partner took possession and worked the mine for three years. Nevertheless he could not avail himself of the doctrine of part performance to validate the grant of the lease and his possession was held to be that of a licensee. Similarly the following agreements cannot be validated under the doctrine of part performance: an agreement by a client to transfer land to a mukhtiar as remuneration for his services, which was invalid under sec. 28 of the Legal Practitioners Act 18 of 1879 (*d*); and an arrangement transferring immoveable property; the assets of a company, effected between the liquidator and the creditors of a company but invalid under sec. 212 of the Indian Companies Act 7 of 1913 as not sanctioned by three-fourths in number and value of the creditors (*e*). Again the Patna High Court has said that an agreement subsequent to the Transfer of Property Act by a reversioner to transfer his right of succession would be invalid under s. 6 (a) and could not be validated by part performance (*f*).

Equity in Walsh v. *Lonsdale.*

(27) **Equity of Walsh *v.* Lonsdale excluded.**—In the last edition of this work it was doubted whether the equity of *Walsh* v. *Lonsdale* was excluded by this section. Two decisions of the Privy Council make it clear that, irrespective of this section, the equity is inconsistent with the requirement of registration in this and the Registration Act. These decisions will be first set forth as illustrations and then will follow a statement of the equity and then the reasons why the equity cannot be resorted to.

Illustrations.

(1) In 1913 *A* orally agreed to grant a permanent lease of land to *B* at a monthly rent of Rs. 80. *B* went into possession of the land and erected buildings on it. No lease was executed, and in December 1918, *A* wrote to *B* refusing to grant him a lease. *B* did not sue for specific performance, and his right to sue became barred in December 1921. In 1923 *A* sued to evict *B*. Held that *A* was entitled to a decree for possession and that as *B*'s right to enforce the agreement was time barred *Walsh* v. *Lonsdale* had no

(*z*) *Pindee* v. *U Hpa* (1928) 6 Rang. 315, 112 I.C. 230, ('28) A.R. 237; *Ma Thin On* v. *Ma Ngwe Hnen* (1935) 154 I.C. 474, ('35) A.R. 12.

(*a*) *Kuchwar Lime Stone Co.* v. *Secretary of State* (1936) 15 Pat. 460, 163 I.C. 507, (1936) A.P. 372.

(*b*) *Maung Ba* v. *Maung Kywe* (1928) 6 Rang. 125, 110 I.C. 735, ('28) A.R. 124; *S. N. Banerji* v. *Kuchwar Lime Stone Co.* (1941) A.PC. 128.

(*c*) (1928) 111 I.C. 351, ('28) A.PC. 273.

(*d*) *Mst. Ranjhari* v. *Gokul Singh* (1930) 128 I.C. 408, ('30) A.P. 61.

(*e*) *Bank of Upper India* v. *Arif Husain* (1931) 28 All. L.J. 1157, 128 I.C. 772, ('31) A.A. 59.

(*f*) *Lalita Prasad* v. *Surnam Singh* (1933) 149 I.C. 491, ('33) A.P. 165.

application. But that if *B* had been entitled to specific performance he could have claimed to have executed in his favour an instrument in writing which he could have duly registered, *A*'s ejectment action being stayed in the meantime: *Ariff* v. *Jadunath* (1931) 58 I.A. 91, 58 Cal. 1235, 131 I.C. 762, ('31) A.PC. 79.

(2) The Collector of Sukkur sold a plot of land to *A*, an Afghan refugee, on condition that he should execute an agreement with *B* to sell the plot to *B* at cost price if he (*i.e., A*) should within a stated time receive permission to reside at Quetta. *A* executed the agreement of sale to *B* and was put in possession by the Collector. *A* got permission within the time stated but nevertheless failed to sell the plot to *B*. *B* instead of filing a suit for specific performance of the agreement of sale, approached the Collector. The Collector in December 1920 illegally cancelled the grant to *A*, illegally evicted *A* and illegally put *B* into possession. *A* filed a suit on the 20th December 1921 to recover the plot. Before the suit was decided *B*'s right to sue for specific performance had become time barred. The District Judge dismissed the suit holding that the possession of *B* coupled with the existence of an agreement in his favour was a complete defence. The Court of the Judicial Commissioner reversed the decree on the ground that *B* was not in possession under the agreement of sale. The judgment of the Privy Council proceeded on a ground that was more fundamental. Their Lordships held that in a case not governed by s. 53A the averment of the existence of a contract of sale is no defence to an action for ejectment. While the contract was still enforceable *B*'s remedy was to apply for a stay of the ejectment suit and to sue himself for specific performance to compel *A* to execute a registered deed of sale in his favour. But after the contract ceased to be enforceable, its part performance was of no avail to *B*: *Mian Pir Bux* v. *Sardar Mahomed Tahar* (1934) 61 I.A. 388, 60 Cal. L.J. 370, 67 Mad. L.J. 865, 36 Bom. L.R. 1195, 1934 All. L.J. 912, 151 I.C. 326, ('34) A.PC. 235.

(28) Equity in Walsh v. Lonsdale.—The rule in *Walsh* v. *Lonsdale* (*g*) may be stated thus:—Where (in a case where a lease not under seal is void at law) *A* agrees to let land to *B* on lease, and *B* goes into possession, and the agreement is one of which specific performance would be granted, *A* and *B* have the same legal rights as between themselves and are subject to the same legal liabilities, as if a lease under seal had been granted on terms of the agreement. Hence the landlord has the same power of distress as he would have had if a lease under seal had been granted; and the tenant can only be evicted if he has committed such a breach of covenant as would (if a lease had been granted) have entitled the landlord to re-enter. The equity depends not so much on part performance as on the fact that there is a valid contract between the parties and that the contract is still capable of being enforced by specific performance, in the same Court and at the same time as the subsequent legal question falls to be determined.

(29) Statutory law of India excludes Walsh v. Lonsdale.—*Walsh* v. *Lonsdale* is an instance of the equitable rule that what ought to be done as a consequence of a binding agreement is treated as actually accomplished. The person who has an equitable interest under an agreement of lease, if he is entitled to specific performance in the same Court, is treated as if the equitable interest had been turned into the legal interest of a lessee. But under the Indian enactments there is no distinction between legal and equitable interests. The right of a person entitled under an agreement of lease is not an equitable interest but a personal right. If that personal right cannot be converted into an interest in land without a registered instrument, the application of the equity would be a contravention of the Transfer of Property Act and of the

(*g*) (1882) 21 Ch. D. 9.

S. 53A Registration Act. In *Ariff* v. *Jadunath* (*h*) as well as in *Mian Pir Bux* v. *Sirdar Mahomed Tahar* (*i*), the Privy Council pointed out that the person entitled should seek his remedy consistently with and not in violation of the Indian statute. He should apply for a stay of the ejectment suit and himself file a suit to have executed in his favour an instrument in writing which he could duly have registered. The Court would stay the suit in ejectment on the principle that the Court will not grant a decree of ejectment which can at once be rendered ineffective by the same Court being required to grant a decree of specific performance resulting in reinstatement.

There are, no doubt, some cases in which an interest in land can be created without a registered instrument, *e.g.*, a lease for less than one year or a sale for less than Rs. 100. But if the defendant were in possession an oral agreement for such a lease or sale, he would not require protection for he would be the owner of the interest. On the other hand if he were not in possession his remedy would be a suit for possession.

(30) Indian cases applying Walsh v. Lonsdale are no longer law.—The decisions of the Privy Council referred to in the last note have the effect of overruling a great many Indian cases in which the equity was applied. These may now be briefly enumerated—

Agreements.—The equity was applied in a series of decisions mostly of Mookerjee, J., to agreements of lease which did not create a present demise (and which were not liable to be registered) although no registered lease was executed (*j*). The equity was applied to an agreement of exchange (*k*) performed in part without the execution of a registered instrument as required by secs. 118 and 54 of the Transfer of Property Act; also in the case of agreements of sale, oral or written, where the transferee took possession without a registered conveyance (*l*); also in the case of an agreement to release in undertenure (*m*); and also in the case of an agreement of usufructuary mortgage where the intended mortgagee took possession though no registered deed of mortgage was executed (*n*).

Deed not registered.—The equity was also applied in the case of an unregistered deed, the deed though not registered being treated as evidence of a contract to transfer. But the decisions on this point were not unanimous. Jenkins, C.J., in *Puchha Lal* v. *Kunj Behari Lal* (*o*) treated an unregistered deed of sale as evidence of a contract of sale. A decision to the contrary by the Madras High Court (*p*) was overruled by a Full Bench (*q*).

(*h*) (1931) 58 I.A. 91, 58 Cal. 1235, 131 I.C. 732, ('31) A.PC. 79.

(*i*) (1934) 61 I.A. 388, 60 Cal. L.J. 370, 67 Mad. L.J. 865, 36 Bom. L.R. 1195, 1934 All. L.J. 912, 151 I.C. 326, ('34) A.PC. 235.

(*j*) *Jogendra Krishna* v. *Kurpal Harshi* (1922) 49 Cal. 345, 68 I.C. 993, ('23) A.C. 63; *Gajendra* v. *Ashraff* (1923) 27 Cal. W.N. 159, 69 I.C. 707, ('23) A.C. 130; *Chan E Maung* v. *Ah Til* (1925) 84 I.C. 396, ('25) A.R. 118; *Peari Dai* v. *Naimish Chandra* (1926) 5 Pat. 40, 90 I.C. 822, ('26) A.P. 184; *Kanti Chandra* v. *Brojendra Mohan* (1929) 49 Cal. L.J. 12, 116 I.C. 630, ('29) A.C. 186; *Karamath Khan* v. *Latchmi Atchi* (1920) 61 I.C. 675; *Akbar Fakir* v. *Intial Sayal* (1915) 29 I.C. 707; *Singheeram* v. *Bhagbat* (1910) 11 Cal. L. J. 543, 6 I.C. 374; *Bipin Behary* v. *Tincowri* (1911) 13 Cal. L.J. 271, 9 I.C. 374; *Secretary of State* v. *Forbes* (1912) 16 Cal. L.J. 217, 17 I.C. 180; *Bibi Jawahir* v. *Chatterput Singh* (1905) 2 Cal. L.J. 348.

(*k*) *Hari Pada* v. *Nirod Krishna* (1921) 33 Cal. L.J. 437, 64 I.C. 687, ('21) A.C. 383; *Mehar Ali Khan* v. *Aratunessa* (1921) 25 Cal. W. N. 905, 67 I.C. 167.

(*l*) *Shyam Kishore* v. *Umesh Chandra* (1920) 24 Cal. W.N. 463, 31 Cal. L.J. 75, 51 I.C. 154; *Hemeshwar* v. *Pal Chandra* (1928) I.C. 370, ('28) A.C. 754; *Maung Myat Tha Zan* v. *Ma Dun* (1924) 2 Rang. 285, 81 I.C. 857, ('24) A.R. 214; *Kankala Kunta* v. *Mandlem Giraviah* (1926) 50 Mad. L.J. 669, 96 I.C. 290, ('26) A.M. 757; *Mt. Akli* v. *Mt. Daha* (1928) 7 Pat. 95, 105 I.C. 63, ('28) A.P. 44.

(*m*) *Khagendra* v. *Sonatan* (1915) 20 Cal. W.N. 140, 31 I.C. 987.

(*n*) *Maung Tun Ya* v. *Maung Aung Dun* (1924) 2 Rang. 313, 84 I.C. 1023, ('25) A.R. 1; *Po Tok Maung* v. *Ma Le War* (1924) 3 Bur. L.J. 238, 84 I.C. 468, ('25) A.R. 102.

(*o*) (1913) 18 Cal. W. N. 445, 447, 20 I.C. 803.

(*p*) *Kurri Veerareddi* v. *Kurri Bapireddi* (1906) 29 Mad. 336 F. B. followed in *Timangowda* v. *Nenepgowda* (1915) 39 Bom. 472, 28 I. C. 946.

(*q*) *Vizagapatam Sugar Development Co.* v. *Muthuramareddi* (1923) 46 Mad. 919, 927, 76 I. C. 886, ('24) A.M. 271; *Maung Tun Pe* v. *Maung Sein Myi* (1929) 7 Rang. 414, 120 I.C. 282, ('29) A. R. 293.

But in *Sanjib Chandra* v. *Santosh Kumar* (r) Rankin, C.J., held that a lease or an agreement of lease creating a present demise which was inadmissible for want of registration, was not admissible in a suit for specific performance of the agreement of lease, and that as it was invalid as an agreement *Walsh* v. *Lonsdale* had no application.

Limitation.—In the cases cited above it was recognised that the equity could not be applied after a suit for specific performance had become time-barred (s). Indeed in some cases it was held that the equity was not available after a suit for specific performance had been dismissed (t), or after execution of a decree for specific performance had become time-barred (u). But other cases recognised the equity of *Walsh* v. *Lonsdale* as subsisting after a suit for specific performance had become time-barred (v). These cases ignored the fact that the foundation of the equity is a subsisting right to specific performance.

Title.—It was recognised that the equity confers no title and that until the person in possession perfects his title by a suit for specific performance he cannot maintain a suit on title (w). Nevertheless it was held that the equity confers an interest which is attachable and saleable. A judgment debtor was in possession under a contract of sale to him. His right, title and interest was attached and sold before he had obtained a registered deed, but it was held that it was not open to him to plead that he had no saleable interest (x).

Fiduciary Capacity of the Vendor.

(31) No equity arises out of the fiduciary capacity of the vendor.—In a Bombay case (y), Scott, C.J., said that if a vendor who has contracted to sell immoveable property puts the prospective vendee in possession and then seeks to eject the vendee who is willing to complete the purchase, he is repudiating his fiduciary obligation and the Court will not grant him the relief he seeks. That this is not a correct statement of the law appears from the passage already cited from the judgment of Lord Macmillan in *Mian Pir Bux* v. *Sardar Mahomed Tahar* (z), *viz.*—"An averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract is not a relevant defence to an action of ejectment in India." The vendor is no doubt under some obligations similar to those of a trustee, but to treat the contract of sale as equivalent to a declaration of trust is an infringement of sec. 5 of the Indian Trusts Act, 1882. This is because under that section a declaration of trust should be made by registered instrument. This has been explained by Page, C.J., in *The Official Assignee* v. *M. E. Moolla & Sons, Ltd.* (a). This supposed equity was enforced by Macleod,

(r) (1922) 49 Cal. 507, 69 I.C. 877, ('22) A. C. 436; *Ramjoo Mahomed* v. *Haridas Mullick* (1925) 52 Cal. 695, 91 I. C. 320, ('25) A. C. 1087; *Baijnath* v. *Kundan Lal* (1929) 27 All. L.J. 1134, 122 I.C. 671, ('29) A.A. 831.

(s) See also *Kalipada* v. *Fort Gloster Jute Manufacturing Co.* (1927) 31 Cal. W. N. 348, 100 I.C. 866, ('27) A.C. 365; *Mahim Chandra* v. *Esahak* (1927) 105 I. C. 860, ('27) A. C. 954. But not under S. 53A; *Nakul Chandra* v. *Kalipada Ghosal* (1939) A.C. 163, (1938) 2 Cal. 328, 42 C.W.N. 630, 182 I.C. 389.

(t) *Lalchand* v. *Lakshman* (1904) 28 Bom. 466.

(u) *Pitamber Gain* v. *Ram Charan* (1924) 28 Cal. W. N. 157, 76 I. C 365, ('24) A. C. 483.

(v) *Mehar Ali Khan* v. *Aratunessa Bibi* (1921) 25 Cal. W. N. 905, 67 I. C. 167, ('21) A. C. 363; *Maung Po Kywe* v. *Maung Po Thin* (1929) 7 Rang. 288, 119 I. C. 744, ('29) A. R. 251; *Shafiqul Huq* v. *Krishna Gobinda Dutt* (1919) 23 Cal. W. N. 284, 47 I.C. 428; *Shyam Kishore* v. *Umesh Chandra* (1920) 24 Cal. W. N. 463, 51 I.C. 154.

(w) *Kalipada* v. *Fort Gloster Jute Manufacturing Co.* (1927) 31 Cal. W. N. 348, 100 I.C. 866, ('27) A.C. 365.

(x) *Juan Chandra* v. *Rajani Kanta Pal* (1916) 22 Cal. W. N. 522, 41 I.C. 850.

(y) *Bapu Appaji* v. *Kashinath Sadoba* (1917) 41 Bom. 438, 39 I.C. 108; *Luxuman* v. *Raoji* (1923) 25 Bom. L.R. 1027, 77 I.C. 305, ('24) A.B. 150 doubting *Lalchand* v. *Lalchand* (1904) 28 Bom. 466; *Gangaram* v. *Laxman* (1916) 40 Bom. 498, 37 I.C. 360; *Laxman* v. *Bhagwan Singh* (1921) 45 Bom. 484, 60 I.C. 561, ('21) A.B. 409.

(z) (1934) 61 I.A. 388, 60 Cal. L. J. 370, 67 Mad. L.J. 865, 36 Bom. L.R. 1195, 1934 All. L.J. 912, 151 I.C. 326, ('34) A.PC. 235; *Namdulla* v. *Saflaba* (1935) 37 Bom. L.R. 82, 156 I. C. 779, ('35) A.B. 208; *Muthuswami* v. *Loganatha* ('35) A.M. 404.

(a) (1934) 12 Rang. 589, 154 I.C. 9, ('35) A. R. 94.

S. 53A

C.J., in *Venkatesh* v. *Malappa* (*b*) in the case of a person in possession under a contract of sale after the time when the defendant could have enforced specific performance of the contract had expired. This case was followed in Rangoon in many cases of invalid oral sales and mortgages (*c*). All these cases are in effect overruled by *Mian Pir Bux*, and many of them have been expressly overruled by *Ma Kyi* v. *Ma Thon* (*d*) a Full Bench decision of the Rangoon High Court where Page, C.J., held that a suit on an oral mortgage which was void for want of registration could not be maintained, but the mortgagor, though he cannot sue for redemption, might ignore the mortgage and sue for possession on his title.

Supplementary Legislation.

(32) Supplementary legislation.—Section 53A has been reinforced by further legislation embodied in the Transfer of Property (Amendment) Supplementary Act 21 of 1929 so as to enable the section to be used in supersession of the Registration Act. This is the amendment of sec. 49 of the Registration Act and the new sec. 27A of the Specific Relief Act.

(33) Section 49 of the Registration Act.—The amended section is as follows :—

"49. No document required by section 17 *or by any provision of the Transfer of Property Act*, 1882, to be registered shall—

(a) affect any immoveable property comprise therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered :

Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, *to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act*, 1877, *or as evidence of part performance of a contract for the purposes of section* 53*A of the Transfer of Property Act*, 1882, *or as evidence of any collateral transaction not required to be effected by registered instrument.*"

The amendments are printed in italics. The amendment in the first paragraph settles a doubt as to whether the section applies not only to documents compulsorily registrable under sec. 17 of the Registration Act but also to documents of which registration is required by the Transfer of Property Act (*e*).

The proviso is the amendment that has an important bearing on sec. 53A. It makes it clear that sec. 49 does not prevent an unregistered agreement or deed being admitted in evidence as a contract. It gives statutory recognition to *Puchha Lal* v. *Kunj Behari Lal* (*f*) and supersedes the decision in *Sanjib Chandra* v. *Santos Kumar* (*g*) where Rankin, J., refused to admit in evidence in a suit for specific performance, an unregistered agreement of lease because it created a present demise and was not registered.

(*b*) (1922) 46 Bom. 722, 66 I.C. 868, ('22) A.B. 9; *Dada* v. *Bahiru* (1927) 29 Bom. L.R. 807, 109 I.C. 533, ('28) A.B. 150.

(*c*) *Maung Shwe Hmon* v. *Maung Tha Byaw* (1923) 72 I.C. 6, ('23) A.R. 125; *Ma Pyone* v. *Ma U* (1924) 77 I.C. 877, ('24) A.R. 89; *Ma Myat Tha Zan* v. *Ma Dun* (1924) 2 Rang. 285, 81 I.C. 857, ('24) A.R. 214; *Maung Tun Ya* v. *Maung Aung* (1924) 2 Rang. 318, 84 I. C. 1023. ('25) A.R. 1; *Ma Ma E* v. *Maung Tun* (1924) 2 Rang. 479, 84 I.C. 517, ('25) A.R. 110; *Maung Ok Kyi* v. *Ma Pu* (1926) 4 Rang. 368, 99 I.C. 519, ('27) A.R. 33; *C. A. M. K. R. Chettiar* v. *Ma Kyaw* (1928) 6 Rang. 270, 110 I.C. 616, ('28) A.R. 321; *Maung Po Sin* v. *Ma Nyein* (1928) 6 Rang. 276, 110 I.C. 610 ('28) A.R. 182.

(*d*) (1935) 13 Rang. 274, 157 I.C. 565, ('35) A.R. 230, F.B.

(*e*) *Dawal* v. *Dharma* (1917) 41 Bom. 550, 41 I.C. 273; *Rama* v. *Gowro* (1921) 44 Mad. 55, 59 I.C. 350, ('21) A.M. 337; *Sohan Lal* v. *Mohan Lal* (1928) 50 All. 986, 118 I.C. 177, ('28) A.A. 726.

(*f*) (1913) 18 Cal. W.N. 445, 20 I.C. 803.

(*g*) (1922) 49 Cal. 507, 69 I.C. 877, ('22) A.C. 436 followed in *Ramjee Mahomed* v. *Haridas Mullick* (1925) 52 Cal. 695, 91 I.C. 320, ('25) A. C. 1087.

S. 53A

This section enacts that in a suit for specific performance the plaintiff may use the unregistered deed as evidence of the contract. But with reference to part performance the section enacts that the deed may be used "as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882." This is an elliptical expression which means that the deed is available not only as a contract but as evidence that the acts done are part performance of the contract, *e.g.*, when a building has been erected in terms of an unregistered lease (*h*). But a document which must be regarded as unregistered for fraud on registration cannot be referred to for the purpose of invoking the operation of Sec. 53A (*i*).

(34) Section 27A of the Specific Relief Act, 1877.—This is a new section inserted in the Specific Relief Act, and is as follows :—

"27A. Subject to the provisions of this Chapter, where a contract to lease immoveable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,—

(a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and

(b) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of part performance thereof.

This section applies to contracts to lease executed after the first day of April 1930."

The effect of the section is to supersede as from the date specified the decision in *Sanjib Chandra* v. *Santosh Kumar* (*j*) where Rankin, J., held that an agreement of lease inadmissible in evidence for want of registration would not support a suit for specific performance although the lessee had taken possession under the agreement. The case put in the section is not covered by sec. 53A, for that section enacts an equity which is only available as a defence. It is therefore the only case recognised by the Legislature where the equity of part performance is an active equity, as in English law, sufficient to support an independent action by a plaintiff (*k*). If a plaintiff is in possession under a lease (which would otherwise be inadmissible for want of registration) he may put the lease in evidence and sue upon it for specific performance treating it as a contract.

The effect of the proviso is that specific performance cannot be enforced against a transferee with notice of the contract and of its part performance. This is in accord with sec. 27 (b) of the Specific Relief Act.

(*h*) Cf. *Lester* v. *Foxcroft* (1701) Colles P.C. 108, W. & T., Ed. 9, Vol. II, p. 410.

(*i*) *Anand Narain* v. *Lala Murli Manohar* (1945) A.O. 120.

(*j*) (1922) 49 Cal. 507, 69 I.C. 887, ('22) A.C. 436.

(*k*) *Hari Prashad* v. *Hanmantrao* (1936) Nag. 115, 170 I.C. 554, (1937) A.N. 74.

CHAPTER III.

Of Sales of Immoveable Property.

S. 54

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

"Sale defined."

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Sale how made.

In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale.

It does not, of itself, create any interest in or charge on such property.

Sale.—The section deals with three subjects:—

I. Definition of sale [pp. 294—299].
II. Mode of transfer by sale [pp. 299—303].
III. Contract of sale [pp. 303—305].

I.—Definition of Sale.

Definition.—Sale is defined as being a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the property sold. No rights are left in the transferor. In a lease there is a partial transfer or demise and the rights left in the transferor are called the reversion (*l*). In a mortgage there is a transfer of an interest to the extent stated in sec. 58 below.

The essential elements of a sale are—

(1) the parties,
(2) the subject-matter,
(3) the transfer or conveyance,
(4) the price or consideration.

(*l*) See note "Demise" under sec. 105.

Parties to sale.—The parties are the seller and the buyer.

The seller must be a person competent to transfer. This is a matter dealt with in the notes to sec. 7. He must be competent to contract and he must have title to the property or authority to transfer it if it is not his own. See notes under sec. 7.

The buyer may be any person who is not disqualified to be a transferee under sec. 6 (h) (3). A duly executed transfer by way of sale to a minor who has paid consideration is valid (*m*).

Subject-matter of sale.—The subject-matter is transferable immoveable property. Immoveable property has been explained in the note under that heading under sec. 3. Immoveable property is transferable except in the cases specified in sec. 6.

The definition of immoveable property in the General Clauses Act is: "Immoveable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth." Things attached to the earth are mentioned in sec. 8 as incidents which pass with the land on transfer and are defined in sec. 3. Land and things attached to the earth are things which can be touched and are therefore tangible immoveable property. Thus a field or a house is tangible immoveable property. A benefit to arise out of land is immoveable property and is an interest in land. But such interests may or may not be tangible. Thus an undivided share in land is tangible as the owner has joint physical possession (*n*). But an easement, a right of ferry, or a fishery are intangible, for these are rights exercised over the property of another and cannot be perceived by the sense of touch. The equity of redemption in a simple mortgage is tangible because the mortgagor is in possession, but in a usufructuary mortgage it is intangible because he is not in physical possession (*o*). Conversely, as to the mortgagee's interest, it is intangible if the mortgage is a simple mortgage, but tangible if the mortgage is a usufructuary mortgage (*p*). In *Sohan Lal* v. *Mohanlal* (*q*) Sulaiman, C.J., said: "A mortgaged property is undoubtedly tangible, but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee including the right to remain in possession and appropriate the profits. The interest which the mortgagor possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing being tangible when it is not capable of actual delivery of possession." This is a dissentient judgment but one would have thought was well founded in principle. The judgment of the majority of the Judges was however that the interest of a mortgagor in a usufructuary mortgage is tangible. The majority view of the Allahabad High Court has been followed by the Patna High Court (*r*) and by the Bombay High Court (*s*).

An interest under a deed of settlement whereby a person is granted an income in future rents and profits of certain immoveable property and also a share in the proceeds

(*m*) *Ulfat Rai* v. *Gauri Shankar* (1911) 33 All. 657, 11 I.C. 20; *Narain Das* v. *Mst. Dhania* (1916) 38 All. 154, 35 I.C. 28; *Munni Kunwar* v. *Madan Gopal* (1916) 38 All. 62, 31 I.C. 792; *Munia* v. *Perumal* (1911) 37 Mad. 390, 26 I.C. 195; *Subba Reddy* v. *Gurava Reddy* (1930) 120 I.C. 77, ('30) A.M. 425.

(*n*) *Peare Lal* v. *Lala* (1911) 14 O.C. 161, 11 I. C. 678; *Maung Hoe Kyin* v. *Pe Hla Gyi* (1924) 83 I.C. 270, ('24) A.R. 267; *Nathu* v. *Gulabchand* (1934) 144 I.C. 919, ('34) A.N. 13.

(*o*) *Ramasami Pattar* v. *Chinnan Asari* (1901) 24 Mad. 449, 463; *Mutsaddi Lal* v. *Muhammad Hanif* (1912) 10 All. L.J. 167, 15 I.C. 853; *Rahmat Ali* v. *Muhammad Mazhar Hussain* (1913) 11 All. L.J. 407, 19 I.C. 818; *Sheikh Hushmat* v. *Sheikh Jamir* (1919) 23 Cal. W. N. 518, 52 I.C. 558; *Ramnarain* v. *Kula Chandra* (1919) 49 I.C. 426.

(*p*) *Ramasami Pattar* v. *Chinnan Asari* (1901) 24 Mad. 449, dissenting from *Subramaniam* v. *Perumal* (1895) 18 Mad. 454; *Mutsaddi Lal* v. *Muhammad Hanif* (1908) 10 All. L.J. 167, 15 I.C. 853.

(*q*) (1928) 50 All. 986, 118 I.C. 177, ('28) A.A. 726 F.B.

(*r*) *Pheku Mian* v. *Syed Ali* (1936) 15 Pat. 772, 167 I.C. 890 (1937) A.P. 178; *Puran Mahton* v. *Bhago Mahton* (1946) A.P. 61.

(*s*) *Tukaram* v. *Atmaram* (1939) A.B. 31.

S. 54

of the property in future is immoveable property within the meaning of the section (*t*).

The distinction between tangible and intangible immoveable property is analogous to that made in English law between a corporeal hereditament and an incorporeal hereditament. Topham explains the distinction as follows: "A corporeal hereditament is an interest in land in possession, *i.e.*, a present right to enjoy the possession of land. An incorporeal hereditament is a right over land in the possession of another, which may be a future right to possession, or a right to use for a special purpose land in the possession of another, *e.g.*, a right of way" (*u*). The contrast is between the estate of one who is possessed of the land, the tangible thing, and that of a man who has the mere right, the intangible thing, without possession of anything tangible (*v*). The "other intangible thing" in sec. 54 is intended to embrace those imponderables which are related to immoveable property. It cannot include such things as a mere licence to sell electricity (*w*).

Mortgage debt.—Before Act 2 of 1900 mortgage debts were assignable as actionable claims and the assignment of the debt passed the security with it under sec. 8 of this Act (*x*). But Act 2 of 1900 remodelled the Chapter on actionable claims (Chapter VII) and inserted in sec. 3 a definition of actionable claims which excludes "a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property." The effect of this amendment is that mortgage debts can no longer be transferred as actionable claims under Chapter VIII. They can only be transferred by way of sale under sec. 54, or by way of exchange under sec. 118, or by way of gift under sec. 123 but in all cases as immoveable property, and consequently only by registered instrument (*y*). But the Privy Council have held that an unregistered transfer of a mortgage debt may be treated as a transfer of the debt dissociated from the security (*z*). See note "Debts" under sec. 8.

Reversion.—A reversion is particularly mentioned probably because the lessor, although out of possession, is able to give symbolical possession by his lessee attorning to the transferee. But such symbolical possession is not equivalent to physical possession and a reversion is therefore intangible (*a*). A transfer of a reversion is a transfer of a right to future rents which is a benefit to arise out of land within the meaning of the phrase used in the definition of immoveable property in the Registration Act (*b*). Arrears of rent already accrued due are not a benefit to arise out of land but a mere debt or chose in action and not immoveable property at all (*c*).

Fruits of an action.—An assignment of the fruits of an action is not illegal (*d*), but such an assignment is not a sale although the suit is for the possession of immoveable

(*t*) *Moola Sons* v. *Rangoon Official Assignee* (1936) A.PC. 230.

(*u*) Topham New Law of Real Property, 4th Ed., pp. 12 & 13.

(*v*) William and Eastwood's Principles of the Law of Real Property, p. 79.

(*w*) *Manmohan Das* v. *Official Liquidator* (1940) A.A. 458 (1940) All. 568, (1940) A.L.J. 449, (192) I.C. 367.

(*x*) *Subramaniam* v. *Perumal* (1895) 18 Mad. 454; *Perumal Ammal* v. *Perumal* (1921) 44 Mad. 196, 200, 61 I.C. 461, ('21) A.M. 187; *Sakhuddin* v. *Sonaullah* (1917) 22 Cal. W.N. 641, 644-645, 45 I.C. 986.

(*y*) *Perumal Ammal* v. *Perumal*, *supra*; *Elumalai* v. *Balakrishna* (1921) 44 Mad. 965, 66 I.C. 168, ('22) A.M. 344; *Bank of Upper India* v. *Fanny Skinner* (1929) 51 All. 494, 119 I.C. 241, ('29) A.A. 161; *Banarsi Das* v. *Ramchandra* (1933) 141 I.C. 421, ('33) A.L. 210; *Girdhar Parashram* v. *Firm Motilal* (1941) A.N. 5, (1941) Nag. 615, (1940) N.L.J. 151, 192 I.C. 556.

(*z*) *Imperial Bank of India* v. *Bengal National Bank* (1931) 58 I.A. 323, 59 Cal. 377, 35 Cal. W.N. 1034, 54 Cal. L.J. 117, 1931 All. L.J. 804, 61 Mad. L. J. 589, 33 Bom. L.R. 1338, 134 I.C. 651, ('31) A.PC. 245; *Fanny Skinner* v. *Bank of Upper India* (1935) 62 I.A. 115, 57 All. 314 155 I.C. 743, ('35) A.PC. 108.

(*a*) *Bhaskar Gopal* v. *Padman Hira* (1916) 40 Bom. 313, 33 I.C. 263. But see *Sibendrapada* v. *Secretary of State* (1907) 34 Cal. 207 where this point seems to have been overlooked.

(*b*) *Mangalaswami* v. *Subbia Pillai* (1911 34 Mad. 64, 6 I.C. 504.

(*c*) *Damodar Das* v. *Girdhari Lal* (1905) 27 All. 564; *Sharp* v. *Key* (1841) 8 M. & W. 379.

(*d*) *Subhadrayamma* v. *Venkatapati Raju* (1924) 47 Mad. L.J. 93, 80 I.C. 897, ('24) A.PC. 162.

property (*e*), because if the defendant succeeded and the suit were dismissed there would be no property to be sold (*f*). On the other hand, if the seller has a present title the mere fact that he is out of possession will not justify the inference that the sale is a transfer of a law suit (*g*).

Easements.—The grant of an easement is not a transfer of ownership under this section (*h*); and the provisions of the Transfer of Property Act have no application to the creation of an easement (*i*).

Price.—The word "price" is used in its ordinary sense as meaning money only (*j*). It is used in the same sense as in sec. 77 of the Contract Act (*k*). Thus a grant of land on what is called adhlapi tenure, *i.e.*, a transfer of the land in return for work done in clearing land and sinking a well is not a sale (*l*); and a transfer of a life interest in land in discharge of a claim for maintenance is neither a sale, nor an exchange nor a gift (*m*). A transfer of land in satisfaction of a charge for maintenance has been held to be not a sale but an exchange (*n*). A transfer of land in satisfaction of a wife's claim for dower is not a sale (*o*). But in some cases such a transaction has been held to be a sale on the ground (submitted to be erroneous) that the extinction of the dower debt is equivalent to the payment of price (*p*). If the consideration for the transfer is not money only but also forbearance to sue or to take proceedings the transfer is not a sale (*q*). A compromise affecting immoveable property is an acknowledgment of an existing right and does not operate as a sale (*r*), but there would be cases in which a compromise might result in a sale (*s*). A decretal amount may be the price (*t*).

The price is fixed by the contract antecedent to the conveyance. Price is of the essence of a contract of sale (*u*), and unless the price is fixed, there is no enforceable contract, because if no price is named the law does not imply, as in the case of a sale of goods, a contract to buy at a reasonable price (*v*). If no price is paid or promised even a registered deed does not effect a sale (*w*). But it is sufficient if the contract specifies

(*e*) *Kalyan* v. *Desrani* (1927) 49 All. 488, 100 I.C. 610, ('27) A.A. 361.

(*f*) *Abdul Wahid Khan* v. *Shaluka Bibi* (1894) 21 Cal. 496, 21 I.A. 26.

(*g*) *Jiyao Singh* v. *Jageshar Singh* (1929) 4 Luck. 185, 114 I.C. 755, ('29) A.O. 22; *Badri Prasad Misir* v. *Bijai Nand Tewari* (1932) 54 All. 905, 139 I.C. 693, ('32) A.A. 685.

(*h*) *Bhagwan Sahai* v. *Narsingh Sahai* (1907) 31 All. 612, 3 I.C. 615; *Kondayya* v. *Veeranna* (1926) 92 I.C. 672, ('26) A.M. 543; *Satyanarayanamurty* v. *Lakshmayya* (1929) 57 Mad. L.J. 46, 115 I. C. 145, ('29) A.M. 79.

(*i*) *Sital Chandra* v. *Delanney* (1916) 20 Cal. W. N. 1158, 34 I.C. 450.

(*j*) *Madam Pillai* v. *Badrakali* (1922) 45 Mad. 612, 617, 68 I.C. 687, ('22) A.M. 311; *Bashir Ahmad* v. *Mst. Zubaida Khatun* (1926) 1 Luck. 83, 92 I.C. 265, ('26) A.O. 186; *Chaudhri Talib Ali* v. *Mst. Kaniz Fatima* (1927) 2 Luck. 575, 102 I.C. 142, ('27) A.O. 204; *Rajjo* v. *Lajja* (1928) 26 All. L.J. 169, 114 I.C. 43, ('28) A.A. 204; *Abadi Begam* v. *Mohammad Khalil* (1930) 7 O.W.N. 1010, ('30) A.O. 431.

(*k*) *Queen Empress* v. *Appasu* (1886) 9 Mad. 141; *Volkart Bros.* v. *Vettivelu* (1888) 11 Mad. 459, 467; *Kedar Nath* v. *Emperor* (1903) 30 Cal. 921; *Samaratmal* v. *Govind* (1901) 25 Bom. 696.

(*l*) *Ghulam Muhammad* v. *Tek Chand* (1921) 2 Lah. 199, 62 I.C. 932, ('21) A.L. 82.

(*m*) *Madam Pillai* v. *Badrakali*, *supra*; overruling *Ariyaputhira Muthukomaraswami*, *supra*.

(*n*) *Rajjo* v. *Lajja*, *supra*.

(*o*) *Chaudhri Talib Ali* v. *Mst. Kaniz Fatima Begam*, *supra*; *Bashir Ahmad* v. *Mst. Zubaida Khatun*, *supra*.

(*p*) *Saiful Bibi* v. *Abdul Aziz Khan* (1932) 54 All. 22, 133 I.C. 901, 1931 All. L.J. 951, ('32) A.A. 596; *Ali Hasan* v. *Mst. Rasidan* (1931) 124 I. C. 756, ('31) A. A. 237; *Mahomed Zaki* v. *Mannu* (1925) 28 O.C. 227, 87 I.C. 176, ('25) A.O. 407; *Asalat* v. *Sambu* (1911) 14 O.C. 214, 11 I.C. 928; *Abbas Ali* v. *Karim Baksh* (1908) 13 Cal. W. N. 160, 4 I. C. 466.

(*q*) *Zamindar of Polavaram* v. *Maharaja of Pittapuram* (1931) 54 Mad. 163, 135 I.C. 17, ('31) A.M. 140.

(*r*) *Krishna Tanaji* v. *Aba* (1910) 34 Bom. 139, 4 I.C. 833.

(*s*) *Alagappa Chettyar* v. *Chettyar Firm* (1936) 14 Rang. 766, 170 I.C. 434 (1937) A.R. 287.

(*t*) *Sura Reddi* v. *Ram Narasu* (1937) A.M. 714.

(*u*) *Milnes* v. *Grey* (1807) 14 Ves. 400; *Bombay Tramways Co.* v. *Bombay Municipal Corporation* (1902) 4 Bom. L.R. 384, 404.

(*v*) *Gourlay* v. *Somerset (Duke)* (1815) 19 Ves. 429, 431; *Morgan* v. *Milman* (1853) 3 DeG. M. & G. 24, 37.

(*w*) *Maung Saing* v. *Shwe Lon* (1909) 4 L.B.R. 369.

S. 54

definite means of ascertaining the price (x). The law is stated by Fry on Specific Performance as follows:—

> "In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable, the contract is void for incompleteness, and incapable of enforcement. It is not however necessary that the contract should in the first instance determine the price. It may either appoint a way in which it is to be determined or it may stipulate for a fair price."

A contract for sale at 33 years' purchase of the net income is valid and capable of specific enforcement (y).

Transfer of ownership and payment of price.—The payment of price is not necessarily a *sine qua non* to the completion of the sale. If the intention is that property should pass on registration, the sale is complete as soon as the deed is registered whether the price has been paid or not (z), and the purchaser is entitled to sue for possession although he has not paid the price (a). This is clear from the words of the section, "price paid or promised or part paid or part promised." A condition that price shall be paid in a year provided that possession was given within that time does not invalidate the sale deed (b). If the price is not paid the seller cannot on that account set aside the conveyance (c). He can only sue for the price (d); and he will have a charge on the property for the unpaid purchase-money. This is a non-possessory charge as explained in the note under sec. 55 (4) (b) and it will not justify the seller refusing to give possession. See note "Non-possessory" under sec. 55 (4) (b).

In *Tatia* v. *Babaji* (e) a registered sale deed was executed before the Act was applied to Bombay in favour of a purchaser who entered into possession without payment of price. Fulton, J., held that the sale was void for want of consideration under sec. 25 of the Indian Contract Act, but Farran, C.J., pointed out that conveyances perfected by registration or possession could not be placed in the same category as agreements void for want of consideration.

Extrinsic evidence.—Notwithstanding an admission in a sale deed that the price has been paid, it is open to the vendor to prove that no consideration was in fact paid (f). See note "Recital of payment" under sec. 55 (4) (b), on p. 304 below. Extrinsic evidence is also admissible to show that a deed which was in form a deed of sale with a receipt for the consideration was in reality intended to operate as a deed of gift (g). If no price was in fact paid and the transfer was a reward for past cohabitation or with the object

(x) *Gourlay* v. *Somerset (Duke), supra*; *Morgan* v. *Milman, supra.*

(y) *Ram Sundar Saha* v. *Raj Kumar Sen Chowdhury* (1928) 55 Cal. 285, 104 I.C. 527, ('27) A.C. 889.

(z) *Ghosh* v. *Rohini* (1908) 13 Cal. W. N. 692, 4 I.C. 541; *Ponayya Goundan* v. *Muttu* (1894) 17 Mad. 146; *Kashidas* v. *Chaithru* (1914) 19 Cal. L. J. 289, 23 I.C. 813; *Sagaji* v. *Namdev* (1899) 23 Bom. 525; *Baijnath Singh* v. *Paltu* (1908) 30 All. 125; *Subbayar* v. *Moniem* (1913) 36 Mad. 8, 10 I.C. 546; *Shib Lal* v. *Bhagwan Das* (1889) 11 All. 244; *K.Y.K. M. Chetty Firm* v. *S. N. V. R. Chetty Firm* (1916) 34 I.C. 125.

(a) *Krishnamma* v. *Mali* (1920) 43 Mad. 712, 56 I.C. 530; *Somasundaram* v. *Shwe Bwa* (1920) 57 I.C. 948.

(b) *Kauleshar Prasad* v. *Abadi* (1915) 37 All. 631, 30 I.C. 512.

(c) *Ponayya Goundan* v. *Muttu, supra*; *Sagaji* v. *Namdev, supra*; *Tatia* v. *Babaji* (1898) 22 Bom. 176, 183; *Goindammal* v. *Gopalachariar* (1906) 16 Mad. L.J. 524; *Subbayar* v. *Moniem* (1913) 36 Mad. 8, 10 I.C. 546; *Nitai* v. *Champaklata* (1919) 29 Cal. L. J. 250, 51 I.C. 104; *Bai Devmani* v. *Ravishankar* (1929) 53 Bom. 321, 116 I.C. 236, ('29) A.B. 147.

(d) *Sagaji* v. *Namdev, supra*; *Velayutha Chetty* v. *Govindaswami* (1907) 30 Mad. 524; *Bai Devmani* v. *Ravishankar, supra.*

(e) (1898) 22 Bom. 176.

(f) *Sah Lal Chand* v. *Indarjit* (1900) 22 All. 370, 27 I.A. 93; see also *Hukumchand* v. *Hiralal* (1879) 3 Bom. 159; *Vasudeva* v. *Narasamma* (1882) 5 Mad. 6; *Lalla Himmat* v. *Llewhellen* (1885) 11 Cal. 486; *Chunni Bibi* v. *Basanti Bibi* (1914) 36 All. 537, 24 I.C. 661; *Lodd Govindoss* v. *Muthiah Chetty* (1925) 48 Mad. L.J. 721, ('25) A.M. 660; *Irpan Ali* v. *Jogendra* (1932) 59 Cal. 1111, ('32) A.C. 708.

(g) *Hanif-un-nissa* v. *Faiz-un-nissa* (1911) 38 I.A. 85, 33 All. 340 reversing *Faiz-un-nissa* v. *Hanif-un-nissa* (1905) 27 All. 612.

of future cohabitation the ostensible sale deed may amount to a gift but would be invalid under sec. 6 (h) of this Act (*h*). The mere fact of non-payment of consideration will not make the sale deed fictitious, although it may sometimes be evidence that it was not intended to operate (*i*).

II.—Mode of Transfer by Sale.

Mode of Transfer.—There are only two modes of transfer by sale and these are (1) registered instrument and (2) delivery of possession.

The first overlaps the second, for a transfer may in all cases be made by a registered instrument. It is only in the case of tangible immoveable property of value less than Rs. 100 that the section allows the simpler alternative of delivery of possession. In all other cases a registered instrument is compulsory. The option of the simpler alternative is allowed in the case of tangible immoveable property of value less than Rs. 100, because the formality of a registered instrument is not considered necessary in view of the small value, and the patent evidence of the transfer afforded by the delivery of physical possession (*j*). The distinction thus made bears some resemblance to the English Common law whereby corporeal hereditaments were transferred by feoffment with livery of seisin whereas incorporeal hereditaments, not being capable of livery, were transferable by deed and were accordingly said to lie in grant.

Registration.—The Registration Act does not distinguish between tangible and intangible immoveable property, and makes registration optional in the case of all immoveable property of value less than Rs. 100. Under this Act a sale of intangible immoveable property can only be made by a registered instrument, whatever the value of such property may be; and a sale of tangible immoveable property, though of a value less than Rs. 100, must also be effected by a registered instrument, unless it is effected by delivery of possession. See note "Supplemental" under sec. 4 above.

In a conveyance of land situate in one registration district, the inclusion of one yard of land in another registration district for the purpose of giving jurisdiction to the registering authority of the latter district and without any intention to convey that one yard of land is a device to evade the registration law and does not constitute an effective registration and therefore no property passes (*k*).

If immoveable as well as moveable property is sold for a single consideration by an unregistered deed the sale is ineffectual not only as to the immoveable but also as to the moveable property. This is because the document embodies only one transaction and there is no separate transaction concerning the moveable property (*l*). See Mulla's Registration Act, 3rd Ed., p. 188.

Official Receiver's sale.—When an official receiver sells the property of an insolvent that has vested in him the sale is a sale by act of parties and is subject to sec. 54, so that if the property is immoveable property of value over Rs. 100 a registered sale deed is necessary (*m*). See note "Clause (d)" under section 2.

No other mode of transfer.—The provisions of this section as to modes of transfer, *i.e.*, (1) by registered instrument and (2) by delivery of possession, are exhaustive; and

---

(*h*) *Subana* v. *Yamanappa* (1933) 35 Bom. L.R. 345, 149 I.C. 464, ('33) A.B. 209.

(*i*) *Alamdar Husain* v. *Moti Ram* (1918) 16 All. L.J. 454, 46 I.C. 392; *Muniran Bibi* v. *Amjad Ali* (1928) 26 All. L. J. 530, 114 I.C. 193, ('28) A.A. 301.

(*j*) *Bhaskar Gopal* v. *Padman Hira* (1916) 40 Bom. 313, 33 I.C. 267.

(*k*) *Inuganti Venkatarama Rao* v. *Sobhanadri Appa Rao* (1936) 63 I.A. 169.

(*l*) *Bhabi Dutt* v. *Ramlalbyamal* (1934) 152 I.C. 431, ('34) A.R. 303; *Bevan* v. *Ganesh Das* (1916) P.R. 60, 34 I.C. 542.

(*m*) *Abdul Hakim* v. *Amar Krishna* (1919) 46 Cal. 337, 53 I.C. 151; *Baliwa Sankaran* v. *Anjaneyulu* (1927) 50 Mad. 135, 99 I.C. 8, ('27) A.M. 1; *Narasappa* v. *Hussain Sab* (1934) 67 Mad. L.J. 746, 172 I.C. 983, ('35) A.M. 55.

S. 54

sale cannot be effected in any other way (*n*). Title to land cannot pass by mere admission when the statute requires a deed (*o*). The Privy Council referring to the transfer of a zemindari estate said that it could not be transferred except by registered instrument and that recitals in deeds and in petitions to officials could not amount to a transfer (*p*); and in a latter case referred to the mischievous but persistent error that proceedings for the mutation of names could affect proprietary rights (*q*). See note "Transfer" under sec. 5, *supra*.

Punjab.—In the Punjab where the Act is not in force, an oral sale is valid in all cases (*r*). The English rule that the contract makes the intending purchaser the equitable owner seems also to be followed (*s*). But when a document is executed, it must be registered (*t*).

Ownership when transferred.—Property does not pass, or, in other words, ownership is not transferred until registration is effected (*u*). But once registration is effected the title relates back to the date of execution (*v*). This is the effect of sec. 47 of the Registration Act. See note "Priority" under sec. 48, *supra*. So a registered sale deed will not be defeated by another deed executed later but registered earlier (*w*). If the deed is registered after a suit has been filed, the transfer will not be subject to *lis pendens* if the deed was executed before the suit was filed against the vendor (*x*).

On the other hand it does not follow that property passes as soon as the instrument is registered, for the true test is the intention of the parties (*y*). Registration is *prima facie* proof of an intention to transfer, but it is no proof of an operative transfer if there is a condition precedent (which must be strictly proved) as to payment of consideration or delivery of the deed. Thus the seller may retain the deed pending payment of price and in that case there is no transfer until the price is paid and the deed delivered (*z*). The words "price paid or promised" in the definition show that the payment of price is not necessarily a *sine qua non* to the completion of the sale (*a*). The case of *Ikbal Begam* v. *Govind Prasad* (*b*), where a purchaser's suit for possession was dismissed as he had not paid off incumbrances for the discharge of which part of the purchase-money had been

(*n*) *Papireddi* v. *Narasareddi* (1893) 16 Mad. 464; *Sheo Narain Singh* v. *Darbari Mahton* (1897) 2 Cal. W. N. 207; *Makhan Lal* v. *Bunku Behari* (1892) 19 Cal. 623 F.B. overruling *Khatu Bibi* v. *Madhuram* (1889) 16 Cal. 622; *Konormal* v. *Nabin Chandra* (1912) 15 I.C. 228; *Ma Mya* v. *V. P. R. V. S. A. Annamalai Chettiyar* (1934) 151 I.C. 227, ('34) A.R. 127; *Narayan Swami* v. *Lakshmi* (1939) A.M. 1220, 48 M.L.W. 959 (1939) M.W.N. 98, 183 I.C. 87.

(*o*) *Mathura Mohan* v. *Ram Kumar Saha* (1916) 43 Cal. 790, 35 I.C. 305.

(*p*) *Immudipattam Thirugnana* v. *Periya Dorasami* (1901) 24 Mad. 377, 28 I.A. 46.

(*q*) *Nirman Singh* v. *Lal Rudra* (1926) 48 All. 529, 53 I.A. 220, 98 I.C. 1013, ('26) A. PC. 100; *Ram Sarup* v. *Charitter Rai* (1927) 100 I.C. 270, ('27) A.A. 338; *Ram Prasad* v. *Bedo* (1912) 13 I.C. 436.

(*r*) *Udho Das* v. *Meher Bakhsh* (1933) 144 I.C. 340 ('33) A.L. 262.

(*s*) *Tomlinson* v. *Harding* (1930) 11 Lah. L.J. 467, 120 I.C. 538, ('30) A.L. 131.

(*t*) *Bank of Upper India* v. *R. H. Skinner* (1942) A.PC. 67.

(*u*) *Ponnayya Goundan* v. *Muttu* (1894) 17 Mad. 146.

(*v*) *Ganesh Prasad* v. *Bhaiyalal* (1938) A.N. 253.

(*w*) *Narayan* v. *Laxuman* (1905) 29 Bom. 42; *Lalubhai* v. *Bai Amrit* (1877) 2 Bom. 299, 343; *Santaya* v. *Narayan* (1883) 8 Bom. 182, 184.

(*x*) *Venkataramana Reddi* v. *Rangiah Chetti* (1922) 41 Mad. L.J. 399, 70 I.C. 212, ('22) A.M. 249, dissenting from *Tilakdhari* v. *Gour Narain* (1920) 5 Pat. L.J. 715, 59 I.C. 290; *Veerakutty* v. *Ramaswami* (1916) 32 I.C. 31; *Guru Basappa* v. *Santhappa* (1925) 48 Mad. L.J. 496, 87 I.C. 568, ('25) A.M. 710.

(*y*) *Nitai* v. *Champaklata* (1919) 29 Cal. L. J. 250, 51 I.C. 104; *Gangi* v. *Govinda* (1924) 46 Mad. L.J. 464, 84 I.C. 626, ('24) A.M. 544; *Seramot Ali* v. *Samad Ali* (1913) 19 I.C. 562; *Jogendra* v. *Manmatha* (1916) 34 I.C. 106; *Maung Mon* v. *Ma Kin Oh* (1927) 5 Rang. 636, 640, 106 I.C. 358, ('28) A.R. 47; See also *Sundar* v. *Lalji* (1933) 145 I.C. 698, ('33) A.P. 129 (a registered mortgage deed); *Parsottam Das* v. *Syed Ali Haidar* (1937) 171 I.C. 233 (1937) A.O. 493.

(*z*) *Sheo Narain Singh* v. *Darbari Mahton* (1897) 2 Cal. W.N. 207; *Mauladan* v. *Raghunandan* (1900) 27 Cal. 7; *Sangu Ayyar* v. *Cumarasami* (1895) 18 Mad. 61; *Ramalinga* v. *Ayyadora* (1905) 28 Mad. 124; *Sarat Chandra* v. *Hari Pada* (1906) 4 Cal. L.J. 338; *Gostho Behary* v. *Rohini* (1908) 13 Cal. W.N. 692, 4 I.C. 541; *Jogendra* v. *Manmatha* (1916) 34 I.C. 106.

(*a*) *Prem Singh* v. *Dt. Board of Rawalpindi* (1934) 151 I.C. 168, ('34) A.L. 917.

(*b*) (1881) 3 All. 77.

retained by him, may possibly be referred to this principle. Again the deed may expressly provide that the sale will be void unless the price of the balance of price is paid in a fixed time (c). But if the intention was that the transfer should take effect on registration, property passes, although the seller has not given possession (d), or the buyer has not paid the price (e). In *Kondu* v. *Vishnu* (f) a contract of sale was registered, and it provided that on certain conditions being fulfilled it should operate as a sale deed. The buyer took possession under the contract, and it was held to operate as a conveyance and passed property to him as soon as he had fulfilled the conditions.

Unregistered deed.—If the deed is not registered, there is no transfer and property does not pass (g). This is so even if the property is tangible immoveable property of value less than Rs. 100 (h). Mere delivery of the deed will not operate as delivery of the property (i); nor will a recital in the sale deed of delivery of possession suffice, for such a recital might be inserted without any attempt at fulfilment (j). But if the unregistered deed of value less than Rs. 100 is accompanied by delivery of the property, the sale would be effective by virtue of delivery of possession and would not be rendered nugatory by the unregistered deed (k). The deed would be evidence of the contract of sale or of any negotiations concerning the transaction (l). See now sec. 49 of the Registration Act as amended by Act 21 of 1929.

An unregistered deed may, under the judgment of the Privy Council in *Varatha Pillai* v. *Jeevarathammal* (m), be used as evidence of the character of possession. Twelve years' possession under an unregistered sale deed will create title by adverse possession, not only when the property is of value less than Rs. 100 and sec. 49 of the registration Act does not apply (n), but also when it is of that value and over (o).

Delivery of Property.—Delivery of the property takes place when the seller places the buyer or such person as he directs in possession of the property. This mode of transfer is only recognised in the case of tangible immoveable property of small value, as delivery of possession is a patent act. Possession of land is given by going on to the land, but it is not necessary to walk over the whole land (p). Possession of a house

(c) *Bakhtawar Ram* v. *Naushad* (1920) 55 I.C. 659.

(d) *Ponnayya Goundan* v. *Muttu* (1894) 17 Mad. 146.

(e) *Sagaji* v. *Namdev* (1899) 23 Bom. 525; *Chinnasamy Reddiar* v. *Krishna* (1906) 16 Mad. L.J. 146; *Amirthathamal* v. *Periasamy* (1909) 32 Mad. 325, 4 I.C. 507; *Govindammal* v. *Gopalachariar* (1906) 16 Mad. L.J. 524; *Velayutha* v. *Govindaswami* (1911) 34 Mad. 543, 8 I.C. 364; *Shib Lal* v. *Bhagwan Das* (1889) 11 All. 244, dissenting from *Ikkbal Begam* v. *Gobind Prasad*, *supra*; *Baijnath Singh* v. *Paltu* (1908) 30 All. 125; *Gostho Behari* v. *Rohini*, *supra*; *Nilmadahab* v. *Hara Proshad* (1913) 17 Cal. W.N. 1161, 20 I.C. 235; *Bhonu Lal* v. *W. A. Vincent* (1922) 65 I.C. 882, ('22) A.P. 619; *Narain Das* v. *Mst. Dhania* (1915) 38 All. 154, 35 I.C. 23; *Ramdhari* v. *Gorakh* (1931) 10 Pat. 264, 133 I.C. 34, ('31) A.P. 236; *Umedmal Motiram* v. *Davu* (1878) 2 Bom. 547 (before the Act).

(f) (1913) 37 Bom. 58, 17 I.C. 176.

(g) *Nilmadhab* v. *Hara Proshad*, *supra*: *Kaliram* v. *Dularam* (1933) 142 I.C. 582, ('33) A.C. 544.

(h) *Makhan Lal* v. *Banku Behari* (1892) 19 Cal. 623, overruling *Khatu* v. *Madhuram* (1889) 16 Cal. 622; *Konormal* v. *Nabin Chandra* (1912) 15 I.C. 228.

(i) *Biswanath Prashad* v. *Chandra Narayan* (1921) 48 Cal. 509, 48 I.A. 127, 63 I.C. 770, ('21) A.PC. 8.

(j) *Nathu* v. *Gulabchand* (1934) 144 I.C. 919, ('34) A.N. 13.

(k) *Immamuddin* v. *Ramzan* (1885) A.W.N. 201; *Kathari* v. *Bhupati* (1916) 29 Mad. L.J. 721, 31 I.C. 52; *Gunga Narain* v. *Kali Churn* (1895) 22 Cal. 179; *Bhagabati Swarnakar* v. *Suchi* (1908) 2 I.C. 413; *Gulab* v. *Lalta* (1919) 22 O.C. 58, 51 I.C. 561; *Daya Ram* v. *Sita Ram* (1925) 79 I.C. 894, ('25) A.A. 206; *Tribhovan* v. *Shankar* (1943) A.B. 431.

(l) *Brajaballav* v. *Akkoy Bagdi* (1926) 30 Cal. W.N. 254, 93 I.C. 115, ('26) A. C. 705; *Uma Jha* v. *Chetu* (1926) 95 I. C. 187, ('26) A.P. 89; *Puchha Lal* v. *Kun Behari* (1913) 18 Cal. W. N. 445, 20 I. C. 803; *Sheikh Juman* v. *Mohammad* (1917) 21 Cal. W. N. 1149, 41 I. C. 779.

(m) (1919) 43 Mad. 244, 46 I. A. 285, 53 I.C. 901 P.C; *Abdul Alim* v. *Abdul Sattar* (1936) A.C. 180.

(n) *Nallamuttu Pillai* v. *Betha* (1900) 23 Mad. 37; *Dawal* v. *Dharma* (1917) 41 Bom. 550, 559, 41 I.C. 273.

(o) *Karnam Kandasawmy* v. *Chinnabba* (1921) 40 Mad. L.J. 105, 62 I.C. 608, ('21) A.M. 82.

(p) *Hanmanta* v. *Mir Ajmodin* (1904) 6 Bom. L. R. 1104.

S. 54 may be given by delivery of the keys (q). Doubtful cases can only arise when the property is already in the possession of the buyer. The Calcutta High Court had held that in such a case an oral sale was invalid (r) as the essence of a transfer by delivery of property is that possession is changed. This case was doubted in a later Calcutta case (s) where a mortgagor sold his equity of redemption of value less than Rs. 100 to the mortgagee in possession by pointing out the boundaries. The Court said that the mortgagor had done what he could to deliver possession and that the oral sale was valid. Also in a Madras case (t) which was also a sale of an equity of redemption less in value than Rs. 100 to a mortgagee in possession, the Court held that it was sufficient that the vendor by appropriate declarations and acts converts the possession of the vendee as mortgagee into possession as purchaser. In the case last cited the Judges observed that it was not the intention of the Act to require sales of properties below Rs. 100 in value to be made by registered instrument when the vendee is in possession as a tenant. But this is clearly wrong, for if the vendee is a tenant the sale would be of the reversion, and a registered instrument would be necessary. The decision in *Sibendrapada Nath* v. *Secretary of State* (u) seems to be supported by an observation of the Privy Council in *Biswanath Prasad* v. *Chandra Narayan* (v) that "for the purpose of sec. 54 there must be a real delivery of the property". But even after this decision the Calcutta High Court have held that if the vendee is already in possession it is sufficient if the vendor by appropriate acts and declarations converts permissive possession into possession as a vendee (w). So has it been held by the Lahore and Rangoon High Courts (x). A Full Bench of the Allahabad High Court by a majority held that where the property was in possession of a usufructuary mortgagee, the interest of the mortgagor was tangible property and therefore could be transferred only by a registered deed, for possession being with the usufructuary mortgagee there could be no delivery of possession unless the mortgagee gave up possession as mortgagee (y). This was followed by the Patna High Court (z). Both these cases followed *Sibendrapada* v. *Secretary of State*, *supra*, on this point.

If on the date of sale the buyer gets into possession a delivery of possession by the seller may be inferred (a).

When tangible immoveable property of value less than Rs. 100 is delivered under an oral contract of sale, the sale is complete. No title is left in the vendor, and if he subsequently executes a registered conveyance to a third person that person gets nothing, even though the price under the oral sale has not been paid (b).

Delivery plus unregistered sale deed.—In the case of tangible immoveable property worth less than Rs. 100 if the transfer is not made by delivery there must be a registered sale deed. An unregistered deed would be invalid and would not operate as

(q) *Guest* v. *Homfray* (1801) 5 Ves. 818.

(r) *Sibendrapada* v. *Secretary of State* (1907) 34 Cal. 207; followed in *Tilak Brittial* v. *Rudeshwar* (1917) 41 I.C. 8 and *Mrinalini* v. *Mohima Chandra* (1910) 6 I. C. 763.

(s) *Sonai Chutia* v. *Sonaram Chutia* (1916) 20 Cal. W. N. 195, 34 I. C. 692; followed in *Santokhi Misser* v. *Siro Jha* (1934) 151 I. C. 55, ('34) A.P. 301.

(t) *Muthukaruppan* v. *Muthu* (1915) 38 Mad. 1158, 25 I. C. 772; followed in *Sheikh Dawood* v. *Moideen* (1925) 48 Mad. L. J. 264, 87 I. C. 331, ('25) A. M. 566 and *Ram Nath* v. *Gajadhar* (1926) 92 I. C. 478, ('26) A. A. 300; *Thakurdas* v. *Sobhachand* (1916) 12 Nag. L. R. 3, 32 I. C. 238; *Dinanath* v. *Manbodhi* (1916) 12 Nag. L. R. 139, 36 I. C. 547.

(u) (1907) 34 Cal. 207.

(v) (1921) 48 Cal. 509, 48 I.A. 127, 63 I.C. 770, ('21) A.PC. 8.

(w) *Kulachandra Ghosh* v. *Jogendrachandra Ghosh* (1933) 60 Cal. 384, 144 I. C. 155, ('33) A.C. 411.

(x) *Mahbub* v. *Kalekhar* (1936) A.L. 756; *Maung Mya Maung* v. *Ma Khine* (1936) 166 I.C. 267 (1936) A.R. 497.

(y) *Sohan Lal* v. *Mohan Lal* 50 All. 986, (1928) A.A. 726, 118 I.C. 177 (F.B.)

(z) *Puran Mahtan* v. *Bhogo Mahtan* (1946) A.P. 81.

(a) *Gunga Narain* v. *Kali Churn* (1895) 22 Cal. 179; *Ummar Sahib* v. *Vythilinga* (1909) 5 Mad. L. T. 263, 4 I. C. 1135; *Ammani* v. *Jagannatha* (1915) M. W. N. 442, 30 I.C. 7; *Tukaram* v. *Atmaram* (1939) A.B. 31, (1939) Bom. 71, 40 Bom. L.R. 1192, 180 I.C. 40.

(b) *Moidin* v. *Avaran* (1888) 11 Mad. 263.

constructive delivery (*c*). But if there is delivery it is, as already stated, not rendered nugatory by the existence of an unregistered deed (*d*). But the delivery need not be contemporaneous with the unregistered deed; it may take place some time after (*e*). In a Madras case (*f*) it was said that the execution of an unregistered sale deed invalidated the oral sale by delivery as the deed excluded evidence of the agreement of sale. But this has been dissented from by the Patna High Court (*g*), and it has been held that a sale deed though not registered is admissible as evidence of the contract of sale (*h*). This is now made clear with reference to certain suits by the proviso inserted in sec. 49 of the Registration Act by Act 21 of 1929. Even if the property were worth more than Rs. 100 so that there could be no oral sale, the vendee in possession under an unregistered sale deed would be protected from dispossession by the doctrine of part performance enacted in sec. 53A. But such an unregistered deed would not support a suit on title (*i*).

III.—Contract for sale.

Contract for sale.—A contract for the sale of immoveable property differs from a contract for the sale of goods in that the Court will grant specific performance of it unless special reasons to the contrary are shown (*j*). It is not within the competence of the guardian of a minor to bind the minor by a contract for the purchase of land. And as there is want of mutuality the minor on attaining majority cannot obtain specific performance of the contract (*k*). Otherwise a contract for the sale of land is subject to the general rules applicable to all contracts; and this and other sections of the Act are taken as part of the Contract Act, see sec. 4 above, at p. 42. A contract for sale by a minor is void, but a contract for sale to a minor is valid. See note under sec. 6 (h) 'Minor as transferee' at p. 72. Incidents peculiar to the sale of land are the subject of sec. 55.

Does not of itself create any interest.—The last clause of the section abolishes the English doctrine that a contract for sale transfers an equitable estate to the purchaser. The law of India does not recognize equitable estates (*l*), and the English rule that the contract makes the purchaser owner in equity of the estate does not apply (*m*). Hence the Privy Council have held that apart from sec. 53A, "an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, is not a relevant defence to an action for ejectment in India" (*n*). A person

(*c*) *Biswanath Prasad* v. *Chandra Narayan* (1921) 48 Cal. 509, 48 I. A. 127, 63 I. C. 770, ('21) A.PC. 8.

(*d*) *Immamuddin* v. *Ramzan* (1885) A.W.N. 201; *Ganga Narayan* v. *Kali Churn*, *supra*; *Kathari* v. *Bhupati* (1916) 29 Mad. L. J. 721, 31 I. C. 52; *Daya Ram* v. *Sita Ram* (1925) 79 I. C. 394, ('25) A. A. 206.

(*e*) *Mahommad Yagoolally* v. *Chottey Lal* (1938) 179 I.C. 583, (1939) A.P. 218.

(*f*) *Kuppuswami* v. *Chinnaswami* (1928) 111 I.C. 677, ('28) A.M. 546.

(*g*) *Keshwar Mahton* v. *Sheonandan* (1929) 122 I.C. 533, ('29) A.P. 620.

(*h*) *Puchha Lal* v. *Kunj Behari* (1918) 18 Cal. W. N. 445, 20 I. C. 808; *Seikh Juman* v. *Mohammad* (1917) 21 Cal. W.N. 1149, 41 I.C. 779S; *Kathari* v. *Bhupati*, *supra*; *Brajaballav* v. *Akhoy Bagdi* (1926) 30 Cal. W. N. 254, 96 I. C. 115, ('26) A.C. 705.

(*i*) *Ko Yan* v. *Ma Maiwi* (1933) 10 Rang. 529, 140 I. C. 777, ('33) A. R. 4.

(*j*) Specific Relief Act, 1877, s. 12.

(*k*) *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1912) 39 I. A. 1, 39 Cal. 232, 131 I.C. 851; *Venkatachalam* v. *Setharam* (1933) 56 Mad. 433, 64 Mad. L. J. 354, 142 I.C. 315, ('33) A. M. 322.

(*l*) *Webb* v. *Macpherson* (1904) 31 Cal. 57, 30 I.A. 238; *Chhatra Kumari* v. *Mohan Bikram* (1931) 10 Pat. 851, 58 I.A. 279, 133 I.C. 705, ('31) A.PC. 196; *Mian Pir Bux* v. *Sardar Mahomed Tahar* (1934) 61 I.A. 388, 60 Cal. L. J. 370, 67 Mad. L. J. 865, 36 Bom. L. R. 1195, 1934 All. L. J. 912, 151 I.C. 326, ('34) A.PC. 275; *The Official Assignee* v. *M. E. Moolla & Sons Ltd.* (1934) 12 Rang. 589, 154 I.C. 9, ('35) A. R. 84.

(*m*) *Maung Shwe Goh* v. *Maung Inn* (1917) 44 Cal. 542, 44 I.A. 15, 38 I.C. 938 P.C.; *Hormasji Manekji* v. *Keshav* (1894) 18 Bom. 13; *Rupchand* v. *Jankibai* (1925) 27 Bom. L. R. 1441, 91 I. C. 817, ('26) A. B. 24; *Kalachand* v. *Jatindra Mohan* (1929) 56 Cal. 487, 117 I. C. 855, ('29) A. C. 263.

(*n*) *Mian Pir Bux* v. *Sardar Mahomed Tahar* (1934) 61 I.A. 388, 396, 58 Bom. 650, 60 Cal. L.J. 370, 67 Mad. L.J. 865, 36 Bom. L. R. 1195, 1934 All. L.J. 912, 151 I. C. 326, ('34) A.PC. 235; *The Official Assignee* v. *M. E. Moolla & Sons Ltd.* (1934) 12 Rang. 589, 154 I.C. 9, ('35) A.R. 84.

S. 54 who has contracted to buy land is not the owner of any interest in the land and is, therefore, not competent to apply to set aside an execution sale of the same land (*o*).

A contract for sale is, therefore, merely a document creating a right to obtain another document and does not require registration. See Registration Act sec. 17 (2) (v) and Mulla's Registration Act 3rd Ed. p. 75. Even before the enactment of the Transfer of property Act, the proceedings of the Legislature when enacting the Registration Act of 1877 show that the Legislature did not regard an agreement for sale as itself creating an interest in land. This was explained by Birdwood, J., in *Chunilal* v. *Bomanji* (*p*) where an agreement for sale of immoveable property was held to be exempt from registration even though it contained an acknowledgment of the receipt of earnest or part payment of the price (*q*). This settled rule of law was broken by the Privy Council decision in *Dayal Singh* v. *Indar Singh* (*r*), but was restored by the amending Act 2 of 1927. Some dicta in *Skinner* v. *Skinner* (*s*) which may seem to infringe this rule are explained in the undernoted cases (*t*).

Before 1877 Indian cases followed the English rule and treated a contract for sale, as creating an equitable interest in land. But these cases (*u*) are now obsolete.

Attachment.—There is a conflict of decisions as to whether the obligation created by a contract for sale will prevail over claims enforceable under an attachment. See in this connection note "Attachment" under sec. 40, *supra*.

Equities of person contracting to buy.—If the transaction is still in the stage of contract, the buyer, even if he has paid the price or part of the price and even if he has taken possession, is not the owner and the property is still in the seller. But these circumstances may give rise to equities in favour of the buyer. A buyer who has paid the price or part of the price in anticipation of a conveyance is entitled under sec. 55 (6) (b) to a charge on the property for the amount paid. If the contract is still capable of specific performance, the buyer may file a suit for specific performance and complete his title. If the buyer is in possession in pursuance of the contract, he is protected from dispossession by the right enacted in sec. 53A. But if sec. 53A does not apply "an averment of the existence of a contract of sale, whether with or without possession following upon the contract is not a defence to an action for ejectment in India" (*v*).

Estoppel.—An admission that land has been sold will not operate as an estoppel so as to do away with the necessity for a registered conveyance (*w*). Title to land will not pass by mere admission when the Act requires a conveyance (*x*).

Mahomedan Law.—The exception in favour of rules of Mahomedan law in sec. 2(d) only refers to such rules as differ from the general rules contained in *Chapter II*. But sec. 54 occurs in *Chapter III* and therefore applies to Mahomedans (*y*). Under the Mahomedan law rule the execution of an instrument of sale is in no case necessary and

(*o*) *Mahadeo* v. *Vasudeo* (1899) 23 Bom. 181.

(*p*) (1884) 7 Bom. 310, 315.

(*q*) *Hormusji* v. *Keshav*, *supra*; *Sreegopal* v. *Ram Cuaran* (1882) 8 Cal. 856; *Pertab Chunder* v. *Mohendranath* (1890) 16 I. A. 233, 17 Cal. 297; *Hurnandan Singh* v. *Jawad Ali* (1900) 27 Cal. 468; *Inder Singh* v. *Dyes Singh* (1926) 6 Lah. 447, 89 I.C. 602, ('25) A. L. 619.

(*r*) (1926) 53 I.A. 214, 28 Bom. L. R. 1372, 98 I. C. 508, ('26) A.PC. 94.

(*s*) (1929) 56 I.A. 363, 33 Cal. W.N. 1150, 119 I. C. 683, ('29) A. PC. 269.

(*t*) *Sohan Lal* v. *Atdi Nath* (1934) 56 All. 142. (1933) All. L.J. 1584, 148 I. C. 229, ('33) A. A. 846; *Jagannatha* v. *Lakshminarayana* (1930) 58 Mad. L. J. 688, 125 I.C. 549, ('30) A.M. 683; *Abdul Latif* v. *Debi Mahton* (1934) 13 Pat. 620, 155 I.C. 47, ('34) A. P. 495.

(*u*) *Fati Chand Sahu* v. *Lilambar Sing Das* (1871) 9 Beng. L. R. 433, 438, 14 M.I.A. 129, 16 W. R. P. C. 26; *Sreemutty Tripoora* v. *Jugger Nath* (1876) 24 W.R. 321.

(*v*) (1934) 61 I. A. 388, *supra*; (1934) 12 Rang. 589, *supra*.

(*w*) *Maung Po Yin* v. *Maung Tet Tu* (1924) 2 Rang. 459, 86 I.C. 205, ('25) A. R. 68.

(*x*) *Mathura Mohan* v. *Ram Kumar* (1916) 43 Cal. 790, 35 I. C. 305; *Maung Po Yin* v. *Maung Tet Tu* (1925) 2 Rang. 459, 86 I. C. 205, ('25) A. R. 68.

(*y*) *Ghafur-ud-din* v. *Hamid* (1912) 10 All. L. J. 154, 16 I. C. 679.

the sale becomes absolute on payment of price and delivery of possession (z) but the section renders this rule obsolete where the Act is in force. In cases where the Mahomedan right of pre-emption is claimed there is a conflict of judicial opinion (a) as to whether the right arises when the sale is complete under Mahomedan law or only when the sale is complete under the Transfer of Property Act. The rule generally applied is that the intention of the parties determines what system of law applies, and what is the date when the sale is complete (b); and this rule has been applied by the Privy Council (c).

The transaction called the *hiba-bil-iwaz* of India (d) has been held to be a sale, so that if the property is immoveable property of the value of Rs. 100 or upwards it must be effected by a registered instrument (e). It has been held in Oudh that a *hiba-bil-iwaz* by which a Mahomedan transfers property to his wife in satisfaction of her dower debt is not a sale (f) and that all cases of *hiba-bil-iwaz* are not necessarily sales (g).

Rights and liabilities of buyer and seller.

55. In the absence of a contract to the contrary, [*p. 339*] the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(*1*) The seller is bound—

(a) to disclose to the buyer any material defect in the property *or in the seller's title thereto* of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover [*pp. 310-312*] ;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power [*pp. 312-313*] ;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto [*pp. 313-315*] ;

(z) *Begam* v. *Muhammad* (1894) 16 All. 344, 346.

(a) *Begam* v. *Muhammad*, *supra* ; *Najm-un-nissa* v. *Ajaib Ali* (1900) 22 All. 343 ; *Janki* v. *Girjadat* (1885) 7 All. 482 F.B. ; *Budhai* v. *Sonaullah* (1914) 41 Cal. 943, 23 I. C. 395 ; *Kheyali* v. *Mullick* (1916) 1 Pat., L. J. 174, 34 I. C. 210.

(b) *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575 ; *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 42 I.C. 32 ; *Abdulla* v. *Ismail* (1921) 46 Bom. 302, 64 I. C. 913, ('22) A. B. 124.

(c) *Sitaram* v. *Jiaul Hasan* (1921) 45 Bom. 1056, 48 I. A. 475, 64 I. C. 826, ('23) A. PC. 41.

(d) See Mulla's Mahommedan Law, Ed. 9, p. 126.

(e) *Abbas Ali* v. *Karim Baksh* (1909) 13 Cal. W. N. 160, 4 I. C. 466 ; *Sarifuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 105 I. C. 67, ('27) A. C. 806 ; *Fateh Ali* v. *Muhammad* (1928) 9 Lah. 428, 119 I. C. 258, ('28) A. L. 516 ; *Saburannessa* v. *Sabdu Shaikh* (1934) 38 Cal. W.N. 747, 152 I.C. 422, ('34) A. C. 693.

(f) *Chaudhri Talib Ali* v. *Mst. Kaniz* (1927) 2 Luck. 575, 102 I.C. 142, ('27) A. O. 204 ; *Bashir Ahmad* v. *Mt. Zubaida* (1926) 1 Luck. 83, 92 I.C. 269, ('26) A.O. 184.

(g) *Abdul Hamid* v. *Abdul Ghani* (1934) 148 I. C. 801, ('34) A. O. 182.

S. 55 (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place [*p. 315*];

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents [*pp. 315-316*];

(f) to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits [*pp. 316-317*];

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing [*pp. 317-318*].

(*2*) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same [*pp. 319-324*]:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it [*p. 324*].

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested [*p. 324*].

(*3*) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident [*pp. 324-325*].

(*4*) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer [*pp. 325-326*];

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, *any transferee without consideration or any transferee with notice of the non-payment*, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part *from the date on which possession has been delivered* [*pp. 326-332*].

(*5*) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest [*p. 332*];

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain, out of the purchase-money, the amount

S. 55

of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto [*pp. 332-333*];

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller [*p. 333*];

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due [*pp. 333-334*].

(*6*) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof [*p. 334*];

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, * *, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission [*pp. 334-339*].

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent [*p. 332*].

Amendments.—The following amendments have been made by Act 20 of 1929. In sec. 55 (1) (a) the words "or in the seller's title thereto" have been inserted. These give effect to the decision in *Haji Essa v. Dayabhai* (*h*) that a material defect in the property includes a defect in the title of the seller. In sec. 55 (4) (b) the words "any transferee without consideration or any transferee with notice of the non-payment"

(*h*) (1896) 20 Bom. 522.

have been inserted after the words "to a charge upon the property in the hands of the buyer." The effect is that the unpaid seller's charge is available not only against the buyer but against a transferee from the buyer with notice or a gratuitous transferee. At the end of the same clause the words "from the date on which possession has been delivered" have been added to indicate that the buyer is liable for interest on unpaid price only from the date when he is put in possession. In sec. 55 (6) (b) the words "with notice of the payment" have been omitted. This makes the charge of the buyer for price prepaid effective not only against the seller but against all persons claiming under him irrespective of notice (i).

In the absence of a contract to the contrary.– See note under the same head on p. 339 below.

Rights and liabilities.—The section sets forth the rights and liabilities of the buyer and seller—

(1) Before completion.
(2) After completion.

These rights and liabilities are as follows.—

(1) Before completion

Seller's liabilities.		*Buyer's liabilities.*	
Sec. 55 (1) (a)	To disclose material defects.	Sec. 55 (5) (a)	To disclose facts materially increasing value.
Sec. 55 (1) (b)	To produce title deeds.		
Sec. 55 (1) (c)	To answer questions as to title.		
Sec. 55 (1) (d)	To execute conveyance.	Sec. 55(5) (b)	To pay price.
Sec. 55 (1) (e)	To take care of the property.		
Sec. 55 (1) (g)	To pay outgoings.		
Seller's right.		*Buyer's right.*	
Sec. 55 (4) (a)	To take rents and profits.	Sec. 55 (6) (b)	Charge for price prepaid.

(2) After completion.

Seller's liabilities.		*Buyer's liabilities.*	
Sec. 55 (1) (f)	To give possession.	Sec. 55 (5) (c)	To bear loss to the property.
Sec. 55 (2)	Implied covenant for title.		
Sec. 55 (3)	To deliver title deeds on receipt of price.	Sec. 55 (5) (d)	To pay outgoings.
Seller's right.		*Buyer's right.*	
Sec. 55 (4) (b)	Charge for price not paid.	Sec. 55 (6) (a)	Benefit of increment.

(1) *Before completion.*—The rights and liabilities before completion are all contractual with the exception of the seller's right to take the rents and profits under sec. 55 (4) (a) which is a right the seller has because he continues to be the owner after the contract. The seller's liabilities—to produce title deeds—sec. 55 (1) (b); to answer questions as to title—sec. 55 (1) (c); to execute conveyance—sec. 55 (1) (d); and to disclose defects—sec. 55 (1) (a); and the buyer's liability to disclose facts materially increasing the value—sec. 55 (5) (a)—merges, in the conveyance. There is no remedy

(i) *Hari Bapuji v. Bhagu Sakhu* (1937) A.B. 142, 39 Bom. L.R. 1200, 167 I.C. 804.

S. 55 (1) (a)

on them after the conveyance except on the ground of fraud, but omission of disclosure is expressly declared to be fraudulent. The buyer's liability to pay the price—sec. 55 (5) (b) does not merge in the conveyance, and after conveyance is enforced by the seller's charge for unpaid price—sec. 55 (4) (b).—Conversely, if the buyer has paid purchase money before conveyance he has a charge—sec. 55 (6) (b). The seller's liability to take care of the property—sec. 55 (1) (e), and to pay outgoings—sec. 55 (1) (g) are obligations collateral to the contract which do not merge in the conveyance and can be enforced after completion.

(2) *After completion.*—The buyer's rights and liabilities after completion—sec. 55 (6) (a), sec. 55 (5) (c), and sec. 55 (5) (d)—are not contractual but are incidents of the ownership that has been transferred to him. The seller's charge for unpaid price—sec. 55 (4) (b)—is security for the enforcement of the buyer's liability to pay price—sec. 55 (5) (b)—which has not merged in the conveyance. The liability to give possession—sec. 55 (1) (f), and to guarantee title—sec. 55 (2)—are contractual liabilities implied in the conveyance.

Open contract for sale.—When nothing is said as to the way in which the seller shall prove his title, and the contract for sale merely fixes the price which is to be paid for a certain piece of land, it is said to be an open contract (*j*). The section sets forth the rights and liabilities that are implied in an open contract for sale, *i.e.*, a contract in which the terms are not subject to particular conditions. They are merely an elaboration of the fundamental duties of the parties which are that the seller must make out a good title, execute a conveyance and deliver the property and title deeds to the buyer, while the buyer must examine title, accept it if good, draft a conveyance for the seller to execute and pay the price.

These implied conditions are usually varied and supplemented by particular conditions which are comprised in the comprehensive phrase "contract to the contrary." A contract to execute a sale deed "containing the necessary stipulations" means a contract for sale on the conditions implied by this section (*k*).

Sec. 55 (1) (a)—Seller's duty of disclosure.—A contract for sale of land is not a contract *uberrimae fidei*; but although the duty of disclosure is not absolute the seller is under an obligation to disclose latent defects of which he is aware. This is the same rule as in the sale of goods under sec. 116 of the Indian Contract Act now replaced by sec. 16 of the Indian Sale of Goods Act, 1930, 3 of 1930. In *Carlish* v. *Salt* (*l*) Joyce, J. said—"In the case of a sale of the chattel, the law as stated by Bramwell, B., in *Horsfall* v. *Thomas* (*m*) is that if there be a defect known to the manufacturer, and which cannot be discovered on inspection, he is bound to point it out. Upon consideration of the authorities, I am of opinion that the vendor of real estate is under a similar obligation with respect to a material defect in the title or the subject of the sale, which defect is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions."

A latent defect is a defect which the buyer could not with ordinary care discover for himself. There is no duty to disclose defects of which the buyer has actual (*n*) or constructive notice (*o*). As to patent defects and defects of which the seller is unaware the maxim of *caveat emptor* applies. But a mutual mistake as to a matter of fact essential to the agreement will render the agreement void (*p*).

(*j*) Topham New Law of Property, 3rd Ed., p. 333.

(*k*) *Ram Sundar Saha* v. *Raj Kumar Sen* (1928) 55 Cal. 285, 104 I.C. 527, ('27) A.C. 889.

(*l*) (1906) 1 Ch. 335, 341.

(*m*) (1862) 1 H. & C. 90.

(*n*) *Ramasubbu* v. *Mulkiah* (1925) 85 I.C. 999, ('25) A.M. 968.

(*o*) *Harilal* v. *Mulchand* (1928) 52 Bom. 883, 113 I.C. 27, ('28) A.B. 427.

(*p*) *Nursing Das* v. *Chuttoo Lall* (1923) 50 Cal. 615, 74 I.C. 996, ('23) A.C. 641; *Meghi Moorji* v. *Tyeballi* (1924) 26 Bom. L. R. 1019, 90 I.C. 189, ('25) A.B. 64.

It has been held that there is a patent defect where it is obvious that there is a right of way enjoyed by some third person or by the public in general (*q*); but that the existence of a public right of way is a latent defect if the land is not such as to indicate clearly a right of public user (*r*). The ruinous condition of a house is a patent defect (*s*). The buyer can see these on inspection and if he is not vigilant and omits to take inspection he has only himself to blame. An underground culvert or drain is a latent defect (*t*).

Material defect.—The latent defect whether of property or of title must be material. This is decided with reference to the principle laid down by Tindall, C.J., in *Flight* v. *Booth* (*u*) that it must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy. The terms of the contract will be referred to in order to decide whether the case falls within the rule in this case. Where land was sold for building purposes, an underground drain was held to be a material defect (*v*); but not when a house and land were sold mainly for residence (*w*).

Defects in property.—It was at one time doubted whether this phrase included defect in title, but the Bombay High Court held that it did (*x*) and the amending Act of 1929 has adopted this decision by adding the words "or in the seller's title thereto." A defect may be of property or of title and a defect of property may also be a defect of title, for a right of way across land would be a good objection to title. Defects of property are defects which interfere with the physical enjoyment of the land sold. Trifling defects such as rotten boards or joists need not be disclosed (*y*).

Defect in title.—Defects in title are always latent defects, for a seller's title is a matter exclusively within his own knowledge and he is bound to state it explicitly and to tell the truth and all the truth which is relevant to the matter in hand (*z*). In the absence of words to the contrary the presumption is that the seller is giving a title free from reasonable doubt and this rule is implied in sec. 25 (b) of the Specific Relief Act, 1877. A title free from reasonable doubt is a marketable title which can at all times be forced upon an unwilling purchaser (*a*).

The following are instances of a defect in the seller's title: an incumbrance (*b*); a notification of intended acquisition under the Land Acquisition Act (*c*); a restrictive covenant (*d*); an easement (*e*); a party-wall notice and award throwing upon the owner the liability to contribute to rebuilding (*f*); unusually onerous covenants in a sale

(*q*) *Bowles* v. *Round* (1800) 5 Ves. 508; *Ashburner* v. *Sewell* (1891) 3 Ch. 405, 408.

(*r*) *Yandle & Sons* v. *Sutton* (1922) 2 Ch. 199.

(*s*) *Grant* v. *Munt* (1815) Coop. G. 173.

(*t*) *In re Puckett & Smiths Contract* (1902) 2 Ch. 258.

(*u*) (1834) 1 Bing. (N.C.) 370.

(*v*) *In re Puckett & Smiths Contract* (1902) 2 Ch. 258; *Re Brewer & Hankins Contract* (1899) 80 L.T. 127.

(*w*) *In re Brewer and Hankins Contract*, *supra*.

(*x*) *Haji Essa* v. *Dayabhai* (1896) 20 Bom. 522; *Sheo Ram* v. *Thakur Mahton* (1919) 58 I. C. 529; *Mohomed Siddiq* v. *Li Kan Shoo* (1925) 92 I.C. 766, ('25) A.R. 372; *Ramasubba* v. *Muthiah*, *supra*.

(*y*) Sugden Ed. 14, pp. 334, 341.

(*z*) *Re Banister, Broad* v. *Munton* (1879) 12 Ch. D. 131; *Re Marsh and Granville (Earl)* (1883) 24 Ch. D. 11; *Bai Dosibai* v. *Bai Dhanbai* (1925) 49 Bom. 325, 85 I.C. 597, ('25) A.B. 85.

(*a*) *Pyrke* v. *Waddingham* (1852) 10 Hare1; *Haji Mahomed Mitha* v. *Musaji Esaji* (1891) 15 Bom. 657; *Shrinivasdas* v. *Meherbai* (1917) 41 Bom. 300, 44 I.A. 36, 39 I.C. 627.

(*b*) *Re Banister Broad* v. *Munton*, *supra*; *Mahomed Siddiq* v. *Li Kan Shoo*, *supra*.

(*c*) *Lallubhai Rupchand* v. *Chimanlal Nandlal* (1935) 59 Bom. 83, 36 Bom. L. R. 1041, 155 I.C. 564, ('35) A.B. 16.

(*d*) *Nottingham Patent Brick & Tile Co.* v. *Butler* (1885) 15 Q. B. D. 261; *Halkett* v. *Dudley (Earl)* (1907) 1 Ch. 590; *Bai Dosibai* v. *Bai Dhanbai* (1925) 49 Bom. 325, 85 I.C. 597, ('25) A.B. 85; *Lallubhai Rupchand* v. *Chimanlal Nandlal* (1935) 59 Bom. 83, 36 Bom. L.R. 1041, 155 I.C. 564, ('35) A.B. 16.

(*e*) *Heywood* v. *Mallalieu* (1883) 25 Ch. D. 357; *Turner* v. *Moon* (1901) 2 Ch. 825; *Great Western Rly.* v. *Fisher* (1905) 1 Ch. 316; 59 Bom. 83, *supra*.

(*f*) *Carlish* v. *Salt* (1906) 1 Ch. 335.

S. 55 (1)(b)

of lease-hold property (*g*); or the fact that the agreed root of title is a voluntary conveyance (*h*). In a Bombay case (*i*) it was held that an outstanding equitable mortgage was not a material defect in the title as the amount of the mortgage was less than the price and could be cleared by the vendor.

Non-disclosure.—If before he has accepted the conveyance the buyer discovers a material defect which has not been disclosed he may claim damages or rescind the contract for misrepresentation. He may also resist a suit for specific performance. The duty of disclosure merges in the conveyance, but if the buyer has accepted the conveyance he has a remedy in damages on the covenant for title (*j*). The fact that the buyer knew of the defect in title of the seller prior to the purchase does not prevent him from suing for damages for breach of the covenant (*k*). Again as non-disclosure of a material defect is a fraud he may sue to set aside the sale and claim damages. See note at p. 311 "Non-disclosure fraudulent."

Illustrations.

(1) *A* sells to *B* an enclosed field. Before accepting the conveyance *B* discovers that the public have a right of way across the field of which there is no visible indication on the land. This is a defect both on the property and in the seller's title. *A* not having disclosed this defect *B* may refuse to complete and claim damages. He can also resist a suit for specific performance.

(2) *A* sells a property to *B*. After he has accepted the conveyance *B* discovers that under a decree for partition a portion of the property had been allotted to *C*. *A*'s omission to disclose the decree is fraudulent and *B* may sue to set aside the conveyance: *Gajapathi* v. *Alagia* (1886) 9 Mad. 89.

Sec. 55 (1) (b)—Production of title deeds.—Under this sub-section the seller is to produce his title deeds for *inspection* and not for delivery. Title deeds are *delivered* on receipt of the whole of the purchase money under sec. 55 (3). This sub-section requires the seller to produce the title deeds for inspection by the buyer in order that the buyer should satisfy himself as to title, but it makes no reference to the abstract of title (*l*). Under the English law (when the title is not registered under the Land Registration Act, 1925) the seller has to prepare and deliver an abstract of title, and the title deeds and other evidence are produced for verification of the abstract. But in India on the whole this practice does not obtain.

There is no obligation to produce title deeds unless the buyer makes a request (*m*). But the buyer must not omit to take inspection otherwise he will be held to have constructive notice of matters which he would have discovered, if he had investigated the title (*n*).

The words "in the seller's possession or power" indicate that the seller must produce not only documents which are in his possession but also in his power. They do not enable a purchaser to insist on the production of documents not in the possession or power of the seller or to claim expenses of making a search for them in the office of the Collector or Registrar. Such a right can be derived by an express term of a contract (*o*).

(*g*) *Reeve* v. *Berridge* (1888) 20 Q. B. D. 523; *In re White and Smiths Contract* (1896) 1 Ch. 637; *In re Haedicke and Lipskis Contract* (1901) 2 Ch. 666; *Molyneux* v. *Hawtrey* (1903) 2 K.B. 487.

(*h*) *Re Marsh and Granville (Earl)* 24 Ch. D. 11.

(*i*) *Haji Essa* v. *Dayabhai* (1896) 20 Bom. 522.

(*j*) *Turner* v. *Moon*, *supra*.

(*k*) *Thamminent* v. *Dhavala Polinaidu* (1945) A.M. 205.

(*l*) See the observations of Rankin, C.J., in *Jyotiprasad Sing* v. *H. V. Low & Co.* (1930) 57 Cal. 1189, 1193-1194, 128 I.C 321, ('30) A.C. 561.

(*m*) *Maung Po Te* v. *Maung Shwe Ko* (1916) 35 I.C. 373.

(*n*) See note "Wilful abstention from inquiry or search" under s. 3.

(*o*) *Rathna Bai* v. *Mrs. A. R.* (1943) A.M. 593.

Under the Conveyancing Act [English] of 1881, it was held that the buyer should bear the expense of the production of deeds in the possession of the vendor's mortgagee (*p*), but under the statute of 1925 the seller is under an obligation to produce deeds in the possession of his trustee or mortgagee at his own expense. The expense of the production of other deeds not in the possession of the seller is by the English statutes imposed on the buyer. It has also been held in England that the buyer must bear expenses of searches for evidence and even for documents of title which are required to verify the abstract (*q*). The object is to prevent frivolous requisitions by the buyer. In Bombay the practice is for the buyer to have the cost of obtaining certified copies of orders and *decrees* asked for in the requisitions (*r*).

The sub-section is silent as to the place of production. This would be as in England at the seller's residence or at or near the property sold or in London. If the buyer wished them to be produced elsewhere the extra cost occasioned thereby would be borne by him.

Abstract of title.—The abstract of title which is prepared in England summarises the title-deeds produced. A perfect abstract is one which contains with sufficient fulness the effect of every instrument which constitutes the title of the vendor and a statement of all facts necessary to deduce a title in the vendor (*s*). It begins with the document which is the root of title and states all facts affecting title during the period for which title has to be shown. It shows the title at the beginning of that period and thenceforward to the end. In the absence of a particular condition the period in England was fixed by the Vendor and Purchaser Act, 1874 (37 & 38 Vic., c. 78, sec.1) as 40 years, *i.e.*, a good root of title at least 40 years old. But that Act has been repealed by the Law of Property Act, 1925, and sec. 44 of that Act alters the period to 30 years. There is no such statutory period in India (*t*). Moreover, an abstract of title is very rarely delivered in India.

Under sec. 44 (8) of the Law of Property Act, 1925, a purchaser is not affected with constructive notice of any matter affecting title before the period fixed by the Act, for the commencement of title, unless he has actually made investigation prior to that period. Under sec. 45 (1) (a) of the Law of Property Act, 1925 [replacing sec. 3 (3) for the Conveyancing and Law of Property Act, 1881] the purchaser is not entitled to require the production of any document prior to the period fixed by the Act or stipulated by the contract for the commencement of title. But the purchaser may object to a prior title if he discovers a defect *aliunde* (*u*).

Recitals.—Under sec. 45 (6) of the Law of Property Act, 1925, re-enacting rule 2, section 2 of the Vendor and Purchaser Act, 1874, the purchaser is required to assume the correctness of statements of fact recited in an abstracted deed which is twenty years old at the date of the contract except so far as they may be proved to be inaccurate. There is no such law in India, but Bombay solicitors have adopted the practice of accepting recitals in deeds over twenty years old (*v*). In a Privy Council case it was held that such a condition with reference to an Indian deed not more than eleven years old would be depreciatory (*w*).

Sec. 55 (1) (c)—Requisitions.—When the documents of title are produced under the last sub-section the buyer examines them and if he is not satisfied he makes requisitions or objections. These are (1) requisitions on title, (2) requisitions as to matters relating to conveyance, and (3) merely enquiries.

(*p*) *In re Willett and Argenti* (1889) W.N. (Eng.) 66, 60 L.T. 735.

(*q*) *In re Stuart and Olivant and Seadon's Contract* (1896) 2 Ch. 328.

(*r*) *Shamsudin* v. *Dayabhai* (1924) 48 Bom. 368, 371, 84 I.C. 947, ('24) A.B. 357.

(*s*) *Nilmoni Addy* v. *Dinendranath Das* (1930) 57 Cal. 1115, 126 I.C. 775, ('30) A.C. 428.

(*t*) The dictum of Sir Richard Couch in *Devisi* v. *Jivraj* (1866) 2 Bom. H. C. 406, 409, that a 20 years' title is sufficient has not been acted upon at least in Bombay.

(*u*) *Nottingham Brick and Tile Co.* v. *Butler* (1886) 16 Q. B. D. 778; *Mancharji* v. *Narayan* (1870) 1 Bom. H. C. 77.

(*v*) *Shamsudin* v. *Dayabhai*, *supra*.

(*w*) *Shrinivasdas* v. *Meherbai* (1917) 41 300, 44 I. A. 36, 39 I. C. 627.

S. 55 (1) (c)

Requisitions on title are objections that the documents do not show the agreed title or that the documents are not efficacious, *i.e.*, not duly attested or not executed by parties having capacity to convey, or that the identity of the property is not established, or that further evidence is necessary. Examples of such requisitions will be found in the cases in foot-note (*x*).

Requisitions as to matters relating to conveyance refer to such matters as the joinder or concurrence of parties to the conveyance.

Inquiries are for the protection of the buyer, and call attention to possible omissions of disclosure by the seller, and seek information on such points as easements, party walls and insurance.

The conditions of sale usually contain a stipulation requiring requisitions to be made within a certain time of the delivery of the abstract. This stipulation is construed as referring to the delivery of a perfect abstract, *i.e.*, an abstract which shows all the documents and gives all the facts upon which the vendor's title is based (*y*). Such a stipulation cannot operate to thrust upon a purchaser a property to which no title is shown (*z*).

Answers to requisitions.—The seller is bound to answer all requisitions which are relevant to the title and which are specific. He is not bound to answer a general inquiry as to whether there was to the knowledge of the seller or his solicitor any settlement, deed, fact, omission or encumbrance affecting the property and not disclosed by the abstract (*a*). He is bound to answer to the best of his information questions regarding the income or rental of the property (*b*). The contract may give the vendor an express power of rescission if requisitions are made which he is unwilling to comply with. But even so, the vendor is not relieved of his duty to make out his title (*c*).

The duty to answer requisitions is altogether distinct from the duty of disclosure under sec. 55 (1) (a), for the omission of the buyer to make a requisition will not absolve the seller if he has not made a full disclosure (*d*).

Where a vendor sells land under an open contract he cannot compel the purchaser to accept a statutory declaration as sufficient evidence to contradict statements appearing in the documents of title, such as the consideration stated in a deed which shows *prima facie* that the deed is insufficiently stamped (*e*).

Waiver of requisitions.—The buyer may waive requisitions. Waiver may be express, or may be implied from conduct as when a buyer does not press a requisition that has been made, or ask for time to pay the price (*f*), or when he enters into possession or pays the whole or part of the price (*g*).

Illustration.

A contracts to sell a house to *B*. Before execution of the deed of sale *B* enters into possession, makes part payment, effects repairs and tries to raise money on a mortgage of the house. *B* had waived his right to object to the title of *A* : *Ghousiah* v. *Rustumjah* (1890) 13 Mad. 158.

(*x*) *Shriniwasdas* v. *Meherbai* (1917) 41 Bom. 300, 44 I. A. 36, 39 I. C. 627 ; *Hirachand* v. *Jayagopal* (1925) 49 Bom. 245, 89 I. C. 553, ('25) A. B. 69.

(*y*) *Nilmani Addy* v. *Dinendranath Das* (1930) 57 Cal. 1115, 126 I.C. 705, ('30) A.C. 428 ; *Hobson* v. *Bell* (1839) 2 Beav. 17 ; *Blacklow* v. *Laws* (1842) 2 Hare 40 ; *Pryce-Jones* v. *William* (1902) 2 Ch. 517.

(*z*) *Nilmani Addy* v. *Dinendranath Das*, *supra*.

(*a*) *In re Ford* v. *Hill* (1879) 10 Ch. D. 365 ; approved in *Taylor* v. *London & County Banking Co.* (1901) 2 Ch. 231, 258.

(*b*) *Premchand* v. *Ram Sahai* (1932) 140 I.C. 209, ('32) A. N. 148.

(*c*) *Lakhmidas & Co.* v. *D. J. Tata* (1927) 29 Bom. L. R. 19, 101 I. C. 229, ('27) A. B. 195 ; *Quinion* v. *Horne* (1906) 1 Ch. 596.

(*d*) *Heywood* v. *Mallalieu* (1883) 25 Ch. D. 357.

(*e*) *In re Spollan and Long's contract* (1936) 1 Ch. 713.

(*f*) *Burroughs* v. *Oakley* (1819) 3 Swans. 159, 172.

(*g*) *Fludyer* v. *Cocker* (1805) 12 Ves. 25 ; *Fleetwood* v. *Green* (1809) 15 Ves. 594. *Haydon* v. *Bell* (1838) 1 Beav. 337 ; *Ghousiah* v. *Rustumjah* (1890) 13 Mad. 158, 160.

Such conduct constitutes waiver because it shows an acceptance of title. But the question is one of fact to be decided on all the circumstances of the case, and payment of price and entry into possession will not have this effect if the contract provides that this may be done before completion (*h*). Such implied waiver only refers to the title shown in the abstract or the documents produced but not to an extraneous defect subsequently discovered (*i*) or to an incumbrance removeable by the seller (*j*).

Sec. 55 (1) (d)—Execution of conveyance.—The execution of the conveyance and the payment of price are reciprocal duties to be performed simultaneously (*k*). If either party sues for specific performance he must show that he was ready and willing to perform. It is the duty of the buyer to tender a conveyance (*l*); but this duty of the buyer is subject to contract to the contrary (*m*).

Where on the sale and purchase of land the description in the contract affords a sufficient and satisfactory identification of the property sold without a plan, the purchaser cannot require, at the expense of the vendor, a plan to supplement the description (*n*).

There is no indication in the section as to what is the proper time and place for execution. The time is usually settled by the contract, and if it is not so settled the proper time is the date when the seller makes out his title. If a time is fixed, and an unreasonable delay occurs, the proper course is to give notice making time the essence of the contract (*o*). The place would be, as in England, the seller's residence or his solicitor's office. There is also no provision as to the cost of conveyance. In England under an open contract, the buyer has to examine title and prepare the draft at his own expense and the seller has to bear the cost of execution by himself and all other necessary parties and of getting in an outstanding estate and otherwise completing his title. See secs. 45 (4) and 45 (8) of the Law of Property Act, 1925. But these matters both in England and in India are settled by the terms of the contract. In India, in the absence of any express term, the buyer has to pay the cost of the stamp (*p*).

If there has been a resale by the buyer and the conveyance is direct to the sub-purchaser, the seller may require the original buyer to be a party to the conveyance if there is a difference of price (*q*), but not otherwise, for an ordinary contract of sale is to convey to the purchaser or to such persons as the purchaser shall direct (*r*).

The payment of price is usually acknowledged in the conveyance, and a receipt also is endorsed upon it and attested by the seller's solicitors.

The purchaser on receipt of the executed conveyance presents it for registration. The seller has to admit execution before the Registrar and he should also be called upon to admit receipt of the price (*s*).

Sec. 55 (1) (e)—Care of property.—Although a contract of sale transfers no right *in rem* (as it does in English Law) yet as already explained (*t*) it imposes upon the seller a personal obligation in the nature of a trust, and though he is still the owner, this sub-section imposes on him the same duties as are imposed upon a trustee by sec. 15 of the

(*h*) *Bolton* v. *London School Board* (1878) 7 Ch. D. 766; *Stevens* v. *Guppy* (1828) 3 Russ. 171.

(*i*) *Blacklow* v. *Laws* (1842) 2 Hare 40.

(*j*) *Re Gloag and Miller's Contract* (1883) 23 Ch. D. 320.

(*k*) See s. 51 of the Indian Contract Act.

(*l*) *Ma Hnit* v. *Maung Po Pu* (1920) 31 Cal. L.J. 87, 55 I.C. 791 P.C.; *Dinkar Rao* v. *Ayub* (1923) 75 I.C. 889, ('23) A. N. 37.

(*m*) *Probodh Kumar Das* v. *Gillanders Arbuthnot & Co.* (1934) 59 Cal. L. J. 508, 152 I. C. 571, ('34) A. C. 699.

(*n*) *In re Sharman's Contract* (1936) 1 Ch. 755.

(*o*) *Jamshed* v. *Barjorji* (1916) 40 Bom. 289, 43 I.A. 26, 32 I.C. 246.

(*p*) S. 29 (c), Indian Stamp Act.

(*q*) Davidsons Precedents in Conveyancing, Ed. 4, Part I., p. 319.

(*r*) *Egmont (Earl)* v. *Smith* (1877) 6 Ch. D. 469, 474; *Rahimtulla* v. *Official Assignee, Bombay* (1935) 37 Bom. L. R. 440, 152 I. C. 1062, ('35) A. B. 340.

(*s*) See s. 58 (1) (c), Indian Registration Act, 1908.

(*t*) See note "Does not of itself create any interest" at p. 279.

S. 55 (1) (f)

Trusts Act. The English law imposes the same liability (*u*) and in *Phillips* v. *Silvester* (*v*) Lord Selborne said that the vendor "is *protanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person." The seller must do what a prudent owner ought to do, and keep the property in reasonable repair and protect it from injury by trespassers (*w*).

The obligation declared by this sub-section is one collateral to the contract and does not merge in the conveyance. Section 55 (5) (c) also implies that after completion the buyer is not responsible for any loss caused by the seller. If the seller neglects his duty, the buyer is entitled to compensation to be deducted from the purchase money; and after completion the buyer may recover damages (*x*).

The seller must also take care of the title-deeds, for loss of the deeds depreciates the value of the property and is damage done to the estate (*y*). On completion he must deliver the title-deeds to the buyer (*z*).

Sec. 55 (1) (f)—Possession.—It is the duty of the seller to give possession and not to leave the buyer to get possession for himself (*a*) notwithstanding a condition in the sale deed that if no possession is given the vendee may take steps to take possession (*b*). The implied contract to give possession may be enforced by a suit for specific performance (*c*). The vendee, however, has no right to obtain from the vendor expenses which he may have incurred subsequent to the sale in obtaining the possession of the property (*d*).

The sub-section does not say when the seller should give possession but sec. 55 (4) (a) shows that possession should be given when ownership passes to the buyer (*e*). This would be at the time of execution of the sale deed (*f*), unless it was the intention of the parties that the transfer of ownership should be deferred till payment of price (*g*). If that is not the intention the seller cannot refuse possession because the price has not been paid (*h*). But the right of the buyer to obtain possession under sec. 55 (1) (f), and the right of the seller to realize the unpaid balance of the price under sec. 55 (4) (b), may be enforced in the same action. The High Courts of Calcutta, Allahabad and Rangoon have held that if the buyer sues for possession he may be required to deposit the balance in Court within a time specified, failing which his suit will be dismissed (*i*). But the High Court of Madras has held that the vendee is entitled to possession, and cannot be put to equitable terms as to payment of price (*j*). The Bombay High Court has held that in a suit by the vendee to recover possession, the Court is not competent to pass a decree for possession conditional on payment of the unpaid price but may incorporate in the decree for possession the statutory charge under sec. 55 (4) (b) for unpaid price (*k*).

(*u*) *Sherwin* v. *Shakespear* (1854) 5 DeG. M. & G. 517, 537; *Phillips* v. *Silvester* (1872) 8 Ch. App. 173; *Egmont (Earl)* v. *Smith* (1877) 6 Ch. D. 469, 475; *Golden Bread Co.* v. *Hemmings* (1922) 1 Ch. 162.

(*v*) (1872) 8 Ch. App. 173, 177.

(*w*) *Royal Bristol Permanent Building Society* v. *Bomash* (1887) 35 Ch. D. 390, 397.

(*x*) *Clarke* v. *Ramuz* (1891) 2 Q. B. 456 C. A.

(*y*) *Hornby* v. *Matcham* (1848) 16 Sim. 325; *Brown* v. *Sewell* (1853) 11 Hare 49.

(*z*) *In re Duthy and Jesson* (1898) 1 Ch. 419.

(*a*) *Darpan* v. *Kedar Nath* (1916) 1 Pat. L. J. 140, 35 I. C. 539.

(*b*) *Barisal Loan Office* v. *Satesh Chandra* (1936) A.C. 12.

(*c*) *Sundara* v. *Sivalingham* (1924) 47 Mad. 150, 77 I.C. 542, ('24) A. M. 360.

(*d*) *U. Mya* v. *Chettyar Firm* (1936) 167 I.C. 84, (1937) A.R. 31.

(*e*) *Subbaroyar* v. *Kottya Goundan* (1916) M. W. N. 284, 34 I.C. 737.

(*f*) *Sri Ram* v. *Kidari Parshad* (1925) 6 Lah. 308, 88 I. C. 743, ('25) A. L. 481.

(*g*) See note under s. 54 'Does not itself create any interest' at p. 279.

(*h*) *Sagaji* v. *Namdeo* (1899) 23 Bom. 525; *Velayutha* v. *Govindasawmi* (1900) 30 Mad. 524 and (1911) 34 Mad. 543, 8 I.C. 364; *Krishnamma* v. *Mali* (1920) 43 Mad. 712, 56 I.C. 530.

(*i*) *Nilmadhab* v. *Hara Proshad* (1913) 17 Cal. W. N. 1161, 20 I. C. 325; *Shib Lal* v. *Bhagwan* (1888) 11 All. 244, 251; *Baijnath* v. *Paltu* (1908) 30 All. 125; *Mst. Pran Dei* v. *Sat Deo Tewaro* (1929) 111 I. C. 761, ('29) A. A. 85; *U Tin* v. *M. P. M. Chettyar Firm* (1933) 147 I. C. 742, ('33) A. R. 401. See also note under s. 55 (4) (b).

(*j*) *Velayutha Chetty* v. *Govindasawmi*, *supra*; *Krishnamma* v. *Mali*, *supra*.

(*k*) *Basalingava* v. *Chinnava* (1932) 56 Bom. 556, 34 Bom. L. R. 427, 138 I. C. 534, ('32) A. B. 247; distinguishing *Kevaldas* v. *Nagindas* (1909) 11 Bom. L. R. 383 2 I. C. 429.

S. 55 (1)(g)

As its nature permits.—These words refer to physical possession in the case of tangible property and symbolical possession in the case of intangible property. As to property already in the possession of the buyer see note "Delivery" under sec. 54. Possession is a flexible term and does not necessarily import personal occupation. So when a buyer had notice of a tenancy (*l*) or of a usufructuary mortgage (*m*), he was only entitled to symbolical possession. In this connection it may be noted that a direction by the mortgagor to the tenants to pay rents to the mortgagee constitutes a usufructuary mortgage (*n*).

Sec. 55 (1) (g)—Outgoings pending completion.—The liability imposed upon the seller by this sub-section is collateral to the contract and may be enforced after completion. The same liability exists under English law. It results from his duty under sec. 55 (1) (e) to take care of the property pending completion. The English phrase "outgoings" includes reasonable repairs; but under the Act the seller's liability for such is attributable to his duty under sec. 55 (1) (e) to take care of the property. The seller repairs is under sec. 55 (4) (a) entitled to the rents and profits for the same period, that is, between contract and completion, as these constitute the fund out of which he would bear the expense.

Incumbrances.—If the property is not sold subject to incumbrances, the seller's duty to discharge an incumbrance may also be referred after completion to the covenant for title implied by sec. 55 (2). In *Nathu Khan* v. *Burtonath* (*o*) the Privy Council said—"The purchase deed contained the express declaration that the property was sold free from incumbrances and consequently by sec. 55 (1) (g), sub-section (2) of the Transfer of Property Act the vendor must have been deemed to contract with the buyers that he had power to transfer the property so sold, and consequently that the property was free from burdens." If the buyer has to discharge such an incumbrance owing to the seller's default the seller is liable, under sec. 69 of the Indian Contract Act, for the moneys paid by the buyer to clear his title (*p*). Under sec. 18 (c) of the Specific Relief Act, 1877, the buyer has a right to compel the seller to discharge the incumbrance. The buyer is not bound to accept an indemnity from the seller (*q*). But, if the seller has not paid off the incumbrance, the buyer may do so himself under sec. 55 (5) (b) and set off the amount against the price. If the buyer is dispossessed by the incumbrancer, he may sue for damages on the implied covenant for title recognized in sec. 55 (2) and in this sub-section (*r*). If the incumbrance is a common charge on the property sold and other properties the buyer may under sec. 56 insist on its being discharged out of the other properties. If the buyer sues for specific performance of the contract for sale, the Court may direct the seller to discharge the incumbrance before he is paid the price (*s*).

It is immaterial that the buyer was aware of the incumbrance when he contracted to buy (*t*). In such a case there is no duty of disclosure by the seller under sec. 55 (1) (a)

(*l*) *Lake* v. *Dean* (1860) 28 Beav. 607; *Hughes* v. *Jones* (1861) 3 DeG. F. & J. 307. See also *Royal Bristol Permanent Building Society* v. *Bomash* (1887) 35 Ch. D. 390, 394.

(*m*) *Mst. Mumtaz-un-nissa* v. *Bhagirath* (1910) 6 I. C. 114.

(*n*) *Venkataratnam* v. *Varahaliah* (1932) 63 Mad. L. J. 310, 139 I. C. 449, ('32) A. M. 769.

(*o*) (1922) 24 Bom. L. R. 571, 26 Cal. W. N. 514, 66 I. C. 107, ('22) A. PC. 176.

(*p*) *Nathu Khan* v. *Burtonath* (1922) 24 Bom. L. R. 571, 66 I. C. 107, ('22) A. PC. 176; *Manishanker* v. *Ramkrishna* (1904) 6 Bom. L. R. 832; *Bhagwati* v. *Banarsi Das* (1928) 50 All. 371, 55 I. A. 135, 108 I.C. 687, ('28) A. PC. 98.

(*q*) *Re Weston and Thomas's Contract* (1907) 1 Ch. 244; *Re Kidd and Gibbons Contract* (1893) 1 Ch. 695.

(*r*) *Gobardhan Das* v. *Afzal Husain* (1932) 138 I. C. 495, 1932 All. L. J. 598, ('32) A. A. 553.

(*s*) *Kathamuthu* v. *Subramaniam* (1926) 50 Mad. L. J. 228, 94 I. C. 561, ('26) A. M. 569.

(*t*) *Ram Chunder Dutt* v. *Dwarkanath* (1889) 16 Cal. 330; *Basaraddi Sheik* v. *Enajaddi* (1898) 25 Cal. 298; *Subbaroya* v. *Rajagopala* (1915) 38 Mad. 887, 23 I. C. 570; *Vellayappa Rowthen* v. *Bava Rowthen* (1915) 29 I. C. 747; *Mahomed Ali* v. *Venkatapathi* (1920) 39 Mad. L. J. 449, 60 I. C. 235; *Chandrayya* v. *Hanumayya* (1927) 98 I. C. 450, ('27) A. M. 193; *Mst. Lakhpat Kuer* v. *Durga Prasad* (1929) 8 Pat. 432, 117 I.C. 654, ('29) A.P. 286.

S. 55 (1) (g)

and therefore no fraud, but the statutory liability does not depend upon proof of fraud (*u*). If the buyer pays the incumbrance he has a right to be indemnified by the seller (*v*). The existence of a covenant in the sale deed guaranteeing non-existence of an incumbrance would entitle the seller to indemnity (*w*). This right of indemnity was denied in an Allahabad case (*x*) before the Act on the ground that there was no express provision in the contract of sale and no such relation as is contemplated by secs. 69 and 70 of the Contract Act. It is submitted that it should have been treated as an implied term of the contract and that sec. 69 was applicable. In another case the buyer was not allowed any damages when it was found that in defending a suit by the mortgagee he did not show sufficient diligence (*y*).

The sale is not subject to incumbrances, unless there is an express provision to that effect (*z*). If the sale is subject to incumbrances, the seller in addition to the price of his interest gets under sec. 55 (5) (d) an implied indemnity against incumbrances affecting the property (*a*). In a case where property was sold subject to an incumbrance which was stated to be of Rs. 16,300, and the buyer had to pay Rs. 23,000 to clear it, it was held that he was not entitled to recover the difference from the seller (*b*). This was, however, merely a matter of the construction of the sale deed.

Proof of discharge of incumbrance.—If the sale is not subject to incumbrances the vendor does not make out a marketable title unless he gives satisfactory evidence of the discharge of the incumbrances. Thus if he produces a release of a mortgage he must show that the release is signed by a person duly authorized (*c*).

Rents.—The seller of leasehold property is bound to pay rents accruing due up to the date of sale (*d*). In the same way the buyer is required by sec. 55 (5) (d) to pay rents accruing due after the ownership has passed to him.

Public charges.—Public charges would include Government revenue (*e*), Municipal taxes, and payments charged upon land by statute either expressly or impliedly by reason of their being recoverable by distress or other process against the land. If the buyer has to pay such charges owing to the seller's default he would have the same right of indemnity as in the case of an incumbrance. The public authority imposing the charge will levy it on the party who is the owner for the time being and is not concerned with the rights *inter se* of the buyer and seller (*f*). The liability exists before the completion of the sale and continues thereafter whether the existence of such charges or incumbrances is discovered before or after completion. The obligation, unless there is a contract to the contrary, is absolute (*g*). War damage contribution under the War Damage Act, 1941 (4 & 5 Geo. 6, C. 12) has been held in England as not covered by "rates, taxes and outgoings" agreed to be apportioned (*h*).

(*u*) *Basaraddi Sheikh* v. *Enajaddi*, *supra*.

(*v*) *Nathu Khan* v. *Burtonath* (1922), *supra*; *Manishanker* v. *Ramkrishna*, *supra*; *Harcharan Lal* v. *Nurul Hasan* (1934) 152 I. C. 221, ('34) A. O. 492; *Gauri Shankar* v. *Munnu* (1935) 153 I. C. 811, ('35) A. O. 142; *Rinsa Ansa* v. *Mohanlal Madangopal* (1938) A. N. 257.

(*w*) *Imam Din* v. *Bhag Sing* (1936) A. L. 746.

(*x*) *Dost Muhammud* v. *Sangad* (1884) 6 All. 67.

(*y*) *Lookmanji* v. *Mangal Sing* (1938) A.L. 743.

(*z*) *Jugal Kishore* v. *Banwari Lal* (1929) 51 All. 1053, 119 I. C. 1, ('29) A. A. 791; *Harcharan Lal* v. *Nurul Hasan* (1934) 152 I.C. 221 ('34) A.O. 492; *Mahamood Mamuna* v. *National Bank of India* (1944) A. M. 678; *Parshotam Parshad* v. *Taiwar Ali* (1945) A.A. 39.

(*a*) *Izzat-un-nissa Begam* v. *Kunwar Pertab Singh* (1909) 31 All. 583, 36 I. A. 203, 3 I. C. 793; *Ram Barat Singh* v. *Sheodeni* (1912) 16 Cal. W. N. 1040, 16 I.C. 73.

(*b*) *Bidhubhushan Pal* v. *Umeshchandra* (1930) 57 Cal. 683, 128 I. C. 183, ('30) A.C. 568.

(*c*) *Shrinivasdas* v. *Meherbai* (1917) 41 Bom. 300, 44 I.A. 36, 39 I. C. 627; *Hirachand* v. *Jayagopal* (1925) 49 Bom. 245, 89 I. C. 553, ('25) A. B. 69.

(*d*) *Phul Kuer* v. *Rambhanjan Singh* (1924) 75 I. C. 975, ('24) A. P. 822.

(*e*) *Dantaluri* v. *Kanjuluri* (1910) 8 I. C. 435.

(*f*) *Nellore Municipality* v. *Dwarapally Kottamma* (1907) 30 Mad. 423.

(*g*) *State of Gondal* v. *Govindram* (1945) A.B. 187 at p. 195.

(*h*) *In re Jacob's and Steadman's Contract* (1942) 1 Ch. 400; *In re Warford Corporation's and A. S. Ware's Contract* (1943) 1 Ch. 82.

Sec. 55 (2)—Covenant for title.—This sub-section implies a covenant for title similar to that implied by sec. 7 of the Conveyancing and Law of Property Act, 1881, now replaced by sec. 76 and Schedule II, part I of the Law of Property Act, 1925 (*i*), but the covenant in the English Act is subject to qualifications which do not appear in sec. 55 (2). In a Calcutta case (*j*) Rankin, C.J., observed that this clause contemplates a completed contract and corresponds to the covenant for title in an English conveyance. The Madras High Court has said that this sub-section applies to cases where the transaction has not progressed beyond the stage of contract (*k*) and the clause was referred to in a Lahore case while the transaction was still in the stage of contract (*l*) but these cases, it is submitted, are incorrect. Before completion and in the absence of any express stipulation in the contract the buyer's right is to a title free from reasonable doubt. Under sec. 25 (b) of the Specific Relief Act a vendor cannot enforce specific performance unless he can give the buyer a title free from reasonable doubt. In *Babu Bindeshri* v. *Mahant Jairam* (*m*) the buyer sued for specific performance of a contract for sale as the seller had refused to give him a guarantee of good title, but the Privy Council dismissed the suit as the plaintiff was not entitled to an absolute guarantee of title. S. 55 (2)

The provisions of sec. 55 (1) enable the buyer before completion to ascertain if the title offered is free from reasonable doubt. Once he has accepted the conveyance and the sale is completed he has no remedy on the contract except for fraud. If the sale is vitiated by fraud the buyer can sue to set aside the sale and to recover the price. Omission to make disclosure under sec. 55 (1) (a) is fraud.

The covenant for title implied by sec. 55 (2) gives the buyer a further remedy in case of defects discovered after conveyance (*m1*). Even if the buyer was aware of the defect at the time of the contract, he may under this covenant hold the seller responsible in damages (*n*), and claim a return of the purchase-money if he is dispossessed by reason of a defect in title (*o*).

The implied covenant of title applies to any lawful eviction by title paramount and imports an absolute warranty of the title professed to be transferred and of the seller's power to deal with it. It therefore supersedes the strict rule of English law by which the doctrine of *caveat emptor* applies after the buyer has accepted the conveyance (*p*).

The implied covenant for title has nothing to do with the question whether the buyer has or has not notice of the defect of title and the buyer's knowledge of the defect

(*i*) *Basaraddi Sheikh* v. *Enajaddi* (1898) 25 Cal. 298.

(*j*) *Jyotiprasad* v. *H. V. Low & Co.* (1930) 57 Cal. 1189, 128 I. C. 321, ('30) A. C. 561.

(*k*) *Adikesavan* v. *Gurunatha* (1917) 40 Mad. 338, 350, 39 I.C. 358 per Abdul Rahim, J.; *Kathamuthu* v. *Subramaniam* (1926) 50 Mad. L.J. 228, 94 I.C. 561, ('26) A.M. 561. See also *Sigamani* v. *Munibadra* (1926) 49 Mad. L. J. 668, 91 I. C. 514, ('26) A.M. 255; *Arunachala* v. *Ramasami* (1915) 38 Mad. 1171, 25 I. C. 618.

(*l*) *Sri Ram* v. *Kidari Parshad-Cheddi Lal* (1925) 6 Lah. 308, 88 I.C. 748, ('25) A.L. 481.

(*m*) (1887) 9 All. 705, 14 I.A. 173.

(*m1*) *Visvanath* v. *Bala* (1916) 18 Bom. L.R. 292, 34 I.C. 147; *Harilal* v. *Mulchand* (1928) 52 Bom. 883, 113 I.C. 27, ('28) A.B. 427; *Bapu* v. *Kashiram* (1929) 31 Bom. L.R. 658, 119 I.C. 650, ('29) A.B. 361.

(*n*) *Ram Chunder Dutt* v. *Dwarkanath* (1889) 16 Cal. 330; *Basaraddi Sheikh* v. *Enajaddi* (1898) 25 Cal. 298; *Mahomed Ali* v. *Venkatapathi* (1920) 39 Mad. L. J. 449, 60 I.C. 235; *Mst. Lakhpat Kuer* v. *Durga Prasad* (1929) 8 Pat. 432, 117 I.C. 654, ('29) A.P. 388; *Risa Ansa* v. *Mohanlal* (1938) A.N. 257; *Avadesh Kumar* v. *Zakaul Husnain* (1944) A.A. 243.

(*o*) *Vellayapa Rowthen* v. *Bava Rowthen* (1915) 29 I.C. 747; *Subbaroya* v. *Rajagopala* (1915) 38 Mad. 887, 23 I.C. 570; *Muhammad Ibrahim* v. *Nakched* (1910) 7 All. L.J. 752, 6 I.C. 890.

(*p*) *Basaraddi Sheikh* v. *Enajaddi*, *supra*; *Mehdi Husain* v. *Jafar Khan* (1905) 8 O.C. 365; *Muhammad Ibrahim* v. *Nakched*, *supra*; *Raghava* v. *Samacharier* (1914) M.W.N. 57, 22 I.C. 42; *Kanshi Ram* v. *Jaimal Singh* (1923) 6 Lah. L.J. 31, 75 I.C. 562, ('23) A.L. 590.

S. 55 (2) does not deprive him of the right to sue for damages (*q*). But the seller's liability is limited to the title which he has professed to transfer. If he describes himself as malik and does not mention that he has derived title from Hindu women, the interest which he professes to transfer is full proprietary title (*r*). If he has only professed to transfer occupancy rights (*s*) he is not liable if the buyer is evicted by title paramount. But if the vendor sells occupancy land as if he was absolutely entitled, he is liable in damages for breach of covenant, whether the buyer was aware of the defect or not (*t*). So also if he sells non-transferable Cantonment land as if he were absolutely entitled (*u*), or if he sells as free from incumbrances land which is subject to an incumbrance (*v*). A mortgage debt is immoveable property and if the mortgage debt is sold, and it then appears that the mortgage was invalid, the buyer is entitled to damages for breach of the implied covenant for title (*w*).

Two persons purchasing as co-tenants have separate interest with reference to the implied covenant for title and may enforce it by separate suits (*x*).

Misdescription.—Misdescription may be either of title or of the property. Misdescription of title is a breach of the covenant for title and gives a right to damages as explained in the last paragraph. But the covenant for title does not extend to misdescription of property or corporeal misdescription, *i.e.*, as to the extent of the land sold (*y*). In such a case a suit will lie for rectification in case of mutual mistake or fraud under sec. 31 of the Specific Relief Act. But there may be a special covenant in the conveyance for compensation for errors (*z*). In such a case even a sub-purchaser may recover damages, for the benefit of the covenant runs with the land (*a*).

Misdescription before completion.—If the misdescription is discovered before the conveyance is executed the purchaser may rescind or claim damages if the misdescription is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser would never have entered into the contract (*b*). This is so even though there is a condition for compensation. But if the misdescription does not materially alter the substance of the contract, the purchaser must complete and accept compensation (*c*).

(*q*) *Subbaroya* v. *Rajagopala, supra*; *Arunachala* v. *Ramasami* (1915) 38 Mad. 1171, 25 I.C. 608; *Adikesavan* v. *Gurunatha* (1917) 40 Mad. 338, 39 I.C. 358; *Muhammad Ali Sheriff* v. *Venkatapathi* (1920) 39 Mad. L.J. 449, 60 I.C. 235; *Basaraddi Sheikh* v. *Enajaddi, supra*; *Bapu* v. *Kashiram, supra*; *Lachman Das* v. *Jawahir Singh* (1924) 70 I.C. 250, ('24) A.L. 476; *Vellayappa Rowthen* v. *Bava Rowthen, supra*; *Parasurama* v. *Muthusuamy* (1925) 50 Mad. L. J. 100, 91 I. C. 313, ('25) A.M. 1209; *Ram Chunder Dutt* v. *Dwarkanath* (1889) 16 Cal. 330; *Muhammad Ibrahim* v. *Nakched, supra*; *Nawal Kishore* v. *Sarju* (1932) 54 All. 774, 1932 All. L. J. 611, 139 I.C. 99, ('32) A.A. 546; *Kalka Singh* v. *Namdar Khan* (1933) 144 I.C. 406, 1933 All. L.J. 938, ('33) A.A. 389.

(*r*) *Kali Din* v. *Madho* (1923) 77 I.C. 862, ('23) A.A. 169.

(*s*) *Kulla Mal* v. *Umra* (1921) 61 I.C. 604; *Sankaran Nair* v. *Ramaswami* (1914) 27 I.C. 889.

(*t*) *Shaligram* v. *Narain* (1918) 45 I. C. 669.

(*u*) *Thomas* v. *Hanuman Prasad* (1929) 27 All. L.J. 1122, 122 I.C. 675, ('29) A.A. 837.

(*v*) *Gobardhan Das* v. *Afzal Husain* (1932) 138 I.C. 495, 1932 All. L.J. 598, ('32) A.A. 553.

(*w*) *Balagurumurthy* v. *Ramakrishna* (1921) 41 Mad. L.J. 267, 69 I.C. 473, ('21) A.M. 277, dissenting from *Samu Pathan* v. *Chidambara* (1916) 29 Mad. L.J. 454, 31 I.C. 179.

(*x*) *Chidambaram* v. *Sivathasamy* (1905) 15 Mad. L.J. 396.

(*y*) *Joliffe* v. *Baker* (1883) 11 Q.B.D. 255; *Abdulla Khan* v. *Abdur Rahman Beg* (1896) 18 All. 322; *Janga Venkata* v. *Jamal Ahmed* (1915) 29 Mad. L.J. 122, 29 I.C. 394.

(*z*) *Palmer* v. *Johnson* (1893) 12 Q.B.D. 32.

(*a*) *Kishenlal* v. *Kinlock* (1881) A.W.N. 164.

(*b*) *Flight* v. *Booth* (1834) 1 Bing. N.C. 370.

(*c*) *In re Fawcett and Homes' Contract* (1889) 42 Ch.D. 150 C.A.; *Administrator General of Bengal* v. *Aghore Nath* (1902) 29 Cal. 420; *Huseonally* v. *Tribhowandas* (1921) 25 Cal. W.N. 385, 61 I.C. 301, ('21) A. PC. 40.

English law.—The strict doctrine of English law as to real property was that a conveyance by itself imports no conditions as to title (*d*). By the contract of sale the seller has undertaken to show a good title, but after the buyer has investigated title and accepted the conveyance, he takes the title at his own risk and the maxim *caveat emptor* applies (*e*). This strict rule was mitigated by the right given to the buyer to require that the seller should execute a proper conveyance, that is a conveyance with the usual covenants for title. Lord Eldon said "If a man covenants to sell a fee simple estate, free from all incumbrances, and says no more, it is clear, that covenant carries *in gremio*, and in the bosom of it the right to proper covenants" (*f*). The covenants for title implied in an English conveyance are set forth in Schedule II, Part I of the Law of Property Act, 1925. They are for a right to convey, for quiet enjoyment, for freedom from incumbrances and for further assurance. These covenants are in some respects more limited and in some respects more extensive than the covenant implied by sec. 55 (2). The English covenants are more limited because they apply only to acts of the seller, and his predecessors in title, subsequent to the last purchase for value (*g*); while the Indian covenant applies to any lawful eviction by title paramount and is an absolute warranty of the title transferred (*h*). The English covenants are more extensive as they include the covenant for quiet enjoyment, for freedom from incumbrances and for further assurance. The Indian covenant for title does not include a covenant for quiet enjoyment; but two Nagpur cases seem to assume that it does (*i*). S. 55 (2)

The covenant for quite enjoyment is the restricted covenant limited to disturbance by the covenantor or persons claiming under him. It is a future covenant and there is no cause of action until the buyer is disturbed (*j*).

The covenant for freedom from incumbrances is a future covenant and applies when the disturbance of possession occurs (*k*).

Under the covenant for further assurance the seller is bound to do such further acts for the purpose of perfecting the buyer's title as the latter may reasonably require (*l*). Thus if a seller has after the sale perfected an imperfect title by the purchase of an outstanding interest he can under this covenant be compelled to convey it to the buyer (*m*). The English covenants are not strictly implied covenants. They are express covenants for title which are implied by the use of specified expressions in the conveyance.

Conveyances before the Act.—In sales before the Act there was no implied covenant for title, nevertheless the strict English law of *caveat emptor* was not applied. In *Dorab Aly* v. *Abdool Azeez* (*n*) the Privy Council said that there was not in India the same difference between real and personal estate as in England, and suggested that a sale of immoveable property may be subject to the same implied warranty of title as applies in the case of chattels. In a Madras case (*o*) the High Court said that the strict doctrines of English law relating to real property had never been applied to the moffusil.

Limitation.—A suit for the return of the purchase money may or may not be based on the implied covenant for title. If it is not based on the covenant, limitation is under Article 97 or Article 62. If it is based on the covenant, limitation is under Article 116.

(*d*) *Clare* v. *Lamb* (1875) L.R. 10 C.P. 334 (widow's equity of redemption sold by executors of husband); *Bree* v. *Halbeck* (1781) 2 Doug. (K.B.) 654 (seller's title deed forged).

(*e*) *Dorab Ally* v. *Abdool Azeez* (1878) 3 Cal. 806, 813, 5 I.A. 116.

(*f*) *Church* v. *Brown* (1808) 15 Ves. 258, 263.

(*g*) *David* v. *Sabin* (1893) 1 Ch. 523.

(*h*) See note, *supra* "Covenant for title".

(*i*) *Kashirao* v. *Sabu* (1932) 136 I.C. 225, ('32) A. N. 5 [F.B.]; *Ambadas* v. *Wamanrao* (1934) 148 I.C. 680, ('34) A.N. 16.

(*j*) *Nottidge* v. *Derring* (1909) 2 Ch.647; *Ardeshir* v. *Vajesing* (1901) 25 Bom. 593, 602.

(*k*) *Nottidge* v. *Derring supra*; *Eastern Mortgage and Agency Co.* v. *Muhammed Fazlul* (1925) 52 Cal. 914, 90 I.C. 851 ('26) A.C. 385.

(*l*) *King* v. *Jones* (1814) 5 Taunt 418.

lor v. *Debar* (1676)1 Cas. in Ch. 274.

(*n*) (1878) 3 Cal. 806, 814, 5 I.A. 116.

(*o*) *Gajapathi* v. *Alagia* (1886) 9 Mad. 89.

S. 55(2) In *Hanuman* v. *Hanuman* (*p*) a sale deed of 1879 was voidable and the sale went off on objection taken by the coparceners of the Hindu vendor. The Privy Council held that the Article applicable was Article 97 which refers to money paid for a consideration which afterwards fails. Their Lordships however said that if the sale was void *ab initio* so that there never was any consideration for the price paid the appropriate Article would be Article 62 which refers to money received by the defendant to the plaintiff's use. This was followed in two Bombay cases not governed by the Act. Article 97 was applied in *Tulsiram* v. *Murlidhar* (*q*) where the sale was voidable and the purchaser was subsequently dispossessed; while Article 62 was applied in *Ardeshir* v. *Vajesing* (*r*) where the sale was void and possession was not given.

The same rule applies in cases governed by the Act if the suit is not on the implied covenant. If the sale is voidable on the objection of a third party or if the title is imperfect, and the purchaser is put into possession and subsequently dispossessed, limitation is under Art. 97 from the date of dispossession (*s*), or if the possession is merely symbolical from the date when the imperfection of title is first declared (*t*). If the sale is void and possession is not given Article 62 would no doubt be applied even if the sale were governed by the Act. But the case where possession is given even though the sale is void is not treated as a case of total failure of consideration *ab initio* and Article 97 is applied from the date of dispossession (*u*).

If the suit for refund of the purchase money is on the implied covenant for title Article 116 applies. This is because the word compensation in Article 116 is not restricted to a claim for unliquidated damages and includes a claim for a sum certain (*v*); and a covenant in a registered deed is a contract in writing registered within the Article (*w*). Therefore if the sale is void as the seller has no title to convey and possession is not given limitation is under Article 116 from the date of the sale deed (*x*).

A covenant for title is a covenant that the vendor has a present title to convey and is broken on the execution of a sale deed containing such a covenant (*y*). It might therefore be supposed that if the vendee is put into possession and subsequently dispossessed owing to a defect of title limitation under Article 116 would still run from the date of the sale deed. But Macleod, C.J., in *Multanmal* v. *Budhumal* (*z*) pointed out that the discovery of the defect and dispossession might occur more than six years from the date of sale so that the *terminus a quo* for limitation should be the date of dispossession.

(*p*) (1892) 18 I.A. 158, 19 Cal. 123.

(*q*) (1902) 26 Bom. 750.

(*r*) (1901) 25 Bom. 593.

(*s*) *Subbaraya* v. *Rajagopala* (1915) 38 Mad. 887, 23 I.C. 570; *Sankara* v. *Kalathil* (1923) 46 Mad. 40, 70 I.C. 787, ('23) A.M. 46.

(*t*) *Joscurn Boid* v. *Pirthichand Lal* (1918) 46 I.A. 52, 46 Cal. 670; *Bapu* v. *Kashiram* (1929) 31 Bom. L.R. 658, 119 I.C. 659, ('29) A. B. 361; *Venkatanarasimhulu* v. *Peramma* (1895) 18 Mad. 173; *Venkatarama* v. *Venkata* (1901) 24 Mad. 27.

(*u*) *Narsing* v. *Pachu* (1913) 37 Bom. 538; *Kashiram* v. *Zabu* (1932) 136 I.C. 225. ('32) A.N. 5 F.B.

(*v*) *Ganapat Putta* v. *Hammad Saiba* (1925) 49 Bom. 596, 89 I.C. 59, ('25) A.B. 440; *Lalchand Nanchand* v. *Narayan Hari* (1912) 37 Bom. 656, 21 I.C. 315; *Tricomdas Cooverji* v. *Gopinathji Thakur* (1916) 44 I.A. 65, 44 Cal. 759, 39 I.C. 156.

(*w*) *Krishnan* v. *Kannan* (1896) 21 Mad. 8; *Muhammad Siddiq* v. *Muhammad Nuh* (1930) 52 All. 604, 124 I.C. 185, ('30) A.A. 771.

(*x*) *Ganapa Putta* v. *Hammad Saiba* (1925) 49 Bom. 596, 89 I.C. 59, ('25) A.B. 440; *Arunachala* v. *Ramasami* (1915) 38 Mad. 1171, 35 I.C. 618; *Injad Ali* v. *Mohini* (1923) 27 Cal. W.N. 1925, 80 I.C. 623, ('24) A.C. 148; *Krishnan* v. *Kannan* (1898) 21 Mad. 8; *Narayana Reddi* v. *Peda Rama* (1891) 1 Mad. L.J. 479.

(*y*) *Raju Malu* v. *Krishna Rao* (1878) 2 Bom. 273; *Tulsiram* v. *Murlidhar* (1902) 26 Bom. 750: Dart on Vendors and Purchasers, 7th Ed., Vol. II, p. 768.

(*z*) (1921) 45 Bom. 955, 61 I.C. 70, ('21) A.B. 255; *Lakhput Kuer* v. *Durga Prasad* (1929) 8 Pat. 432, 117 I.C. 654, ('29) A.P. 388; *Muhammad Siddiq* v. *Muhammad Nuh* (1930) 52 All. 604, 124 I.C. 185, ('30) A.A. 771; *Abdul Rahim* v. *Kadu* (1930) 118 I.C. 203, ('30) A.S. 12; *Chandrawatibai* v. *Valabdas* (1931) 133 I.C. 76, ('31) A.S. 141.

If there is an express covenant for quiet enjoyment or for indemnity in case of dispossession limitation will be under Article 116 from the date of disturbance (*a*).

Express covenant for title.—Express covenants override and do away with the effect of all implied covenants (*b*). But although an express covenant is a special stipulation which alone governs the rights of the parties, yet the implied covenant cannot be got rid of except by clear and unambiguous expressions (*c*); so that the express covenant is over and above that implied by this sub-section (*d*). For instance in a case (*e*) where the covenant was: "you shall henceforward be enjoying the same hereditarily and with right of alienation by gift, sale or otherwise as you please. Removing the hindrances to this arising from my agnates or king or neighbour, I shall see that the sale is given effect to in your favour without any obstruction",—this was held to be a covenant for title as well as a covenant for quiet enjoyment. But although the recitals showed that title was derived from a widow yet the implied covenant for title was not excluded because there were no clear and unambiguous expressions showing that the vendor did not mean to guarantee that he had a good title. The usual express covenant for title, is, like the above, one that includes a covenant for quiet enjoyment (*f*).

A covenant for quiet enjoyment does not exclude the covenant for title, for a specific covenant will not exclude an implied covenant unless it relates to the same subject matter. Thus in the case of sale of his interest by a mortgagee with a covenant to make good any sums that had been paid by the mortgagor, this covenant was referred to the personal debt and did not exclude the implied covenant for title, and the mortgagee was liable in damages when the mortgage proved to be invalid (*g*). In another case covenant in a sale deed was that "if any dispute arise through me in respect of the land, I shall get it settled." The Madras High Court held that this was an express covenant for quiet enjoyment and that it did not exclude the implied covenant for title (*h*). This is correct, for a covenant for quiet enjoyment is a future covenant. But in an Allahabad case (*i*) the covenant was—"If, God forbid, any person comes forward as partner or co-sharer and brings a claim, or if an encumbrance, etc., is found . . .and the property passes out of the possession of the vendees we, the vendors shall . . . pay to the vendees . . . the consideration of this sale deed with costs." This was held to exclude the implied covenant for title and when the vendees had to pay a sum exceeding the purchase-money to clear a prior mortgage the Court held that they had no remedy. But this decision was erroneous and was reversed by the Privy Council (*j*). Their Lordships observed—"With regard to the last portion of the sale deed, which states what is to ensue in the event of the vendees being put out of possession, it may, of course, be an additional safeguard, it may have been a thing suggested by the parties to cover

(*a*) *Ramchandra* v. *Tohfah* (1904) 26 All. 519; *Ram Jaggi Rai* v. *Kauleshar Rai* (1908) 30 All. 405; *Mul Kunwar* v. *Chattar Singh* (1908) 30 All. 402; *Hanwant Rai* v. *Chandi Prasad* (1929) 51 All. 651, 119 I.C. 243, ('29) A.A. 293; *Mangladha* v. *Gandamal* (1929) 120 I.C. 424, ('29) A.L. 388; *Ratanbai* v. *Ghasiram* (1932) 56 Bom. 565, 134 I.C. 1157, ('32) A.B. 36.

(*b*) *Subramania* v. *Saminatha* (1898) 21 Mad. 69; *Line* v. *Stephenson* (1838) 4 Bing. (N.C.) 678; *Dennett* *Atherton* (1872) L.R. 7 Q.B. 316.

(*c*) *Mahomed Ali Sheriff* v. *Venkatapathi* (1920) 39 Mad. L.J. 449, 60 I.C. 235; *Seaton* v. *Mapp* (1846) 2 Coll. 556; *Page* v. *Midland Rly.* (1894) 1 Ch. 11; *Digambar Das* v. *Nishibala Debi* (1910) 8 I.C. 91.

(*d*) *Kashirao* v. *Zabu Pande* (1933) 147 I.C. 842, ('33) A.N. 364.

(*e*) *Mahomed Ali Sheriff* v. *Venkatapathi*, *supra*, at p. 450; *Mst. Nanhi* v. *Mst. Kalki* (1932) 30 All. L.J. 69, 136 I.C. 73, ('32) A.A. 224.

(*f*) Cf. *Nagardas Saubhagydas* v. *Ahmedkhan* (1897) 21 Bom. 175.

(*g*) *Balagurumurty* v. *Ramakrishna* (1921) 41 Mad. L.J. 257, 69 I.C. 473, ('21) A.M. 277.

(*h*) *Raghava Iyengar* v. *Samachariar* (1914) Mad. W.N. 57, 22 I.C. 42.

(*i*) *Ram Chander* v. *Bhagwati* (1924) 22 All. L.J. 576, 578, 79 I.C. 590, ('24) A.A. 937.

(*j*) *Bhagwati* v. *Banarsi Das* (1928) 50 All. 371, 55 I.A. 135, 138, 108 I.C. 687, ('28) A.P.C. 98; *Nanhi* v. *Kalki* (1932) 136 I.C. 73. 1932 All. L. J. 69, ('32) A.A. 224; *Nand Ram* v. *Purshotam Das* (1933) 145 I.C. 615, 1933 All. L.J. 201, ('33) A.A. 203.

S. 55 (3)

contingencies which were not yet wholly foreseen, but that it contradicts or restricts the wider language of the contract of sale or that it either narrows or wipes out the obligations under the statute cannot be maintained." In other words their Lordships held that it was a covenant for quiet enjoyment which did not exclude the implied covenant for title. It has been held that eviction by a pre-emptor is due to the buyer being disqualified to purchase and is therefore not a breach of the covenant for title (*k*). The correctness of this decision is very doubtful for the seller's covenant is 'that he has power to transfer' and this must mean transfer to the buyer. With reference to the covenant for quiet enjoyment, a general covenant to indemnify the purchaser against any loss that might accrue in connection with the sale has been held to apply to eviction by a pre-emptor (*l*). But a covenant to refund the purchase money in case of dispossession does not apply to eviction by a pre-emptor, as the pre-emptor would have to pay the purchase money (*m*).

Fiduciary character.—The implied covenant for title does not apply in the case of a trustee ; or in the case of a guardian selling on behalf of a minor (*n*). A trustee is only deemed to covenant that he has done no act whereby the property is incumbered or his power of transfer restricted. This is the same as in English law. The covenant, implied in a conveyance by a trustee is set forth in Schedule II, Part VI of the Law of Property Act, 1925 (*o*). If a trustee conveys without disclosing his fiduciary character he could no doubt be required to convey 'as beneficial owner' so as to become subject to the usual covenants for title. Section 38 of the Trust Act, 1882, empowers trustees to sell on special conditions.

Runs with the land.—The benefit of the implied covenant for title runs with the land (*p*). It is therefore enforceable by subsequent purchasers of the land ; and if the buyer re-sells to several purchasers each one is entitled to sue on the covenant in respect of his part. There is a similar provision in England in sec. 76 (6) of the Law of Property Act, 1925. In *David* v. *Sabin* (*q*) *A* granted a lease to *B* and *B* mortgaged to *C*. *B* then surrendered the term to *A*. *A* mortgaged to *D*, and then *A* and *D* conveyed to *E*. *A* had, however, not got in the interest left outstanding in *C*. *C* established his charge by suit against *E*. The Court of Appeal held that *A* was liable on the covenant for title to *E* and that as the covenant ran with the land it was no defence that *B* had mortgaged without the knowledge of *A*. For instances of a restrictive covenant in a deed of conveyance running with the land see the undernoted cases (*r*). Covenants running with the land are further dealt with in the notes on secs. 40 and 108 (c) and 108 (j).

Sec. 55 (3)—Delivery of title deeds.—The title deeds are things which pass with the conveyance without being named, as accessory to the estate (*s*). This has been a principle of English law since the earliest times (*t*). Accordingly, as in England, the seller has to deliver to the buyer all deeds relating to the property conveyed (*u*). This includes documents in his power but not in his possession and the cost of obtaining

(*k*) *Ghulam Jilani* v. *Imdad* (1881) 4 All. 337.

(*l*) *Khenmon Bibi* v. *Shah Mali* (1908) P.R. 111, 4 I.C. 690; *Sita Ram* v. *Nanak Chand* (1926) 92 I.C. 318, ('26) A.L. 182 ; *Kaliyan Singh* v. *Fazal Din* (1926) 94 I.C. 1055, ('26) A.L. 455 ; *Hanwant Rai* v. *Chandi Prasad* (1929) 51 All. 651, 119 I.C. 243, ('29) A.A. 293.

(*m*) *Mt. Ishro* v. *Naubat Rai* (1933) 146 I.C. 120, ('33) A.L. 522.

(*n*) *Maida* v. *Kishan Bahadur* (1934) 56 All. 997, 151 I.C. 826, 1934 All. L.J. 645, ('34) A.A. 645.

(*o*) See *Wise* v. *Whitburn* (1924) 1 Ch. 460.

(*p*) *Hanwant Rai* v. *Chandi Prasad* (1929) 51 All. 651, 119 I.C. 243, ('29) A.A. 293 ; *Ba u* v. *Kashiram* (1929) 31 Bom. L.R. 658, 119 I.C. 659, ('29) A.B. 361 ; *Ramayya* v. *Kotayya* (1930) Mad. W.N. 195, 127 I.C. 617, ('30) A.M. 748 ; *Abdul* v. *Kisan* (1931) 29 Nag. L. R. 392, 136 I. C. 879, ('31) A.N. 166.

(*q*) (1893) 1 Ch. 523.

(*r*) *Re Ecclesiastical Commissioners for England* (1936) 1 Ch. 430 ; *Drake* v. *Gray* (1936) 1 Ch. 451 ; *White* v. *Bijou Mansions Ld.* (1937) 1 Ch. 610 ; *Marquess of Zetland* v. *Driver* (1939) 1 Ch. 1.

(*s*) *Austin* v. *Croome* (1842) Car. & M. 653.

(*t*) *Buckhurst (Lord)* v. *Fenner* (1572) 1 Co. Rep. 1.

(*u*) *Shri Bhawani* v. *Devrao* (1887) 11 Bom. 485 ; *In re Williams and Newcastle's (Duchess) Contract* (1897) 2 Ch. 144, 148 (the right to the deed would go with the land).

them must be borne by the seller (*v*). Counterpart leases and kabulayets are deeds of title accessory to the estate (*w*); and it has also been held that village account books should be delivered on the sale of a village as they are necessary for the enjoyment and management of the estate (*x*). S. 55 (4) (a)

Before completion the seller is bound under sec. 55 (1) (b) to produce all title deeds in his possession and power for inspection. But the duty to deliver them does not depend upon completion. Even if the seller has executed the conveyance and put the buyer in possession he need not deliver the deeds, until the price has been paid in full. This accords with the English law under which the seller's equitable lien gives him a right to retain the deeds of title until payment (*y*). In *Ma Hnit* v. *Maung Po Pu* (*z*) the Privy Council observed that "the duty of the purchaser . . . . was to tender a conveyance, and he would then, and not before such a tender was either made or waived, have the right to the deeds as the accompaniment of the transferred title." But in this case the price had already been paid.

The first exception to the rule is where the seller retains part of the property comprised in the deeds in which case he may retain the deeds, but is under an obligation for their safe custody and to produce and give true copies of them when required. There is a similar provision in sec. 45 (9) of the Law of Property Act, 1925. In a case where a mortgagee sold land and the mortgage deed comprised an assignment of a policy of insurance on the life of the mortgagor it was held in England that the mortgagee was not entitled to retain the deed (*a*); but this decision has not escaped criticism (*b*).

The second exception is when the property is sold in different lots. In that case the purchaser of the lot of the greatest value is entitled to the documents, but is under the same liability as to their safe custody and production, as stated in the preceding paragraph. This rule may be excluded by an express contract to the contrary, *e.g.*, that the purchaser of "the largest lot," *i.e.*, the lot of the greatest area should have the deeds (*c*). The sub-section does not explain what is to be done if the sales are at different times. In that case the last purchaser would be entitled to the documents (*d*).

Sec. 55 (4) (a)—Rents and profits.—As already explained the contract for sale transfers no right *in rem* (*e*). The seller is the owner subject to an obligation to fulfil the contract and accordingly he has to take care of the property—sec. 55 (1) (e); and to pay public charges and rents—sec. 55 (1) (g). This sub-section, therefore, declares his right to receive rents and profits which belong to him as owner, and which are the fund out of which he performs the duties of maintenance.

This sub-section shows that possession should be given by the seller when ownership passes to the buyer (*f*). But if the buyer takes possession before completion, he would, as he takes the rents and profits, pay interest on unpaid purchase-money. This is because it is inequitable that the same person should enjoy both the rents and profits of the land

(*v*) *Re Duthy and Jesson* (1898) 1 Ch. 419.

(*w*) *Shri Bhawani* v. *Devrao, supra.*

(*x*) *Shri Bhawani* v. *Devrao, supra.*

(*y*) Shephard and Brown note that the English law is different but the learned authors have been misled by Dart. See Dart V. & P., 8th Ed., p. 607. The editors submit that the statement in the text is correct—See *Dryden* v. *Frost* (1838) 3 My. & Cr. 670, 672.

(*z*) (1919) 31 Cal. L.J. 87, 55 I.C. 791 P.C.

(*a*) *In re Williams and Newcastle's (Duchess) Contract* (1897) 2 Ch. 144; see also *Re Lehmann and Walker's Contract* (1906) 2 Ch. 640.

(*b*) William on Vendor and Purchaser, 3rd Ed., p. 640; *Clayton* v. *Clayton* (1930) 2 Ch. 12, 19.

(*c*) *Griffiths* v. *Hatchard* (1854) 1 K. & J. 17.

(*d*) *In re Lowe, Capel* v. *Lowe* (1901) 36 L.J. 78; *Khanderao* v. *Romer* (1941) A.B. 46.

(*e*) See note 'Does not of itself create any interest,' at page 279.

(*f*) *Subbarayar* v. *Kottaya* (1916) Mad. W. N. 284, 34 I.C. 787.

S. 55 (4) (b)

as also the interest of the money (*g*). It makes no difference that the land yields no profit and that the delay in completion is due to the seller (*h*). The rule in *Fludyer* v. *Cocker* (*i*) that possession and interest are mutually exclusive was applied by the Judicial Committee in a case of compulsory acquisition and the owner was allowed interest on price from the date on which he was dispossessed (*j*). The Committee said—"Their Lordships are of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports otherwise, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other, the former owner parting with these, has interest on the price. This is sound in principle, and authority fully warrants it."

The only exception to this rule is when after the buyer has taken possession, the seller delays completion and the circumstances are such as to require the purchaser to keep the purchase money lying idle and unproductive. In such a case the seller will not be entitled to interest (*k*).

If the seller refuses to execute a conveyance or to give possession the buyer will be entitled to specific performance by execution of the conveyance and compensation which would be mesne profits from the date when the conveyance should have been executed and possession given (*l*). If the buyer takes possession before completion, the seller is entitled to interest on unpaid price from the day on which the buyer actually takes possession although the buyer might safely have taken possession earlier (*m*).

Sec. 55 (4) (b)—Seller's charge for unpaid price.—If the sale is completed by conveyance and the price or any part of the price is unpaid, the seller has under this sub-section a charge for the balance of price unpaid. This charge is the converse of the buyer's charge for price prepaid under sec. 55 (6) (b). The mere execution of a promissory note by the vendee for the purchase money in favour of the vendor does not put an end to the vendor's charge for the unpaid purchase money even if the vendor sues upon the note and obtains advance or even if he assigns the decree (*n*). A sum of money kept with the vendee under a sale deed by the vendor is a portion of the unpaid purchase money for which the vendor has a lien on the property sold (*o*). Where a mortgagee having purchased the entire mortgaged property an arrangement was arrived at between the mortgagee and the widow and infant son of the original mortgagor pursuant to which the mortgagee reconveyed one village out of the mortgaged properties purchased by him and the widow being unable to pay the price down executed a mortgage in favour of the mortgagee-purchaser which mortgage, however, was found invalid for want of attestation, the Privy Council held that the transaction constituted a sale and under section 55 (4) (b) the mortgagee-purchaser who became the vendor was entitled to a charge on the village for the unpaid purchase price (*p*).

(*g*) *Fludyer* v. *Cocker* (1805) 12 Ves. 25, 27 ("the act of taking possession is an implied agreement to pay interest"); *Birch* v. *Joy* (1852) 3 H.L.C. 565, 590; *Binks* v. *Rokeby* (*Lord*) (1818) 2 Swan 222, 226; *Plews* v. *Samuel* (1904) 1 Ch. 464; *Muthia Chetty* v. *Sinna* (1912) 35 Mad. 625, 627, 10 I.C. 662; *Suryaprakasa Rao* v. *Venkata Dikshitulu* (1933) 146 I.C. 317, ('33) A.M. 844.

(*h*) *Ballard* v. *Shutt* (1880) 15 Ch. D. 122.

(*i*) (1805) 12 Ves. 25.

(*j*) *Ratanlal Choonilal* v. *Municipal Commissioner* (1919) 43 Bom. 181, 45 I.A. 233, 245, 48 I.C. 404; *Pandurang* v. *Mahadev* (1922) 46 Bom. 195, 64 I.C. 492, (22) A.B. 186; *Dinkar Rao* v. *Ayub* (1923) 75 I.C 889, ('23) A.N. 37.

(*k*) *Narasingerji* v. *Panaganti* (1921) Mad. W.N 519, ('21) A.M. 498; cf. *Powell* v. *Martyr* (1803) 8 Ves. 146; *Pulliyadi Ellaruyan* v. *Nagendra* (1917) 42 I.C. 509.

(*l*) *Subbaroyar* v. *Kottaya* (1916) Mad. W.N. 284, 34 I.C. 737; *Hari Prasad* v. *Harihar* (1923) 70 I.C. 804, ('23) A.P. 205; cf. *Nilkamal* v. *Sri Gunomani* (1871) 7 Beng. L. R. 113 P.C.

(*m*) *Maung Shwe Goh* v. *Maung Inn* (1917) 44 Cal. 542, 44 I.A. 15, 38 I.C. 938 P.C.

(*n*) *Somu Achari* v. *Singara Achari* (1945) A.M. 407.

(*o*) *Kesho Das* v. *Jiwan* (1941) A.L. 10.

(*p*) *Kocharlakota Venkata* v. *Ravu Venkata Kumara* (1936) 63 I.A. 304.

S. 55 (4) (b)

English law.—Under English law the seller parts with the equitable estate as soon as the contract is made, and equity gives him a lien, *i.e.*, right to enforce payment out of the interest he has transferred and this lien continues after he has by conveyance parted with the legal estate. But the contract in India does not operate to transfer any estate, and so, the whole ownership still being in the seller, there is not and cannot be a lien before conveyance. The English lien is a right which begins with the contract; while the Indian charge is a right which begins with the conveyance (*q*). An equitable lien is a right derived from an equitable principle, whereas a charge is a right derived from contract or statute. The effect of both is the same, for both give the right to a Court sale. But there is this distinction that an equitable charge being a creature of equity can be moulded by equity, whereas a statutory charge is more rigid and depends for its existence on the terms of the contract or statute. This distinction was explained by the Privy Council in the leading case of *Webb* v. *Macpherson* (*r*).

Non-possessory.—The charge has been said to be a non-possessory lien (*s*) *i.e.*, it is not a right to retain possession. Accordingly, as the ownership has passed, the charge gives the seller no right to refuse possession (*t*). The Madras High Court had held that if the vendee sues to recover possession after the execution of conveyance but before payment of price the Court has no power to put him on equitable terms as to payment of price (*u*). But the Calcutta High Court following a judgment of Mahmud, J., in an Allahabad case (*v*) have held that such terms may be imposed as "there is no reason why the right of the purchaser to obtain possession under sec. 55 (1) (f) and the right of the vendor to realise the unpaid balance of the purchase money under sec. 55 (4) (b) should not be recognized and enforced in one action" (*w*). The Rangoon High Court follows Calcutta (*x*). The Bombay High Court while not making payment of the balance of the purchase money a condition of the purchaser obtaining possession proceeds as if the vendor had counter-claimed. The purchaser's suit for possession is decreed, but in the decree is incorporated a declaration of the vendor's charge with a direction that the vendor should on payment of the Court fee recover the amount by sale of the property (*y*). The same view is taken by the Nagpur High Court (*z*). The Allahabad High Court held that the provisions of sec. 55 did not exclude the application of the principles of equity. Hence where a purchaser who has not paid the full price, sues for possession, he can be put to terms by the decree (*a*). See note "Sec. 55 (1) (f)—Possession," *supra*. If the seller is not in possession he cannot of course rescind and reclaim possession because the buyer has not paid (*b*). The seller's only remedy is to sue to enforce his charge and he may also under sec. 55 (3) refuse to part with the title deeds, if he has not already done so.

Several buyers.—If there are several purchasers, the seller is not concerned with the proportion to be paid by each, but he has a charge on the whole property for unpaid purchase money (*c*).

Har Lal v. *Muhamdi* (1899) 21 All. 454, 458. (1904) 31 Cal. 57, 30 I.A. 238. See *Shobhalal Shyamlal* v. *Sidhelal Halkelal* (1939) Nag. 636, 185 I.C. 169, (1939) A.N 210.

(*s*) *Velayutha Chetty* v. *Govindaswami* (1907) 30 Mad. 524; *Krishnamma* v. *Mali* (1920) 43 Mad. 712, 56 I.C. 530.

(*t*) *Sagaji* v. *Namdev* (1899) 23 Bom. 525; *Velayutha Chetty* v. *Govindaswami* (1907) 30 Mad. 524, and (1911) 34 Mad. 543, 8 I.C. 364; *Krishnamma* v. *Mali*, *infra*

(*u*) *Krishnamma* v. *Mali* (1920) 43 Mad. 712, 56 I.C. 530; *Velayutha Chetty* v. *Govindaswami*, *supra* dissenting from *Subrahmania Ayyar* v. *Poovan* (1904) 27 Mad. 28; *Poomabai* v. *Annamal* (1944) A.M. 124.

(*v*) *Shib Lal* v. *Bhagwan Das* (1889) 11 All. 244; followed in *Baijnath Singh* v. *Paltu* (1908) 30 All. 125; *Mt. Pran Dei* v. *Sat Deo* (1929) 111 I.C. 761, ('29) A.A. 85.

(*w*) *Nilmadhab Parhi* v. *Hara Proshad* (1913) 17 Cal. W.N. 1161, 1164, 20 I.C. 325.

(*x*) *U Tin* v. *M.P.M.S. Chettiyar Firm* (1933) 147 I.C. 742, ('33) A.R. 401.

(*y*) *Baslingava* v. *Chimnava* (1932) 56 Bom. 556, 34 Bom. L.R. 427, 138 I.C. 534, ('32) A.B. 247 distinguishing *Kevaldas* v. *Nagindas* (1909) 11 Bom. L.R. 386, 2 I.C. 429.

(*z*) *Sobhalal Shyamlal* v. *Sidhlal Halkelal* (1939) Nag. 636, 185 I.C. 169, (1939) A.N. 210.

(*a*) *Peary Lal* v. *Hub Lal* (1945) A.A. 139.

(*b*) *Bansiram* v. *Panchami Dasi* (1916) 20 Cal. W.N. 635, 35 I.C. 294; *Trimalrao* v. *Municipal Commissioners* (1879) 3 Bom. 172.

(*c*) *Bhagh Mal* v. *Shiromani Gurudwara* (1934) 150 I.C. 725, ('34) A.L. 848.

S. 55 (4) (b)

Substitution of equivalent property.—If the seller is unable to deliver possession of the property sold and the buyer accepts in substitution other equivalent property, the buyer remains liable for unpaid price (*d*). The point did not arise in the case cited, but it is believed that the charge attaches to the substituted property.

In the hands of the buyers.—This expression has been made more intelligible by the addition of the words inserted by the amending Act 20 of 1929. The phrase now is "in the hands of the buyer, any transferee without consideration or any transferee without notice of the non-payment." Before the amendment the words "in the hands of the buyer" were difficult to understand particularly as the converse section—sec. 55 (6) (b)—dealing with the buyer's charge correctly expresses that charge to be as against the seller and all persons claiming under him with notice. Sir Lawrence Jenkins, C.J., drew attention to the difference in language, but assumed that the seller's charge was against not only the buyer but against all persons claiming under him with notice (*e*). This construction seems to have been put upon the section by the Privy Council in *Webb* v. *Macpherson* (*f*). It was adopted by the Courts in India (*g*), and has now received the sanction of the Legislature (*h*).

Illustration.

A sold his house to *B*. There was a recital in the sale deed that the price had been paid. But the price had not been paid and eleven days after registration, *B*, as he could not raise the money, returned the deed to *A* with an endorsement rescinding the conveyance. The endorsement was not registered and did not affect *B*'s title. The house was attached and sold by an execution creditor of *B*. The purchaser became legal owner of the house but took subject to *A*'s charge for unpaid purchase money. The purchaser could not claim to be a purchaser without notice as *A* was in possession at the date of the sale: *Umedmal Motiram* v. *Davu bin Dhondiba* (1878) 2 Bom. 547.

In a case where the seller admitted receipt of consideration by a recital in the deed and also by a receipt endorsed on the deed, it was held that he was estopped from enforcing his charge against a transferee for value (*i*). But in another case it was said that recitals of receipt of consideration where none was paid were so common that there was no estoppel (*j*). In such cases it becomes a question of fact whether the transferee took with notice of the charge or not.

Interest.—After the words "interest on such amount or part" the words "from the date on which possession has been delivered" have been added by the amending Act 20 of 1929. This amendment adopts the decision of the Madras High Court in *Muthia Chetty* v. *Sinna Velliam* (*k*) that the right to interest depends upon the circumstances and equities of each case and that interest on unpaid purchase money will not be payable as long as the seller is in possession of the land. The purchaser is not liable for interest if he retains part of the purchase money as security for the seller discharging an

(*d*) *Mathura Prasad* v. *Ram Sarup* (1934) 149 I.C. 304, ('34) A.A. 617.

(*e*) *Tehilram* v. *Kashibai* (1909) 33 Bom. 53, 1 I.C. 614.

(*f*) (1904) 31 Cal. 57, 30 I.A. 238.

(*g*) *Meghraj* v. *Abdullah* (1914) 12 All. L. J. 1034, 25 I. C. 208; *Gur Dayal Singh* v. *Karam Singh* (1916) 38 All. 254, 35 I.C. 289; *Rama Nand Bharti* v. *Sheo Das* (1921) 43 All. 314, 60 I.C. 938, ('21) A.A. 54; *Syed Hasan Bagarw*. *Thakur Sheo Narain Singh* (1926) 1 Luck. 7, 91 I.C. 917, ('26) A.O. 81; *Alliance Bank of Simla* v. *Walsh* (1883) P.R. 66.

(*h*) See note "Amendments," *supra*.

(*i*) *Tehilram* v. *Kashibai* (1909) 33 Bom. 53, 1 I.C. 614.

(*j*) *Meghraj* v. *Abdullah* (1914) 12 All. L.J. 1034, 25 I.C. 208.

(*k*) (1912) 35 Mad. 625, 10 I.C. 662. See also *Fludyer* v. *Cocker* (1805) 12 Ves. 25 and other cases cited under note on sec. 55 (4) (a).

incumbrance (*l*). But if the purchaser retains part of the purchase money in order to pay off an incumbrance himself, and then fails to do so, he is liable for interest (*m*). **S. 55 (4) (b)**

Enforcement.—The charge is enforced under sec. 100 by a suit for sale as if the seller were a mortgagee. The charge cannot be enforced by a creditor (*n*), or by a judgment creditor (*o*). Being only a charge it cannot be enforced against a bona fide purchaser for value without notice of the charge (*p*).

Limitation.—Article 111 of the Limitation Act, 1877, was for suits by a vendor of immoveable property to enforce his lien for unpaid purchase money. This led to some decisions to the effect that limitation for enforcing the charge was under that article (*q*). But the amendment of that article in the Limitation Act of 1908 by the substitution of the words "for personal payment of unpaid purchase money" makes it clear that art. 111 applies only to suits to recover the price from the defendant personally, while for suits to enforce the charge against the property art. 132 is the appropriate article. This was so decided both before and after the amendment of the article (*r*). If the liability arises by virtue of a registered conveyance, limitation for a suit to recover the price from the purchaser personally, is under article 116 of the Limitation Act (*s*). Time runs not from the date of sale, but from the date when the plaintiff was damnified (*t*).

Recital of payment.—A false acknowledgment of receipt of price by a recital in a deed does not estop the seller from giving evidence as against the buyer that he has not received payment. The Privy Council in *Shah Lal Chand* v. *Indarjit* (*u*) said that it was "settled law, that notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds." But such a recital may give rise to a presumption of payment (*v*).

Exclusion of charge.—Sale is a transfer for a price paid or promised or part paid or part promised. Therefore where the consideration is price promised, the promise is itself the consideration, and there is no scope for a charge. So also when the price is part paid and part promised, and the amount to be paid is fully paid. The distinction between a sale in consideration of a covenant to pay a sum of money in the future and a sale in consideration of a sum of money which the buyer covenants to pay, may seem fine, but it is a very real distinction (*w*). The former gives rise to a charge, the latter

(*l*) *Muhammad Siddiq* v. *Muhammad Nasirullah* (1899) 21 All. 223, 26 I.A. 46.

(*m*) *Choakklinga Tambiran* v. *Rama ̣adan* (1926) 97 I.C. 586, ('26) A.M. 1031.

(*n*) *Hari Ram* v. *Denaput Singh* (1883) 9 Cal. 167; *Mela Ram & Sons* v. *Ram Das Joshi & Sons* (1942) A.L. 275, 44 P.L.R. 415, 203 I.C. 462 (F.B.)

(*o*) *Moti Lal* v. *Bhagwan Das* (1909) 31 All. 443, 3 I.C. 497.

(*p*) *Tehilram* v. *Kashibai, supra*; *Gur Dayal Singh* v. *Karam Singh* (1916) 38 All. 254, 35 I.C. 289.

(*q*) *Natesan Chetti* v. *Soundraraja* (1898) 21 Mad. 141; *Avuthala* v. *Dayumma* (1901) 24 Mad. 233; *Subramania Ayyar* v. *Poovan* (1904) 27 Mad. 28.

(*r*) *Virchand* v. *Kumaji* (1894) 18 Bom. 48; *Chunilal* v. *Bai Jethi* (1896) 22 Bom. 846; *Har Lal* v. *Muhamdi* (1899) 21 All. 454; *Ramakrishna Ayyar* v. *Subramania* (1906) 29 Mad. 305; *Munir-un-nissa* v. *Akbar Khan* (1906) 30 All. 172; *Meghraj* v. *Abdullah* (1914) 12 All. L. J 1034, 25 I.C. 208; *Kallu* v. *Ram Das* (1928) 26 All. L.J. 53, 107 I.C. 679, ('29) A.A. 121; *Gulzari Mal* v. *Meghi Mal* (1933) 14 Lah. 380, 141 I.C. 435, ('33) A.L. 109.

(*s*) *Ram Raghubir Lal* v. *The United Refineries* (1933) 60 I.A. 183, 11 Rang. 186, 64 Mad. L.J. 655, 37 Cal. W. N. 633, 57 Cal. L.J. 308, 35 Bom. L.R. 758, 1933 All. L.J. 541, 142 I.C. 788, ('33) A.PC. 143; *Baijnath* v. *Parmeshwari* (1934) ('34) A.O. 240.

(*t*) *Gulzari Mal* v. *Meghi Mal* (1933) 14 Lah. 380, 141 I.C. 435, ('33) A.L. 109 dissenting from *Raghubar Rai* v. *Jai Rai* (1912) 34 All. 429.

(*u*) (1900) 22 All. 370, 27 I.A. 93,97; see also *Kukumchand* v. *Hiralal* (1879) 3 Bom. 159; *Vasudeva* v. *Narasamma* (1882) 5 Mad. 6; *Lala Himmat* v. *Llewhellen* (1885) 11 Cal. 486; *Chunni Bibi* v. *Basanti Bibi* (1914) 36 All. 537, 24 I.C. 661; *Lodd Govindoss* v. *Muthiah Chetty* (1925) 48 Mad. L.J. 721, ('25) A.M. 660; *Irfan Ali* v. *Jogendra* (1932) 59 Cal. 1111, 143 I.C. 241, ('32) A.C. 703.

(*v*) *Bai Devmani* v. *Ravishankar* (1929) 53 Bom. 321, 118 I.C. 236, ('29) A.B. 147.

(*w*) *Webb.* v. *Macpherson* (1904) 31 Cal. 57, 73, 30 I.A. 238.

S. 55 (4)

does not. If the sale is in consideration of a sum of money which the buyer covenants to pay, the charge may be excluded by an agreement express or implied which is inconsistent with its continuance. In *Webb* v. *Macpherson* (x) the Privy Council said:— "In their Lordships' opinion there is no ground whatever for saying that the charge is excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by instalments, nor is it in their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge". A direction to the buyer to pay the price to the creditor of the seller or to a third party does not exclude the charge (y). If part of the purchase money is left with the buyer to pay off creditors of the seller, the seller is entitled to a charge for the amount left with the buyer, if the latter omits to pay the creditors (z). Nor is the charge lost if the seller takes a security for the amount unpaid such as a memorandum of agreement (a), or a bond (b), or a mortgage (c), or a promissory note (d). But if there is an agreement which puts the buyer under an enforcible liability to a third party as to the unpaid price, there is a contract to the contrary and the charge is lost. Thus the seller has no charge if the buyer by his direction executes a promissory note to a third party, for the right to recover the unpaid price cannot reside in one party and the right to enforce the security in another (e). So also if the direction to pay a third party is the result of a *novatio* by which the seller's liability to the third party is extinguished and the buyer becomes liable to the third party instead of the seller (f). In cases where it was held that the promissory note or mortgage was not collateral security for the price, but the price itself, the charge was excluded (g). Where the vendor leaves a part of the price with the vendee to be paid to his illegitimate son on attaining majority, the vendor is not entitled to have a lien on the property sold (h).

Illustrations.

(1) *A* sells property to *B* on the 10th February 1905 for Rs. 790. At the time of the conveyance Rs. 300 are paid and Rs. 490 remain unpaid. For this amount *B* on the 13th February 1905 executes a registered bond promising to pay the amount in instalments of Rs. 50 per mensem. *B* fails to pay and on the 10th February 1917 *A* sues to recover the unpaid price and to enforce his charge on the property sold. The remedy on the bond was time barred at the date of suit. But the bond was only a collateral security for the price. *A* had therefore a charge for the unpaid price. Limitation to

(x) (1908) 31 Cal. 57, 30 I.A. 238, 245.

(y) *Sivasubramania Ayyar* v. *Subramania A.* (1916) 39 Mad. 997, 37 I.C. 429 F. B. overruling *Abdulla Beary,* v. *Mamhali Beary* (1910) 33 Mad. 446, 5 I.C. 87 and *Subramania Mudaliar* v. *Gnana Sambanda* (1911) 21 Mad. L. J. 359, 10 I.C. 98; *Megraj* v. *Abdulla* (1914) 12 All. L.J. 1034, 25 I.C. 208; *Har Chand* v. *Kishori Singh* (1910) 7 I.C. 639; *Kunchithapatham* v. *Palamalai* (1917) 32 Mad. L.J. 347, 39 I.C. 405; *Alwar* v. *Jagannatha* (1928) 54 Mad. L.J. 109, 108 I.C. 291; *Kesho Das* v. *Jiwan* (1941) A.L. 10, (1941) Lah. 568, 43 P.L.R. 450, 195 I.C. 980; *Mela Ram & Sons* v. *Ram Das Joshi & Sons* (1942) A.L. 275, 44 P.L.R. 415, 203 I.C. 412; *Shankar Bala* v. *Gotiram Pandurang* (1942) A.B. 67, 43 Bom. L.R. 1014, 199 I.C. 481.

(z) *Daulat Ram* v. *Inderjeet* (1933) 8 Luck. 185, 141 I.C. 468, ('33) A.O. 33.

(a) *Webb* v. *Macpherson, supra*; *Karuppiah Pillai* v. *T. B. Hari Row* (1911) 21 Mad. L.J. 849, 11 I.C. 890.

(b) *Virchand* v. *Kumaji* (1894) 18 Bom. 48; *Bashir Ahmed* v. *Nasir* (1921) 43 All. 544, 63 I.C. 495, ('21) A.A. 74; *Rangasayakalu* v. *Parthasarathy* (1929) 54 I.C. 503; *Munayya* v. *Krishnayya* (1925) 47 Mad. L.J. 737, 84 I.C. 949, ('25) A.M. 215.

(c) *Lakshmana Iyer* v. *Sankaramoorthi* (1913) 25 Mad. L.J. 245, 18 I.C. 199; *Naima Khatun* v. *Basant Singh* (1934) 56 All. 766, 1934 All. L.J. 318, 149 I.C. 781, (34) A.A. 406; *Ahmad Ali* v. *Raihan Raza* (1934) 1934 All. L.J. 682, 148 I.C. 639, ('34) A.A. 525.

(d) *Vellayappa Chettiar* v. *Narayana* (1913) 18 I.C. 81; *Dyal Das* v. *Harkishan Singh* (1930) 11 Lah. 587, 125 I.C. 330, ('30) A.L. 568; *Krishnaswami* v. *Vijayaraghava* (1939) A.M. 590, (1939) 1 M.L.J. 344, 49 M.L.W. 597, (1939) M.W.N. 284; *Somu Achari* v. *Singara Achari* (1945) A.M. 407.

(e) *Swaminatha* v. *Subbarama* (1927) 50 Mad. 548, 100 I.C. 10, ('27) A.M. 219.

(f) *Thayyaraja* v. *Seshappier* (1920) 55 I.C. 456; *Ramkrishna* v. *Panchammal* (1939) A.M. 876.

(g) *Krishnaswami Iyengar* v. *Subramania* (1918) 35 Mad. L.J. 304, 44 I.C. 528; *R.M.A.R.S. Chettyar Firm* v. *Daw Nyun* (1934) 153 I.C. 1026, ('34) A.R. 190.

(h) *Chandra Kesavalu* v. *Perumal Chettiar* (1939) A.M. 722, (1939) 1 M.L.J. 820, 49 M.L.W. 605, (1939) Mad. 487.

enforce the charge was 12 years under art. 132. The suit on the charge was in time and was decreed: *Bashir Ahmad* v. *Nazir* (1921) 43 All. 544, 63 I.C. 495, ('21) A.A. 74.

(1A) *A* is a minor and his guardian on his behalf sells *A*'s share of a house for Rs. 2,886 to *B*. *B* pays half the price and as security for the unpaid balance executes a bond promising to pay *A* the sum of Rs. 1,443 with interest at 6 per cent. when he attained majority. *A*'s charge for unpaid price is not lost: *Munayya* v. *Krishnayya* (1925) 47 Mad. L.J., 737, 84 I.C. 949, ('25) A.M. 215.

(2) *A* and *B* jointly sell property to *C*, *D*, *E* and *F* for Rs. 10,000. Of this Rs. 8,650 are paid on execution of the conveyance; and *C* alone executes two promissory notes each of Rs. 675, one to *A* and the other to *B*. *A* alone sues to recover the amount due on his promissory note from *C*, and to enforce his charge against the property sold to *C*, *D*, *E* and *F*. The fact that separate promissory notes were executed by *C* alone shews that the promissory notes were intended to be the price itself. *A* is therefore not entitled to a charge: *Krishnaswami Iyengar* v. *Subramania* (1918) 35 Mad. L.J. 304, 44 I.C. 523; *R.M.A.R.S. Chettyar Firm* v. *Daw Ngwe* (1934) 153 I.C. 1020, ('34) A.R. 190.

(3) *A* sells property to *B* for Rs. 28,000. Of this amount Rs 8,200 are paid on the date of the conveyance and Rs. 19,800 are left with *B* to discharge a mortgage by *A* on the same and two other properties. *B* on the same date executes a security bond hypothecating his property as security for the payment of the mortgage, and covenanting to pay Rs. 15,000 damages in case he defaults in making the payment by a fixed date. *B* does not pay off the mortgage. *A* is entitled to a charge for Rs. 19,800, being the unpaid price, but as to the Rs. 15,000 he is entitled only to damages actually incurred: *Naima Khatun* v. *Basant Singh* (1934) 56 All. 766, 1934 All. L.J. 318, 149 I.C. 781, ('34) A.A. 406.

(4) *A* sells property to *B* for Rs. 2,000 of which Rs. 1,000 is not paid. *A* owes Rs. 1,000 to *C*. *C* agrees to release *A* from liability for the debt and to recover the amount from *B* who promises to pay *C* instead of *A*. The arrangement is a contract to the contrary and the charge is lost.

Waiver.—The charge as explained in the preceding paragraph is not waived on equitable considerations which would apply to the unpaid vendor's equitable lien in English law. It can only be waived by an express contract to the contrary or by an implied contract, that is, some conduct inconsistent with the continuance of the charge.

The cases overruled by the Madras High Court in *Sivasubramania Ayyar* v. *Subramania Ayyar* (*i*) proceeded on the ground of waiver in spite of the warning given by the Privy Council in *Webb* v. *Macpherson* (*j*) that a statutory charge cannot be waived on equitable grounds. In the two cases cited in illustration (2) above it is doubtful if the Court was correct in finding that the promissory note in one case and the mortgage in the other were accepted not as collateral security for the price, but as the price itself. The facts were not inconsistent with the continuance of the charge, and the reference in the judgments to intention suggest that the Court had in mind the English rule (*k*). In the Punjab where the Act is not in force the English rule was followed in a case where the seller agreed to accept shares in lieu of cash for the balance of the price (*l*).

Assignment.—If the seller assigns the debt for unpaid price the assignee gets the benefit of the charge if the assignment is registered, but not otherwise (*m*). See note under sec. 8 'Debt secured by a charge' at p. 83.

(*i*) (1916) 39 Mad. 997 see footnote (*i*), *supra*.
(*j*) (1908) 31 Cal 57, 30 I.A. 238.
(*k*) See the criticism of the Madras case in *Munayya* v. *Krishnayya* (1925) 47 L.J. 737, 84 I.C. 949, ('25) A.M. 215.
(*l*) *Morton* v. *Woodfall* (1927) 8 Lah. 257, 90 I.C. 770, ('27) A.L. 103; *In re* [illegible] *Brick and Coal Co.* (1876) 4 Ch. D. 562.
(*m*) *Rajagopala* v. *Ranganatha* (1934) 152 I.C. 375, ('34) A.M. 615; affirming *Ranganatha* v. *Rajagopala* (1933) 142 I.C. 730, ('33) A.M. 161.

S. 55 (5) (a), (b)

Leases.—The charge under this section cannot be extended to leases. There is no charge on the leasehold for unpaid premium even though the lease be in perpetuity (*n*).

Sec. 55 (5) (a)—Buyer's duty of disclosure.—The seller is by sec. 55 (1) (a) under a duty to disclose latent defects. There is no doubt that the buyer is under no duty to disclose latent advantages although he may not make a statement which is misleading. This is also the law in England as stated in the following passage from the judgment of Lord Selborne in *Coaks* v. *Boswell* (*o*):—

> "Every such purchaser is bound to observe good faith in all that he says or does, with a view to the contract, and (of course) to abstain from all deceit, whether by suppression of truth or by suggestion of falsehood. But inasmuch as a purchaser is (generally speaking) under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts, would be necessarily or naturally and probably misleading."

Thus a buyer need not disclose the existence of a coal mine of which the seller is unaware (*p*).

But to this rule matters of title constitute an exception. Although the seller's title is ordinarily a matter exclusively within his knowledge yet there may be cases where the buyer has information which the seller lacks. In such a case he must not make an unfair use of it. He must give the information to the seller under the penalty of the contract being voidable for fraud both under sec. 17 (5) of the Indian Contract Act and the last clause of this section. An English illustration is the case of *Summers* v. *Griffiths* (*q*) where an old woman sold property at an undervalue believing that she could not make out a good title to it while the purchaser knew that she could. The purchaser was held to have committed a *suppressio veri* and the sale was set aside as fraudulent. Another is *Ellard* v. *Landaff (Lord)* (*r*) where a lessee obtained a renewal of a lease, in consideration of a surrender of the old lease, suppressing the fact that the person on whose life the old lease depended was on his death bed. This case has been adversely criticised (*s*), but it would be good law under this Act and has been adopted in illustration (a) to sec. 22 of the Specific Relief Act, 1877.

There are no cases in India under the sub-section, but it has been described in *Haji Essa* v. *Dayabhai* (*t*) as casting upon the buyer the duty of communicating facts about the seller's title.

Sec. 55 (5) (b)—Payment of price.—This sub-section is the corollary of sec. 55 (1) (d), or the execution of the conveyance by the seller and the payment of price by the buyer are reciprocal duties to be performed simultaneously. The buyer is bound to tender a conveyance for execution (*u*), but the buyer is not bound to part with the price except on a complete conveyance to himself of the whole interest that he has purchased. This sub-section imposes a personal liability on the buyer apart from the liability imposed by sec. 55 (4) (b) on the property (*v*).

(*n*) *Venkatacharyulu* v. *Venkatasubha Rao* (1925) 48 Mad. 821, 90 I.C. 725, ('26) A.M. 55.

(*o*) (1886) 11 App. Cas. 232, 235.

(*p*) *Fox* v. *Mackreth*, *Pitt* v. *Mackreth* (1788) 2 Bro. C.C. 400; *Turner* v. *Harvey* (1821) Jac. 169, 178.

(*q*) (1866) 35 Beav. 27.

(*r*) (1810) 1 Ball and Beatty 241.

(*s*) See *Turner* v. *Green* (1895) 2 Ch. 205.

(*t*) (1896) 20 Bom. 522, 532.

(*u*) *Ma Hnit* v. *Maung Po Pu* (1920) 31 Cal. L.J. 87, 55 I.C. 791 P.C.

(*v*) *Raghukul Tilak* v. *Pitam Singh* (1931) 52 All. 901, 130 I.C. 198, ('31) A.A. 99.

S. 55 (5)(c),(d)

Free from incumbrances.—It follows that if the property is sold free from incumbrances and these are not discharged at the time of conveyance the buyer is not bound to pay. He may under sec. 18 (c) of the Specific Relief Act compel the vendor to discharge the incumbrance; or he may under this sub-section discharge it himself and set off the amount against the purchase money (*w*) or recover it by subsequent suit against the vendor (*x*). If the amount due on the incumbrance is greater than the purchase money he may retain the latter as security for the seller discharging it; and in such a case he will not be liable for interest on the purchase money until after the seller has shown himself ready and willing to pay the difference and discharge the incumbrance (*y*). If the seller has deposited a sum with the buyer for the discharge of the incumbrance and the sum proves to be greater than what is due, the excess belongs to the seller as part of his price (*z*).

Illustration.

A mortgages property to her son-in-law *B*. *A* dies and her son *C* and daughter *D*, the wife of *B*, succeed to the property under Mahomedan law. *C* sells his share to *E* free from incumbrances and deposits Rs. 5,426 with *E* for the discharge of the mortgage to his brother-in-law *B*. *B* remits half the amount due on the mortgage. *C* is entitled to the amount remitted as part of his price: *Ram Ratan Lal* v. *Abdul Wahid* (1913) 18 I. C. 503.

Sec. 55 (5) (c)—After completion buyer bears losses.—After completion by conveyance the ownership of the property having passed to the buyer, the buyer is the owner and the property is at his risk. If the seller has committed waste he is liable, but for all accidental destruction or deterioration after conveyance the loss falls on the buyer. This is different from the English law under which the contract for sale transfers an equitable estate and with it liability for loss or destruction (*a*).

It is clear both from this sub-section as well as sub-section (1) (e) that in the interval between the contract and conveyance the seller bears the loss. Illustration (a) to sec. 13 of the Specific Relief Act would suggest the opposite. But that illustration is based on English law and cannot be applied where the Transfer of Property Act is in force (*b*).

If the seller has insured the property against fire the buyer may require the seller to apply the insurance money in restoring the premises. See note "Insured property" under sec. 49.

Sec. 55 (5) (d)—Outgoings after completion.—Under sec. 55 (1) (g) the seller pays public charges and rent which have accrued due up to the date of the sale. After the sale this liability is transferred to the buyer. The liability is a statutory and not a contractual liability and therefore it is binding on a minor vendor on whose behalf the property is sold (*c*).

If the property is sold free from incumbrances, *i.e.*, if absolute ownership is to be conveyed the seller must discharge the incumbrances. If a mortgagee brings to sale the mortgaged property free from incumbrances the amount of Municipal taxes accrued due before the sale must be deducted from the sale proceeds payable to him (*d*). If the

(*w*) *Munir-un-nissa* v. *Akbar Khan* (1906) 30 All. 172, 175.

(*x*) *Mahtab Singh* v. *Collector of Saharanpur* (1932) 30 All. L. J. 556, 142 I.C. 83, ('32) A.A. 454.

(*y*) *Muhammad Siddiq* v. *Muhammad Nasirullah* (1899) 21 All. 223, 26 I.A. 45; *Badri Das* v. *Jiwan* (1912) 10 All. L. J. 480, 15 I.C. 854; *Veerabhadrayya* v. *Subbarayudu* (1942) A.M. 650.

(*z*) *Ram Ratan Lal* v. *Abdul Wahid* (1913) 81 I.C. 503; *Subba Row* v. *Varadiah* (1943) A.M. 482, (1943) Mad. 885, 56 M.L.W. 199, (1943) 1 M.L.J. 279; *Satyanarayan Murthi* v. *Sathiraju* (1942) A.M. 525.

(*a*) *Paine* v. *Weller* (1801) 6 Ves. 349.

(*b*) See Pollock and Mulla's Contract Act, 6th Ed., pp. 765-766.

(*c*) *Gangi* v. *Govinda* (1924) 46 Mad. L. J. 464, 84 I. C. 628, ('24) A.M. 544.

(*d*) *Bibhuti Bhushan Majumdar* v. *Mujibar Rahman* (1934) 61 Cal. 956, 38 Cal. W.N. 971, 153 I.C. 247, ('34) A. C. 842.

S. 55 [illegible]

property is [illegible] subject to incumbrances the seller must pay interest on the incumbrances up to date of sale and after the completion the buyer is liable to discharge the incumbrances. The rights and liabilities of the seller and buyer in a sale subject to incumbrances and in a sale free from incumbrances were contrasted in a case with reference to stamp duty (*e*).

The liability enacted in this sub-section is between the seller and the buyer. If after a sale subject to incumbrances the seller is made personally liable for an incumbrance he has a right of indemnity against the buyer. If the incumbrance prove to be invalid, the seller has nothing to complain of, for his indemnity is complete. He cannot pick up the burden of which the land is relieved and claim it as his. The seller cannot participate in any benefit the buyer may derive from his purchase after the conveyance (*f*).

Illustration.

A sells property to *B* for Rs. 5,000. The sale is subject to a mortgage incumbrance which was believed to be of Rs. 2,000. After the sale it is discovered that the mortgage is invalid; so that *B* has got complete ownership for Rs. 5,000. *A* then sues to recover Rs. 2,000 as part of his purchase money. *A*'s suit fails for after conveyance the seller cannot participate in any benefit derived by the buyer from his purchase.

(Note that this illustration is the converse of the illustration in the note "Free from incumbrances" under sec. 55 (5) (b)).

Public charges would be payable by the seller or by the buyer according as they accrued due before or after the sale (*g*). The liability of the seller and the buyer *inter se* is no concern of the authority levying the charge (*h*). If the charge is levied upon the seller after transfer of ownership he has a right of indemnity against the buyer (*i*).

Interest accrues due from day to day and would be apportioned accordingly; the seller paying interest up to date of sale, and the buyer paying subsequent interest.

The buyer is bound to pay rents accruing due after the conveyance just as the seller is under sec. 55 (1) (g) bound to pay rents accruing due up to the date of sale. The sub-section assumes that the liability to pay rent is apportionable.

Sec. 55 (6) (a)—Benefits after completion.—After completion the transfer passes to the buyer all rights of ownership and such rights as are under sec. 8 the legal incidents thereof. As to rents and profits sec. 55 (4) (a) gives these to the seller until completion and this sub-section gives them to the buyer after completion.

Sec. 55 (6) (b)—Buyer's charge for price prepaid.—The buyer has a charge for price prepaid, that is for price that he has paid in anticipation of completion. This is the converse of the seller's charge for unpaid price under sec. 55 (4) (b). Interest on price prepaid would run from the date of payment to the date of delivery of possession (*j*). After the conveyance is executed and possession is given this clause has no application (*k*).

If the seller has no personal interest in the property, there can be no charge under this sub-section. This was so held in a case where a mutawalli (who is a mere

(*e*) *Waman Martand* v. *Commissioner, C. D.* (1925) 49 Bom. 73, 26 Bom. L.R. 942, 84 I.C. 421, ('24) A.B. 524; cf. as to Court sales *Mangalathammal* v. *Narayanaswamy* (1906) 30 Mad. 461.

(*f*) *Izzat-un-nissa Begum* v. *Kunwar Pertab Singh* (1909) 31 All. 583, 36 I.A. 203, 3 I. C. 793.

(*g*) *Izzat-un-nissa Begum* v. *Kunwar Pertab Singh, supra.*

(*h*) *Nellore Municipality* v. *Duvvurpally Katamma* (1907) 30 Mad. 423.

(*i*) *Arunachella* v. *Rangiah* (1906) 29 Mad.

(*j*) *Juggo* v. *Harihar Prasad* (1940) A.A. 41, (1940) All. 52, (1939) A.L.J. 1107, 187 I.C. 509.

(*k*) *Kapadvanj Municipality* v. *Ochhavlal* (1928) 30 Bom. L. R. 920, 113 I. C. 161, ('28) A. B. 328.

S. 55 (6) (b)

custodian) sold wakf property without the sanction of the Court (*l*). When a guardian of a minor contracts to sell a property and such transfer is for legal necessity, the purchaser has a charge for the price paid on the minor's interest in the property (*m*).

There is a reference to the buyer's charge in an Oudh case (*n*); which is difficult to understand. The shares of a father and sons were brought to sale in execution of a money decree and bought by *A*. Before the sale was confirmed the property was mortgaged to *B* by a mortgage which was valid as to the father's share only. *B* paid off *A* and the sale was set aside. Subsequently the son's share was sold subject to *B*'s mortgage, to *C*. *B* sued to enforce his mortgage and it was held that *B* was entitled to recover the amount he had paid to *A* to set aside the sale. This is good law, for *B*'s payment was not officious and he had paid the money for the preservation of his security. But the judgment seems to proceed on the ground that *B* was subrogated to the charge of the purchaser *A* whose sale was set aside It is difficult to understand how *A*'s charge could continue after the sale had been set aside and the price refunded to him. The judgment refers to sec. 55 (4) (b) but that again seems to be a mistake for sec. 55 (6) (b). The principle underlying sec. 55 (6) (b) is a principle of justice, equity and good conscience and applies to the Punjab (*o*). The buyer's charge under the section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract (*p*). A buyer can enforce his statutory charge against the property and the plea of want of notice on the part of a third person would be of no avail (*q*).

All persons claiming under him.—The charge on the property is enforceable not only against the seller but against all persons claiming under him. Before the Amending Act of 1929 the words "with notice of the payment" occurred after the words "all persons claiming under him." These words have been omitted as they would have allowed a transferee without notice to escape. A gratuitous transferee or a transferee with notice would be liable under the second paragraph of sec. 40.

Improperly decline to accept delivery.—The buyer has a charge for all sums that he pays towards the purchase money and for interest thereon. This charge attaches from the moment the buyer pays any part of the purchase money and is only lost in case of his own subsequent default (*r*). If the buyer improperly refuses to accept delivery he loses his charge. But although the buyer loses his charge the seller has no right to retain any instalments of price that have been paid, unless they have been paid as deposit or earnest. In a suit against the buyer whether for specific performance or for damages the seller would have to give credit for moneys prepaid not as earnest but as instalments of price (*s*).

Earnest.—The characteristic of earnest is that it serves two purposes. It goes in part payment of the purchase money for which it is deposited but primarily it is security for the performance of the contract (*t*). In *Kunwar Chiranjit* v. *Har Swarup* (*u*) Lord Shaw said—"Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or

(*l*) *Shailendranath Palit* v. *Hede Kasa Mane* (1932) 59 Cal. 586, 36 Cal. W. N. 193, 54 Cal. L. J. 328, 137 I.C. 500, ('32) A.C. 356.

(*m*) *Tukaram* v. *Mumbaji* (1939) 183 I.C. 456, (1939) A.N. 209.

(*n*) *Sheo Dulare* v. *Jagannath* (1932) 7 Luck. 405, 136 I.C. 222, ('32) A. O. 88.

(*o*) *Shankri* v. *Milkha Singh* (1941) A.L. 407, 43 P.L.R. 656, 197 I.C. 282.

(*p*) *Chettiar Firm* v. *Chettiar* (1941) A.PC. 47.

(*q*) *Hari Bapuji* v. *Bhagu Sadhu* (1937) A.B. 142, 38 Bom. L.R. 1200, 167 I.C. 804.

(*r*) *Balvantu* v. *Bira* (1899) 23 Bom. 56, 61; *Mst. Kesar* v. *Mst. Munna* (1917) 13 Nag. L. R. 19, 39 I. C. 50; *Adari Sanyasi* v. *Nookalamma* (1931) 54 Mad. 708, 131 I. C. 487, ('31) A. M. 592.

(*s*) *Cornwall* v. *H* (1900) 2 Ch. 298, 302, 305.

In re Parnell, Ex parte Barrell (1875) 10 Ch. App. 512; *Howe* v. *Smith* (1884) 27 Ch. D. 89, 95, 98; *Soper* v. *Arnold* (1889) 14 App. Cas. 429; *Hall* v. *Burnell* (1911) 2 Ch. 551; *Krishna Chandra* v. *Khan Mamud* (1936) A.C. 51?

(*u*) (1926) 24 All. L. J. 248, 249, 94 I.C. 782, ('26) A. PC. 1.

S. 55 (6) (b)

failure of the vendee." If the contract goes off by default of the buyer the seller is entitled to retain the earnest money as forfeited (*v*). But if the seller is in default, the buyer refusing to complete is entitled to a refund of the earnest money (*w*). The fact that after a judicial investigation, the title of the vendor is ultimately found to be clear does not disentitle the vendee to claim a refund of the earnest money (*x*).

If the buyer has accepted title and the seller has rescinded the contract and forfeited the deposit by reason of the buyer's failure to pay the balance of the price, the buyer cannot afterwards recover his deposit on discovering that the title is defective (*y*). If the buyer's conduct does not amount to a repudiation, mere delay or such circumstances as would suffice to deprive him of the equitable remedy of specific performance would not justify a forfeiture of the deposit (*z*).

If it was intended to embody the terms of the contract in a written agreement, the mere payment of earnest money will not preclude the purchaser from pleading that there was no concluded contract (*a*).

Properly declines to accept delivery.—This may occur when the sale goes off by default of the seller or without default of either party.

If the seller is in default he is not entitled to forfeit the earnest (*b*). When the buyer by reason of such default properly declines to take delivery, his charge extends not only to prepaid price including earnest and interest thereon but also to the costs of suit for specific performance or for rescission. There is a similar provision in sec. 18 (d) of the Specific Relief Act, 1877. Expenses incurred in pursuance of the contract have also been allowed (*c*). An instance of a sale not being completed owing to the default of the seller is *Rose* v. *Watson* (*d*). The buyer agreed to buy a part of a large plot on the seller representing that it would be laid out in buildings. The seller failed to carry out his representation and the buyer rescinded the contract owing to the seller's default. Lord Westbury said—" The purchaser would have been willing to perform the contract if the vendor had performed those things which, in good faith, he was bound to do " and held that the purchaser's charge was not lost.

Illustrations.

(1) *A* agrees to sell property to *B*, and undertakes that a part owner *C* will join in the conveyance. But in breach of the agreement *A* and *C* convey the property to *D*. *B* sues for specific performance and *D* offers to convey *A*'s half share if *B* will pay the full price. *B* refuses this offer as he was entitled to do under sec. 15 of the Specific Relief Act. *B* has properly declined to accept delivery and has a charge for part of the price that he had prepaid: *Sultan Kani Rowthan* v. *Mahomed Meera* (1929) 56 Mad. L. J. 99, 115 I. C. 251, ('29) A. M. 189.

(2) *A* agrees to sell a house to *B* and puts *B* in possession. A sale deed is executed but is not registered. *B* sues for specific performance but his suit is dismissed. *A* sues to evict *B*. Property has not passed under the unregistered deed, and the case being

(*v*) *Bishan Chand* v. *Radha* (1897) 19 All. 489; *Natesa Aiyar* v. *Appavu* (1915) 38 Mad. 178, 19 I.C. 462 F. B.; *Veerayya* v. *Sivayya* (1914) 25 Mad. L. J. 482, 26 I.C. 121; *Kunwar Chiranjit* v. *Har Swarup* (1926) 24 All. L. J. 248, 94 I.C. 782, ('26) A. PC. 1.

(*w*) *Ibrahimbhai* v. *Fletcher* (1897) 21 Bom. 827, 853; *U Tho Nyo* v. *Chettyar* (1938) 178 I.C. 822, (1938) A.R. 367.

(*x*) *Tulsidas* v. *Pralhad* (1943) A.S. 92, (1942) Kar. 543, 208 I.C. 101.

(*y*) *Soper* v. *Arnold* (1887) 37 Ch. D. 96, 14 A.C. 429.

(*z*) *Howe* v. *Smith* (1884) 27 Ch. D. 89; *Levy* v. *Stogden* (1898) 1 Ch. 478; *Alokeshi Dassi* v. *Harachand* (1897) 24 Cal. 897; *Ibrahimbhai* v. *Fletcher*, *supra*; *Balvanta* v. *Bira* (1899) 23 Bom. 561.

(*a*) *Hyam* v. *Gubbay* (1915) 20 Cal. W.N. 66, 32 I.C. 53.

(*b*) *Ibrahimbhai* v. *Fletcher*, *supra*.

(*c*) *Karsandas* v. *Gopaldas* (1923) 25 Bom. L. R. 1144, 85 I.C. 491, ('24) A. B. 252; *Kitton* v. *Hewitt* (1904) W. N. 21.

(*d*) (1864) 10 H. L. C. 672, 679.

before the enactment of sec. 53A, the agreement is no defence to the ejectment. *B* is only entitled to a charge for price prepaid: *Lalchand* v. *Lakshman* (1904) 28 Bom. 466. **S. 55 (6) (b)**

If without default of either party the sale is not completed, the buyer does not lose his charge. An instance of such a case is *Whitbread & Co., Ltd.* v. *Watt* (e). The agreement was to purchase as soon as three hundred houses were built on the estate. The purchaser rescinded after three years as the houses had not been built. The Court held that the charge remained operative although there had been no default on the part of the vendor.

Sub-purchaser.—In case the buyer before completion resells to a sub-purchaser the latter has in English law a charge on the buyer's equitable interest (f). This statement of the law is accepted by Shephard and Brown as being applicable in India. But the judgment of Lord Cairns in the case cited proceeds on the ground that the buyer who has by virtue of his contract an equitable estate becomes on part payment owner of the property to the extent of his payment. This line of reasoning has no application under the Transfer of Property Act where no right *in rem* passes under the contract. When the case arises it will probably be held that the sub-purchase operated as an assignment *pro tanto* of the buyer's charge.

Enforcement.—The charge is enforced by suit for sale—see sec. 100. It is enforceable against all persons claiming under the seller, whether they have notice of the payment or not. See Note *supra* "All persons claiming under him."

Non-disclosure fraudulent.—The last paragraph of the section enacts that the omission of disclosure, whether by the seller under sec. 55 (1) (a) or by the buyer under sec. 55 (5) (a), is fraudulent. In the absence of this provision such non-disclosure would be a misrepresentation under sec. 18 (2) of the Contract Act and render the contract voidable. It is well settled that where a purchaser discovers defects in the property before conveyance he can either rescind the contract or successfully resist a suit for specific performance (g). But the effect of this provision is that the party who suffers by the non-disclosure has the right not only to rescind the contract but to set aside the conveyance. This is necessary as the non-disclosure may only be discovered after the conveyance.

Remedies after completion.—Remedies after completion are much more limited than those before completion because most contractual rights merge in the conveyance. Thus in the absence of an express covenant no suit will lie after completion for damages for an error of description (h), unless it is fraudulent (i), although compensation could have been claimed before conveyance. Indeed the completed conveyance can only be set aside on the grounds of fraud, coercion, undue influence or common mistake. There can, of course, be no fraud if the purchaser had actual or constructive notice of the defect (j).

Remedies after completion are (1) Rescission or (2) Rectification.

Rescission.—Rescission may be on the ground either (a) of fraud or (b) common mistake or (c) incapacity legal or equitable or (d) coercion or undue influence. The first two grounds, fraud and common mistake, follow the Common law rule that except

(e) (1902) 1 Ch. 835.

(f) *Aberaman Ironworks* v. *Wickens* (1868) 4 Ch. App. 101.

(g) *Reeve* v. *Berridge* (1888) 20 Q.B.D. 523; *Caballero* v. *Henty* (1874) 9 Ch. 447; *Eastern Mortgage, etc.* v. *Muhammad Fuzlul* (1925) 52 Cal. 914, 90 I. C. 851, ('26) A.C. 385.

(h) *Joliffe* v. *Baker* (1883) 11 Q.B.D. 255; *Abdullah Khan* v. *Abdur Rahman Beg* (1896) 18 All. 322; *Permanand Bhojraj* v. *Matumal Phatumal* (1933) 144 I.C. 871, ('33) A.S. 144.

(i) *Brownlie* v. *Campbell* (1880) 5 A.C. 937; *Eastern Mortgage, etc.* v. *Mahomed Fuzlul* (1925) 52 Cal. 914, 90 I. C. 851, ('26) A.C. 385; *Udho Das* v. *Mehr Bakhsh* (1933) 144 I.C. 340, ('33) A.L. 262.

(j) *Ramsubba* v. *Muthiah* (1925) 85 I.C. 999, ('25) A.M. 965; *Harilal* v. *Mulchand* (1928) 52 Bom. 333, 112 I. C. 27, ('28) A.B. 427.

S. 55 (6) (b)

on these grounds an executed conveyance cannot be rescinded after it has been substantially performed (*k*). Non-disclosure infringing sec. 55 (1) (a) or sec. 55 (5) (a) is declared to be fraud and would therefore give a right to set aside the conveyance and to a refund of the purchase money. The undernoted Bombay case (*l*) is an instance of a deed set aside for fraud, while *Bingham* v. *Bingham* (*m*) is an instance of a common mistake where the buyer purchased land which both parties thought belonged to the seller but which really belonged to the buyer himself.

A seller is under a legal incapacity to sell if he is a minor or a lunatic and a suit would lie to set aside the sale. A fiduciary relationship between the parties may also render the contract voidable after completion (*n*).

Rectification.—When the sale deed either on account of fraud or of common mistake does not truly express the intention of the parties the Court will rectify it in conformity with the contract (*o*).

Enforcement of obligation not merged in the conveyance.—The buyer may under sec. 55 (1) (f) sue to recover possession (*p*); or under sec. 55 (3) for the delivery of title deeds (*q*); or under sec. 55 (2) for compensation for breach of the covenant for title (*r*); or under sec. 55 (1) (e) for compensation for breach of the duty to take care of the property (*s*); or under sec. 55 (1) (g) for an indemnity against incumbrances discharged in case of sale of land free from incumbrances (*t*); or under sec. 55 (6) (b) to enforce his charge for price prepaid (*u*).

On the other hand the seller may sue under sec. 55 (4) (b) to enforce his lien for unpaid purchase money (*v*); or for an indemnity against incumbrances in case of a sale of land subject to incumbrances (*w*).

There would also be a right of suit for compensation for breach of express covenants such as for quiet enjoyment (*x*), or for compensation for errors of description where the contract provides for such compensation (*y*), or for breach of collateral warranty (*z*).

Remedies before completion.—Remedies before completion depend upon the law of contract and of specific performance. The contract may be rescinded not only for fraud, common mistake (*a*) or the disability of the party, but also for misrepresentation when there is no intention to deceive or to state a falsehood (*b*). The right to repudiate a contract for defect of title must be exercised immediately the defect is discovered. If after ascertaining the defect the purchaser treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he chooses, but must give the vendor a reasonable time to remedy the defect (*c*). On the breach of any essential term of the contract the other party may rescind and sue for damages (*d*), and in that

(*k*) *Seddon* v. *North Eastern Salt Co.* (1905) 1 Ch. 326.

(*l*) *Sadashiv* v. *Dhakubai* (1881) 5 Bom. 451, 459, following *Clark* v. *Malpas* (1862) 4 DeG. F. & J. 401; *Sheo Ram Mahton* v. *Thakur Mahton* (1920) 58 I.C. 529.

(1748) 1 Ves. Sen. 126.

Ss. 62 & 88, Trusts Act.

Dagdu v. *Bhana* (1904) 28 Bom. 420; *Natha* v. *Hamid Ali* (1926) 93 I.C. 7, ('26) A.O. 344.

(*p*) *Sundara* v. *Sivalingam* (1924) 47 Mad. 150, 77 I.C. 542, ('24) A.M. 360; *Krishnamma* v. *Maki* (1920) 43 Mad. 712, 56 I.C. 530.

(*q*) *In re Williams and Newcastle's (Duchess) Contract* (1897) 2 Ch. 144; *Shri Bhavani* v. *Devrao* (1887) 11 Bom. 485.

(*r*) *Basaraddi Sheikh* v. *Enajaddi* (1898) 25 Cal. 298; *Harilal* v. *Mulchand* (1928) 52 Bom. 882, 113 I.C. 27, ('28) A.B. 47.

(*s*) *Clarke* v. *Ramuz* (1891) 2 Q.B. 456 C.A.

(*t*) *Nathu Khan* v. *Burtonath* (1922) 24 Bom. L.R. 571, 26 Cal. W.N. 514, 66 I.C. 107, ('22) A.PC. 176; *Manishanker* v. *Ramkrishna* (1904) 6 Bom. L.R. 832.

(*u*) *Ibrahimbhai* v. *Fletcher* (1897) 21 Bom. 827; *Balvanta* v. *Bira* (1899) 23 Bom. 56; *Sultan Kani* v. *Mahomed* (1929) 56 Mad. L.J. 99, 115 I.C. 251, ('29) A.M. 189.

(*v*) *Webb* v. *Macpherson* (1904) 31 Cal. 57, 30 I.A. 238.

(*w*) *Izzat-un-nissa Begam* v. *Kunwar Pertab Singh* (1909) 31 All. 583, 36 I.A. 203, 3 I.C. 793.

(*x*) *Nottidge* v. *Derring* (1909) 2 Ch. 647; *Raghava Iyengar* v. *Samachariar* (1914) Mad. W.N. 57, 22 I.C. 42.

(*y*) *Palmer* v. *Johnson* (1883) 12 Q.B.D. 32.

(*z*) *Vishvanath* v. *Bala* (1916) 18 Bom. L. R. 292, 34 I.C. 147.

(*a*) *Meghji* v. *Tyeballi* (1924) 26 Bom. L.R. 1019, 90 I.C. 189, ('25) A.B. 64.

(*b*) S. 18, Contract Act.

(*c*) *Bai Dosibai* v. *Bai Dhanbai* (1925) 49 Bom. 325, 85 I.C. 597, ('25) A.B. 85; *Halkett* v. *Dudley (Earl)* (1907) 1 Ch. 590, 596.

(*d*) Ss. 39 & 75, Contract Act.

case must restore any benefit that he has received (e). If the buyer has gone into possession he is accountable for the rents and profits that he has received. If the seller has received the price he must return it. If the seller rightfully rescinds, he is entitled to forfeit the deposit or earnest. He is under no obligation to return the deposit because it is not a benefit he has received under the contract but a collateral security (f). But if he recovers damages as well, he must give credit for the deposit against the damages (g). S. 55 (6) (b)

If the aggrieved party does not elect to rescind he may still sue for damages for the breach. The best remedy is, however, a suit for specific performance of the contract. A vendor in such a suit may compel the purchaser to take the property in spite of trivial defects and to receive compensation for the deficiency (h). This relief is discretionary and the Court has regard not only to the legal rights of the parties but to their conduct and the circumstances of the case. Specific performance will be refused under sec. 22 of the Specific Relief Act on the ground of unfair advantage or of hardship.

Damages.—Damages are claimable under the law as enacted in sec. 73 of the Indian Contract Act. This would be the difference in the market value at the time of the contract and at the time of the breach. The rule is the same in English law except where the default of the vendor is due to a defect in his title. In this case damages are limited to the expenses the buyer has incurred (i). This exception does not apply where the default of the seller is wilful (j), and it has no application to a breach of covenant for title in a conveyance (k). The English law was once assumed to be the law in India (l), but it is now settled that the law in India is different and that there is the same measure of damages in the case of goods as in the case of land and that both are governed by sec. 73 of the Indian Contract Act (m). For a further exposition of the law on this subject the reader is referred to Pollock and Mulla's Indian Contract Act, 6th Ed., pp. 425-427. Damages for eviction in breach of an express covenant for quiet enjoyment is the value of the land calculated at the date of the breach (n), and if the land has increased in value the purchaser will be entitled to recover the higher value (o).

In the absence of a contract to the contrary.—The implied conditions enumerated in this section are supplemented or varied in actual practice by numerous particular conditions. Such conditions are strictly construed in favour of the party whose rights are restricted. In *Seaton* v. *Mapp* (p) Vice-Chancellor Knight Bruce stated the principle of construction as follows :—" I think, and have always thought that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words,

(e) S. 64, Contract Act.

(f) *Natesa Aiyar* v. *Appavu* (1913) 38 Mad. 178, 19 I.C. 462 F.B.

(g) *Vellore Taluk Board* v. *Gopalaswami* (1913) 38 Mad. 801, 26 I.C. 226 F.B.; *Natesa Aiyar* v. *Appavu*, *supra*; *Ockenden* v. *Henly* (1858) E.B. & E. 485; *Shuttleworth* v. *Clews* (1910) 1 Ch. 176.

(h) *Hussonally* v. *Tribhowandas* (1921) 25 Cal. W.N. 385, 61 I.C. 361, ('21) A. PC. 40.

(i) *Flureau* v. *Thornhill* (1776) 2 Wm. Bl. 1078; *Bain* v. *Fothergill* (1874) L. R. 7 H. L. 158.

(j) *Engell* v. *Fitch* (1869) L.R. 4 Q.B. 659 Ex. Ch.; *Jaques* v. *Millar* (1877) 6 Ch. D. 153; *Royal Bristol Permanent Building Society* v. *Bomash* (1887) 35 Ch. D. 390; *Day* v. *Singleton* (1899) 2 Ch. D. 320 C.A.

(k) *Lock* v. *Furze* (1866) L.R. 1 C.P. 441.

(l) *Pitamber* v. *Cassibai* (1886) 11 Bom. 272.

(m) *Nagardas* v. *Ahmedkhan* (1896) 21 Bom. 175, 185; *Ranchhod* v. *M*[illegible] (1907) 32 Bom. 165; *Nabinchandra* v. *Krishna* (1911) 38 Cal. 458, 465, 9 I.C. 525; *Bapu* v. *Kashiram* (1929) 31 Bom. L. R. 658, 119 I.C. 659, ('29) A.B. 361; *Jai Kishen Das* v. *Arya Priti* (1920) 1 Lah. 380, 58 I.C. 757; *Adikesavan* v. *Gurunatha* (1917) 40 Mad. 338, 39 I.C. 358; *Parmanand* v. *Ghulam Hussain* (1929) 116 I.C. 449, ('29) A.L. 416.

(n) *Nagardas* v. *Ahmedkhan*, *supra*.

(o) *Dhanrajgirji* v. *Tata Sons Ltd.* (1924) 49 Bom. 1, 92 I.C. 225, ('24) A.B. 478; *Dhadha Sahib* v. *Muhammad Sultan* (1921) 44 Mad. 167, 59 I.C. 311, ('21) A.M. 384; *Ramayya* v. *Kotayya* (1930) 127 I.C. 617, ('30) A.M. 748.

(p) (1846) 2 Coll. 556, 562, cited with approval and followed by Sargent, C.J., in *Moti*[illegible] *Vinayak* (1[illegible] Bom. 1, 17 and in *Mahomed Ali* [illegible] v. *Venkatapathi* (1920) 39 Mad. L.J. 449, 60 I.C. 235. See also *Wadell* v. *Wolfe* (1874) L.R. 9 Q.B. 515.

S. 55 (1) (b)

the purchaser may generally construe them in the manner most advantageous to himself." This rule applies especially to conditions restricting investigation of title.

Conveyancing in India is in a rudimentary condition. Even in the Presidency-towns like Bombay and Calcutta (where the conveyancing practice which obtained in England at Common law is generally followed), an abstract of title is very rarely delivered. The seller's solicitor sends the buyer's solicitor a bundle of deeds on his requisitions. But the investigation of title is a difficult matter. There is no standard period for the root of title. Title deeds are more often lost in India. This is because the seller does not keep them in safe custody with his solicitor or banker. Again the prevalence of benami transactions, the joint and undivided Hindu family system, and the tenancy in common of Mahomedan heirs, are all matters which complicate the investigation of title. It is therefore not unusual to supplement the sale deed by a declaration that uninterrupted possession has been held for upwards of 12 years, or that the property is self acquired. Further, publicity is given to the transaction by the beating of a battaki or by advertisement in a local newspaper giving notice of the contract of sale and inviting claims if any.

The particular conditions restricting investigation of title which are common in England are therefore rare in India. However, solicitors especially in Presidency-towns in India follow English conveyancing precedents, and it is therefore useful to enumerate not only the particular conditions which occur in Indian contracts for sale, but also those which have been the subject of judicial construction in England.

(1) *Restricting requisitions.*—The conditions in contracts for sale frequently impose restrictions on the buyer's right to make requisitions as to title. These generally fall into the following classes:—

(a) Requiring requisitions to be made in a specified time.

(b) Restricting the period for which title is to be shown.

(c) Requiring the existence of a fact to be assumed.

(d) Requiring the buyer to accept title as it is.

(*a*) *Requiring requisitions to be made in a specified time.*—Conditions of sale may stipulate that requisitions shall be made in a specified time of the delivery of the abstract of title or otherwise the buyer shall be deemed to have accepted title. This is construed as meaning a time from the delivery of a perfect abstract, *i.e.*, an abstract as perfect as the seller can make it (*q*), and an abstract which shows all the documents and gives all the facts upon which the vendor's title is based (*r*). If the contract provides that time is to be of the essence of the contract, it operates as a waiver if a requisition is not made in time. But the condition does not apply if the seller has no title at all (*s*), and it cannot be used to thrust upon a purchaser a property to which there is no title (*t*).

(*b*) *Restricting the period.*—In England it used to be necessary to show title commencing with a good root of title at least 60 years old. In 1874 this was reduced to 40 years by the Vendor and Purchaser Act (37 & 38 Vict., c. 78) and the period has been further reduced to 30 years by sec. 44 of the Law of Property Act, 1925. There is no such statutory period in India. Apart from the statutory limit the period for which title has to be shown may be fixed by the contract. The condition may require that a particular deed be taken as the root of title, and in that case requisitions cannot be made with regard to a time before that deed.

(*q*) *Blackburn* v. *Smith* (1848) 2 Exch. 785.

(*r*) *Nilmani Addy* v. *Dinendranath Das* (1930) 57 Cal. 1115, 126 I.C. 775, ('30) A.C. 428; *Hobson* v. *Bell* (1839) 2 Beav. 17; *Blacklow* v. *Laws* (1842) 2 Hare 40; *Pryce-Jones* v. *Williams* (1902) 2 Ch. 517.

(*s*) *Want* v. *Stallibrass* (1873) L.R. 8 Exch. 175.

(*t*) *Nilmani Addy* v. *Dinendranath Das*, *supra*.

S. 55 (6)(b)

With reference to the statutory period it is enacted (*u*) that no requisition can be made with reference to documents before the period; and that all recitals in abstracted deeds with reference to documents before the period, as also the due execution of such documents, must be accepted as correct.

But both with reference to the statutory period and the period (if any) fixed by contract it is well settled that such limitation does not affect the main rule that the seller should show a good title, but only the subordinate rule that title for the period fixed by contract or by statute shall be *prima facie* evidence of a good title; in other words, the purchaser may object that the title shown for the period is defective.

Thus in *Phillips* v. *Caldcleugh* (*v*) the condition required that a conveyance of the 17th April 1860 should be the root of title and that no requisition as to title should be made before that deed. The deed, however, was a conveyance subject to covenants and conditions contained in an indenture of the 2nd March 1850. The buyer's requisition that the seller should show that these covenants and conditions did not affect the property was upheld because the condition did not relieve the seller of his main obligation to show a good title free from incumbrances. In other words the conditions ceased to be operative as soon as the deed of the 17th April 1860 proved not to be a good root of title. A similar case is that of *In re Marsh and Granville (Earl)* (*w*) where the conveyance which was agreed to be the root of title proved not to be a good root of title because it was voluntary.

A condition restricting the period of investigation does not prevent the buyer from making inquiries *aliunde*, and if he discovers a defect he is entitled to call for evidence to cure the defect (*x*), so also if the seller himself allows inspection of a prior title deed which enables the buyer to discover the defect (*y*).

On the other hand the seller may by appropriate stipulation exclude even independent investigation of title. The leading case on this point is *Hume* v. *Bentley* (*z*) where leaseholds were sold on condition that "the lessor's title will not be shown and shall not be inquired into." The buyer discovered facts, which he contended showed that the lessor, a Canal company, had under its incorporating statute no power to grant the lease, but his objection was disallowed. A similar case is *Re National Provincial Bank of England and Marsh* (*a*), where the condition was that the root of title should be a conveyance of 1869 and that "the prior title shall not be required, investigated or objected to." The buyer discovered *aliunde* facts which showed that it was doubtful whether a former grantor had a fee simple or merely a life estate, but he was not allowed to rescind. In such cases the buyer cannot rescind as there has been no fraud or misrepresentation by the seller, but the seller would probably not be able to enforce specific performance if the title were shown to be bad, as the Court would exercise in favour of the buyer the discretion that it has under sec. 22 of the Specific Relief Act. Specific performance was enforced in *Hume* v. *Bentley* (*b*), as the Court refused to decide the question whether the lease was valid, and the buyer apparently got what is called a good holding title, *i.e.*, a title not likely to be challenged; but in *Re National Provincial Bank of England and Marsh* (*c*) North, J., said that he was not deciding that the purchaser was bound to accept the vendor's title, if it should turn out to be a bad one.

(*u*) S. 45, Law of Property Act, 1925.

(*v*) (1868) L.R. 4 Q.B. 159.

(*w*) (1883) 24 Ch. D. 11.

(*x*) *Nottingham Brick and Tile Co.* v. *Butler* (1886) 16 Q.B.D. 778; *Sellick* v. *Trevor* (1843) 11 M. & W. 722; *Darlington* v. *Hamilton* (1854) Kay 550; *Mancharji* v. *Narayan* (1870) 1 Bom. H.C. 77.

(*y*) *Smith* v. *Robinson* (1879) 13 Ch. D. 148; and see *Waddell* v. *Wolfe* (1873) L.R. 9 Q.B. 515.

(*z*) (1852) 5 DeG. & Sm. 520.

(*a*) (1895) 1 Ch. 190.

(*b*) (1852) 5 DeG. & Sm. 520.

(*c*) (1895) 1 Ch. 190.

S. 55 (6)(b)

(c) *Requiring the existence of a fact to be assumed.*—Such a condition will be enforced if the seller himself believes the statement of fact to be correct (*d*). But if the seller knows it to be false, the condition gives the seller an unfair advantage over the buyer and the contract will not be enforced in a suit for specific performance. Thus in *In re Banister, Brod* v. *Munton* (*e*) the condition stated that it was not accurately known how a predecessor in title acquired the property and required the buyer to assume that he was seized in fee-simple free from incumbrances. The seller, however, who was a solicitor, knew accurately, how the predecessor had acquired the property and that she was not seized in fee-simple. Jessel, M.R., said that the utmost that can be asked of a purchaser is that he shall assume something of which the seller knows nothing, and refused specific performance.

(*d*) *Requiring the buyer to accept title as it is.*—If the seller stipulates that the buyer shall accept the title as it is, the buyer has notice that the title is questionable and if he chooses to buy he will be held to his bargain (*f*). But this condition does not relieve the seller of the obligation under sec. 55 (1) (a) of disclosure (*g*) or of giving as good a title as he can, *i.e.*, by paying off a mortgage (*h*). Nor will the condition be enforceable if he has no title at all (*i*) and *a fortiori* if he knows that he has no title (*j*).

Illustrations.

A, a mortgagee, acting under a power of sale, agreed to sell the property mortgaged and *B* agreed to purchase it. *B* then discovered that *A* had no title because his mortgagor had stolen the title deeds and the real owner was in possession. The sale contained a condition that "the purchaser shall take the premises sold with such title only as the vendor can give him." *A* was nevertheless not entitled to require *B* to complete his purchase; for the condition necessarily implied that *A* had some title however defective it might be: *Motivahoo* v. *Vinayak* (1888) 12 Bom. 1.

When a mortgagee assigned the debt and his interest with a condition that he was not liable for any defect in the claim transferred, and the mortgage proved to be invalid as it was attested by only one witness, the assignment was nevertheless held to be valid because it included a personal claim (*k*).

(2) *Title to the satisfaction of the buyer's solicitors.*—The contract sometimes provides that the seller should show a title satisfactory to the buyer's solicitors. The seller must then show either that the solicitor did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it (*l*). The reasonable meaning of this condition is not to make the possibly arbitrary opinion of a certain or uncertain solicitor final, but to claim the purchaser's right of investigating title with professional assistance and of refusing to complete if the title proved to be bad (*m*). This is a usual condition in contracts of sale in Bombay.

(3) *Deposit.*—The seller invariably insists on a provision for the payment of a deposit. This is advantageous to him as the deposit is not only part payment but security for performance and may be forfeited if the sale goes off owing to the buyer's default (*n*).

(*d*) *Re Sandbach & Edmonsons Contract* (1891) 1 Ch. 99; *Blaiberg* v. *Reeves* (1906) 2 Ch. 175.
(*e*) (1879) 12 Ch. D. 131.
(*f*) *Freme* v. *Wright* (1819) 4 Madd. 364; *Tweed* v. *Mills* (1865) L.R. 1 C.P. 39; *Motivahoo* v. *Vinayak* (1888) 12 Bom. 1; *Hiranand* v. *Mahia* (1876) P.R. 90; *Indra Narain* v. *Badan Chandra Das* (1918) 47 I.C. 340.
(*g*) *Hume* v. *Pocock* (1866) 1 Ch. App. 379.
(*h*) *Goold* v. *Birmingham Banking Co.* (1888) 4 T.L.R. 413.
(*i*) *Motivahoo* v. *Vinayak* (1888) 12 Bom. 1, 3.
(*j*) S. 25 (a) of the Specific Relief Act, 1877.
(*k*) *Sada Kavaur* v. *Tadepally* (1907) 30 Mad. 284.
(*l*) *Treacher & Co.* v. *Mahomedally* (1911) 35 Bom. 110, 7 I.C. 669; *Abro* v. *Promotho* (1914) 18 Cal. W.N. 538, 24 I.C. 452.
(*m*) *Hussey* v. *Horne-Payne* (1879) 3 App. Cas. 311, 322.
(*n*) *Howe* v. *Smith* (1884) 27 Ch. 89; *Kunwar Chiranjit* v. *Har Swarup* (1926) 24 All. L.J. 248, 94 I.C. 782, '26) APC. 1; *Natesa Aiyer* v. *Appavu* (1915) 38 Mad. 178, 19 I.C. 462 F. B.; *Veerayya* v. *Sivayya* (1914) 27 Mad. L.J. 482, 26 I.C. 121.

But the buyer should pay it to the seller's solicitor as stakeholder, for if he pays it to the solicitor as the agent of the seller, and the seller becomes insolvent he will be unable to recover it from the solicitor (*o*). There is sometimes an express provision for forfeiture of deposit on the buyer's default, with liberty to the seller to resell and recover the deficiency and the costs of resale from the original buyer. **S. 55 (6)(b)**

(4) *Vendor's right of rescission.*—This provision is that on the buyer making, or the buyer insisting upon any requisition with which the seller is unwilling or unable to comply, the seller may rescind the contract returning the deposit without interest and without costs of investigating title. This right must be exercised reasonably and in good faith (*p*). Thus the vendor may rescind if the purchaser insists on an objection as to an undisclosed right of way (*q*). The seller cannot exercise it if he has been guilty of misrepresentation (*r*), or if he has no title (*s*). The condition does not empower the seller to override reasonable requisitions (*t*).

(5) *Purchaser's right of rescission.*—It is also a common condition that the buyer may rescind if any notice affecting the property is received from the Municipality, or if the property or any part of it is notified for acquisition under the Land Acquisition Act.

(6) *Identity of the property.*—It is usually stipulated that no other evidence of the identity of the property should be required than that afforded by a comparison of the description in the contract with that in the documents. But this condition is not effective if such comparison affords no evidence of identity (*u*); or if the description in the document is discrepant (*v*).

(7) *Compensation for errors of description.*—It is usually provided that errors of description will not annul the sale, and either that compensation should be allowed, or that compensation should not be allowed. If the condition is that compensation should not be allowed it will probably exclude the purchaser's right to enforce specific performance with compensation. But such a condition will not enable a seller to force upon a buyer a substantially different property (*w*).

If the condition allows compensation, English cases (*x*) apply the rule in *Flight* v. *Booth* (*y*) that the condition will cover even a considerable discrepancy if the property is substantially the same. This would probably be followed in India, for the terms of the condition would be regarded rather than the somewhat restrictive provision of sec. 14 of the Specific Relief Act. Under this condition compensation may be claimed even after completion (*z*).

Whether the condition includes or excludes compensation, it applies of course only to innocent errors and not to cases of intentional misrepresentation (*a*).

If the condition applies to any error, mis-statement or omission discovered in the particulars of sale, it refers to matters of title as well as the subject matter of the contract (*b*). If it refers to the description of the property it does not extend to defects of title (*c*).

(*o*) *Ellis* v. *Goulton* (1893) 1 Q. B. 350.

(*p*) *Re Dames and Wood's Contract* (1885) 29 Ch. D. 625.

(*q*) *Ashburner* v. *Sewell* (1891) 3 Ch. 405, 410.

(*r*) *Re Jackson's and Haden's Contract* (1906) 1 Ch. 412.

(*s*) *Re Deighton's and Harris's Contract* (1898) 1 Ch. 458.

(*t*) *Lakhmidas & Co.* v. *D. J. Tata* (1927) 29 Bom. L.R. 19, 101 I.C. 229, ('27) A.B. 195; *Quinion* v. *Horne* (1906) 1 Ch. 596.

(*u*) *Curling* v. *Austin* (1862) 2 Drew & Sm. 129.

(*v*) *Flower* v. *Hartopp* (1843) 6 Beav. 475.

(*w*) *Whittemore* v. *Whittemore* (1869) L. R. 8 Eq. 603; *In re Terry and White's Contract* (1886) 32 Ch. D. 14; *Jacobs* v. *Revell* (1900) 2 Ch. 858.

(*x*) *E. g., In re Fawcett & Holmes Contract* (1889) 42 Ch. D. 150.

(*y*) (1834) 1 Bing. (N.C.) 370.

(*z*) *Palmer* v. *Johnson* (1884) 12 Q.B.D. 32.

(*a*) *Clermont (Viscount)* v. *Tasburgh* (1819) 1 Jac. & W. 112.

(*b*) *In re Fawcett & Holmes Contract, supra.*

(*c*) *Re Beyfus and Masters Contract* (1888) 39 Ch. D. 110.

S. 55

(8) *Time for completion.*—A time for completion is usually fixed, but where no time is fixed the Privy Council have adopted the English rule that time is not of the essence of the contract unless it can be so inferred from the circumstances of the case (*d*). If there has been an unreasonable delay either party can make time of the essence by giving notice to complete in a reasonable time (*e*). See Indian Contract Act, 1872, sec. 55. The stipulation as to time for making requisitions, referred to in condition (1) above, is a useful means of expediting completion.

(9) *Interest on unpaid price.*—It is usual to provide that the buyer shall pay interest from the date fixed for completion on the balance of the price. This may either be absolute, or conditional on non-completion due to wilful default of the purchaser, or any cause other than wilful default of the seller.

If it is absolute, *i.e.*, where the delay occurs "for any cause whatever," these words will not allow a vendor to take advantage of his own wrong (*f*). But if the seller has not been guilty of misconduct, lapse of time occasioned by a defect in the seller's title not known to him at the time of the contract, and which he has taken steps to remove will not relieve the purchaser of his liability for interest under the condition (*g*).

Illustration.

A contracted to sell half an estate to *B*, the purchase to be completed on the 24th June 1854 and if "for any cause whatever" the purchase should not be completed on that day *B* was to pay interest. The other part owner claimed the whole estate and refused to part with the deeds. *A* sued for partition and a decree was made in July 1862. *B* had not elected to rescind and in spite of the delay of 8 years he was liable to pay interest because there had been no misconduct by *A* : *Williams* v. *Glenton* (1866) L.R. 1 Ch. 200.

Wilful default.—What is wilful default is a question of fact. Wilful default implies that the default is intentional (*h*), *i.e.*, that the party knows that what he is doing or omitting is something which it was wrong for him to do or omit (*i*). Wilful default implies that the party was a free agent and that what he has done arises from the spontaneous operation of his will; while default means nothing more and nothing less than not doing what is reasonable in the circumstances (*j*).

If both parties are in the wrong it is not a case of cause other than wilful default of the seller so as to exempt the purchaser from liability for interest (*k*).

(10) *Cost of conveyance.*—The conditions of sale generally throw the cost of conveyance as much as possible on the buyer. But a condition that each party should pay half and half including the Stamp and Registration charges is not unusual in India. The seller is liable for the cost not only of perusing and executing the draft tendered by the buyer but also of execution by any other necessary party and of getting in an outstanding legal estate and completing the title; but the latter expenses are sometimes thrown on the buyer (*l*). In an open contract the seller must bear the expense of procuring and making an abstract of any deed forming part of the title although such deed be not in his possession (*m*).

(*d*) *Jamsed* v. *Burjorji* (1916) 40 Bom. 289, 43 I.A. 26, 32 I.C. 246 P.C.; *Mahadeo* v. *Narain* (1920) 24 Cal. W. N. 330, 57 I.C. 121; *Suryanarayanamurthi* v. *Satyanarayanamurthi* (1925) 48 Mad. L.J. 150, 85 I.C. 521, ('25) A.M. 211.

(*e*) *King* v. *Wilson* (1843) 6 Beav. 124; *Compton* v. *Bagley* (1892) 1 Ch. 313; *Stickney* v. *Keeble* (1915) A.C. 386.

(*f*) *Williams* v. *Glenton* (1866) L.R. 1 Ch. 200; *In re Woods and Lewis, Contract* (1898) 2 Ch. 211; *Subhadrabai* v. *Mahomedbhai* (1923) 25 Bom. L.R. 931, 77 I.C. 247, ('24) A.B. 187.

(*g*) *Williams* v. *Glenton* (1866) L.R. 1 Ch. 200; *Subhadrabai* v. *Mahomedbhai*, *supra*.

(*h*) *In re Young and Harstons Contract* (1885) 31 Ch. D. 168.

(*i*) *In re City Equitable Fire Insurance Co.* (1925) Ch. 407, 435-438.

(*j*) *In re Young and Harstons Contract*, *supra*, per Bowen, L.J.

(*k*) *Re Mayor of London and Tubb's Contract* (1894) 2 Ch. 524; *Subhadrabai* v. *Mahomedbhai*, *supra*.

(*l*) In England the expense of getting in an outstanding legal estate must now be borne by the seller. See Law of Property Act, 1925, s. 42 (3).

(*m*) *In re Johnson and Tustin* (1885) 30 Ch. D. 42.

(11) *Property sold free from incumbrance.*—The direction given in the sale deed that the amount retained by the vendee was to be paid to a simple money creditor and a covenant on the part of the vendor to pay off an outstanding mortgage and giving liberty to the vendee to pay the same in case the vendor failed to pay was not a contract to the contrary and the vendee was not precluded from retaining the sum reserved for payment to the simple creditor (*n*).

(12) *Insurance.*—The condition as to insurance provides that on payment of a proportionate part of the premium, and subject to the consent of the insurance office the benefit of the policy shall be assigned to the buyer from the date of completion.

Marshalling by subsequent purchaser.

56. *If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.*

Amendment.—This section has been substituted by the Amending Act of 1929 for the original section which was as follows :—

> "Where *two* properties are subject to a common *charge*, and one of the properties is sold, the buyer is, *as against the seller*, in the absence of a contract to the contrary, entitled to have the *charge* satisfied out of the other property, so far as such property will extend."

The scope of the section has been widened so that it now provides for cases where there are more than two properties. The section uses the word "mortgages" instead of the word "charge." This is because in the amended Act the word charge is used in the sense defined in sec. 100 and does not include a mortgage. The words "as against the seller" have been dropped to show that the right can be enforced against the mortgagee. The section may apply to charges (*o*).

Marshalling by purchaser.—This section deals with the right of a subsequent purchaser to claim marshalling. It should be contrasted with sec. 81 which refers to marshalling by a subsequent mortgagee. Marshalling is the converse of contribution, for while marshalling requires that a mortgagee who has the means of satisfying his debt out of several properties shall exercise his right so as not to prejudice the purchaser of one of them ; contribution requires that if several properties are liable to a mortgage and the mortgagee has been paid out of one, the others shall not escape. Marshalling arises under this section where property has been sold free from incumbrances, while contribution is applicable where the property has been sold subject to the mortgage (*p*).

Illustrations.

(1) Properties X, Y and Z are subject to a mortgage. The mortgagor sells X to *A* free from incumbrances. Marshalling enables *A* to require that the mortgagee shall satisfy his mortgage as far as possible out of properties Y and Z.

(*n*) *Janki Ambalavani* (1942) A.M. 553.

(*o*) *Mohamed Yunus Khan* v. *Court of Wards, Balrampur Estate* (1937) 167 I.C. 962, (1937) A.O. 307. But see *Nilkanthrao Laxmanrao* v. *Satyabhamabai* (1944) A.N. 25.

(*p*) *Rama Shankar* v. *Ghulam Husain* (1921) 43 All. 580, 63 I.C. 209, ('21) A.A. 323.

S. 56

(2) Properties X, Y and Z are subject to a mortgage. The mortgagor sells the equity of redemption of X to *A*, of Y to *B*, and of Z to *C*. If the mortgagee satisfy his mortgage out of X, then *A* may require *B* and *C* to contribute *pro rata* to the discharge of the mortgage debt.

The rule of marshalling is expressed by Dart as follows :—

> "If two estates X and Y are subject to a common charge and estate X be sold to *A*, *A* will as against his vendor and his representatives have a *prima facie* equity in the absence of express agreement and whether or not he had notice of the charge, to throw it primarily on estate Y in exoneration of estate X."

In *Aldrich* v. *Cooper* (*q*) Lord Eldon stated the equitable principle to be that,

> "a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that, which can be affected by him only; to the intent that the only fund, to which the other has access, may remain clear to him."

Omission of the words "as against the seller."—The rule as stated in Dart and as enacted in this section before the amendment conferred a right only as against the seller. Accordingly, as the mortgagee had a right to proceed against whatever property he chose and could not be compelled to split his security, the right could not be enforced against the mortgagee (*r*). *Tara Prasanna* v. *Nilmoni* (*s*) was an exception to this rule but in the case the mortgagee had foreclosed and was treated as representing the seller. The section was therefore practically a dead letter, for the purchaser had a remedy against the seller under sec. 55 (1) (g). The Court in execution in the exercise of the discretion under O. 34, r 5, of the Code of Civil Procedure adjusted the equities by requiring the mortgagee to proceed first against the unsold property (*t*). But under the amended section the purchaser can insist upon this as of right.

Independent of notice.—The right given to the purchaser by this section is independent of notice. Section 81 has been amended to make it clear that the right to have securities marshalled is independent of notice. This is in accord with the principle that it should not depend upon the will of one creditor to disappoint another. In some cases not falling under the Act it was suggested that the purchaser is not entitled to call for marshalling unless he is a bona fide purchaser for value without notice (*u*). But no such distinction has actually been made, for the rule as to notice as it stood in sec. 81 before its amendment was held not to apply to mortgages before the Act (*v*), and this was followed by Farran, C.J., in the case of a purchaser (*w*).

Marshalling between purchaser and purchaser.—If the mortgagee in the illustration given by Dart realized his mortgage by sale of X, then the buyer *A* will be entitled to a charge on Y for the value of X. Thus if Y is worth Rs. 2,000, and X is worth Rs. 1,000, and the mortgagee realizes his security by the sale of X, *A* will have a charge on Y for Rs. 1,000. In case both properties are sold the buyer of the first has no charge against the buyer of the second. Dart states that if after X is sold to *A*, the owner sells Y to *B* who has notice of the prior sale to X, and of *A*'s charge then the charge will be enforceable

(*q*) (1803) 8 Ves. 382, 395; *Barnes* v. *Rachester* (1842) 1 Y. & C. Ch. Cas. 401; *Flint* v. *Howard* (1893) 2 Ch. 54.

(*r*) *Narayansami* v. *Vellaya* (1924) 47 Mad. 688, 83 I. C. 852, ('24) A. M. 366; *Lala Dilawar* v. *Dewan Bolakiram* (1885) 11 Cal. 258; *Bhikari Das* v. *Dalip Singh* (1895) 17 All. 434; *Appayya* v. *Rangayya* (1908) 31 Mad. 419 F. B., explaining *Krishna Ayyar* v. *Muthukumarasawmiya* (1906) 29 Mad. 217; *Subraya* v. *Ganpa* (1911) 35 Bom. 395, 11 I.C. 989; cf. *Manks* v. *Whiteley* (1911) 2 Ch. 448.

(*s*) (1914) 41 Cal. 418, 25 I.C. 118.

(*t*) *Appayya* v. *Rangayya*, *supra*; *Subraya* v. *Ganpa*, *supra*; *Rajkeshwar Prasad* v. *Mahommad* (1924) 3 Pat. 522, 78 I.C. 796, ('24) A.P. 459; *Ram Dhun Dhur* v. *Mohesh Chunder* (1883) 9 Cal. 406; *Raghavachariar* v. *Krishna* (1924) 46 Mad. L. J. 32, 83 I. C. 918, ('24) A. M. 509.

(*u*) *Rodh Mal* v. *Ram Harakh* (1885) 7 All. 711 citing *Toolsi Ram* v. *Munno Lall* (1864) 1 W.R. C. R. 353; *Bishonath Mookerjee* v. *Kisto* (1867) 7 W. R. 483.

(*v*) *Chunilal* v. *Fulchand* (1894) 18 Bom. 160.

(*w*) *Lakhmidas* v. *Jamnadas* (1898) 22 Bom. 304 F.B.

against *B* (*x*). The correctness of this proposition is doubtful and the Courts in India do not apply the rule of marshalling between purchaser and purchaser, and require both purchasers to contribute rateably to the satisfaction of the original charge (*y*).

It is obvious that a purchaser of an equity of redemption cannot claim the right to marshal because he has purchased subject to the mortgage. But supposing of two properties X and Y which are subject to a mortgage, X is sold to *A* free from the mortgage and then Y is sold to *B* subject to the mortgage, X would be entitled to marshal and to require the mortgage to be realized out of Y. Such a case occurred in Patna (*z*). Of the two mortgagedproperteis X was sold to *A* free from incumbrances, and then Y was sold to *B*, and money to discharge the mortgage was left by the seller with *B*. But *B* failed to pay off the mortgage and the Court held that *B* was not entitled to contribution, but that *A* was entitled to marshal against *B*.

Lessee.—A lessee is not entitled to the right of marshalling under this section (*a*).

Contract to the contrary.—The charge on the unsold property may be excluded by contract to the contrary. Thus if X and Y are subject to a mortgage and the mortgagor sells X to *A* and deposits with *A* a sum of money to discharge the mortgage and agrees that if the sum is not sufficient he will pay the excess with interest, that is, a contract to the contrary, which excludes *A*'s charge on Y and makes the seller personally liable (*b*). A contract to the contrary need not be express. It may be implied (*c*).

So as not to prejudice.—The right of marshalling cannot be exercised so as to prejudice the mortgagee or persons claiming under him or any person having an interest in any of the properties. There is a similar proviso to sec. 81. Marshalling would not be allowed where it would impair the security of a subsequent mortgagee. See note 'No prejudice to other incumbrancers' under sec. 81.

Execution sales.—The doctrine of marshalling has been considered with reference to purchasers at execution sales, and it has been said that an execution purchaser cannot claim marshalling (*d*). The doctrine has no application at all to execution sales (*e*).

Discharge of Incumbrances on Sale.

Provision by Court for incumbrance and sale freed therefrom.

57. (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable

(*x*) *Hamilton* v. *Roysee* (1804) 2 Sch. & Lef. 315.
(*y*) *Magniram* v. *Mehdi Hossein* (1904) 31 Cal. 95; *Dip Dayal* v. *Gur Saran Lal* (1920) 42 All. 336, 59 I. C. 67; *Ramlochan* v. *Ram Narain* (1898) 1 Cal. L. R. 296.
(*z*) *Kamla Singh* v. *Chaturbhuj Singh* (1929) 8 Pat. 585, 120 I.C. 17, ('29) A.P. 664.
(*a*) *Low & Co.* v. *Hazarimull* (1926) 30 Cal. W. N. 183, 94 I.C. 786, ('26) A. C. 525.
(*b*) *Pirthiraj* v. *Rukmin* (1926) 24 All. L. J. 527, 95 I.C. 843, ('26) A. A. 415.
(*c*) *Achanta Venkata* v. *Manna Venkayamma* (1946) A.M. 59.
(*d*) *Timappa* v. *Lakhsmamma* (1882) 5 Mad. 385; *Rama Raju* v. *Subbarayudu* (1882) 5 Mad. 387; *Banwari Das* v. *Muhammad* (1882) 9 All. 690.
(*e*) *Rama Shankar* v. *Ghulam Husain* (1921) 43 All. 589, 63 I.C. 209, ('21) A.A. 322; *Naubat Lal* v. *Mahadeo Prasad* (1929) 51 All. 606, 116 I.C. 297, ('29) A.A. 202; *Upendra Nath* v. *Kali Charan* (1930) 28 All. L. J. 1472, 128 I.C. [illegible], ('30) A.A. 634. But see *Wasdeo* v. *Feria Dharamal* (1940) A.L. 291, 42 P.L.R. 221, 190 I.C. 525.

S. 57

interest in the property—of such amount as, when invested in securities of the Central Government, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of the ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Provincial Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

Freedom from incumbrances.—The object of this section is to facilitate the sale of incumbered estates by taking the incumbrance off the title before sale. This procedure also avoids the necessity of joining the incumbrancers as parties to the sale.

The section is borrowed from sec. 5 of the Conveyancing and Law of Property Act, 1881, now replaced by sec. 50 of the Law of Property Act, 1925.

The section will not apply when a mortgagee's decree for sale has been adjusted out of Court. A mortgagee obtained a decree in enforcement of his mortgage. The petitioner negotiated for the purchase of the property. The mortgagee agreed to accept a certain sum in discharge of his decree. The petitioner then purchased the property from the mortgagor and tendered the agreed sum to the mortgagee. The mortgagee refused to accept it. The petitioner then applied for leave to pay the money into Court and to obtain a declaration that the property was freed from the mortgage. The Court held that the section had no application to the case as it involved a question of an adjustment of a decree out of Court (*f*).

Procedure.—The Court will not act *suo motu*. There must be an application by a party to the sale. The power is discretionary and in cases of hardship, *e.g.*, when the capitalized value of the incumbrance is considerably in excess of the price and the seller prefers to exercise his right of rescision the Court will not make an order for payment into Court (*g*). Service of notice is not obligatory and it is believed that an order would be made in a proper case even if the incumbrancer could not be found. But notice should ordinarily be given in order to ascertain the amount due on the incumbrance and for that purpose the Court will construe a will and make a declaration as to future rights (*h*). An order under this section is necessary although a fund has been set apart in an administration action (*i*).

The English section has been applied to sales by mortgagors (*j*). There is a very similar provision in O. 34, r. 12 of the Code of Civil Procedure enabling a puisne mortgagee to bring the mortgaged property to sale free from the prior mortgage (*k*).

One-tenth.—The maximum of one-tenth for future contingencies may be exceeded for special reasons.

Direct or allow.—The word "direct" refers to a sale by the Court and the word "allow" refers to a private sale out of Court (*l*).

(*f*) *Mallikarjuna Sastri* v. *Narasimha* (1901) 24 Mad. 412.

(*g*) *In re Great Northern Rly. Co. and Sanderson* (1884) 25 Ch. D. 788. As to the effect of payment into Court, see *In re Wilberforce's Trusts* (1915) 1 Ch. 94.

(*h*) *In re Freme's Contract* (1895) 2 Ch. 778.

(*i*) *In re Evans and Bettell* (1910) 2 Ch. 438.

(*j*) *Milford Haven & Co.* v. *Mowatt* (1884) 28 Ch. D. 402.

(*k*) Cf. *Jagernath Singh* v. *Mst. Mohra* (1917) 2 Pat. L.J. 118, 39 I.C. 76.

(*l*) *In re Great Northern Rly. Co. and Sanderson* (1884) 25 Ch. D. 788, 794.

CHAPTER IV.

Of Mortgages of Immoveable Property and Charges.

"Mortgage," "mortgagor," "mortgagee," "mortgage-money," and "mortgage-deed" defined.

58. (a) A mortgage is the transfer of an interest [*p. 358*] in specific immoveable property [*pp. 359-360*] for the purpose of securing the payment of money advanced or to be advanced [*p. 360*] by way of loan, an existing or furture debt [*pp. 360-361*], or the performance of an engagement which may give rise to a pecuniary liability [*p. 361*].

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Simple mortgage.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee [*pp. 361-364*].

Mortgage by conditional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale [*pp. 364-367*]:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale;

Usufructuary mortgage.

(d) Where the mortgagor delivers possession *or expressly or by implication binds himself to deliver possession* of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property *or any part of such rents and profits and to appropriate the same* in lieu of interest, *or* in payment of the mortgage-money, *or* partly in lieu of interest *or* partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee [*pp. 368-371*].

English mortgage.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage [*pp. 371-375*].

Mortgage by deposit of title-deeds.

(f) *Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the Provincial Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds* [*pp. 375-380*].

Anomalous mortgage.

(g) *A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mo.tgage* [*pp. 380-383*].

Amendments.—The following amendments have been made by the Amending Act 20 of 1929 :—

(1) A proviso has been inserted in sec. 58 (c).

(2) Section 58 (d) has been made more exhaustive by the inclusion of the case where the mortgagee is entitled to appropriate a portion only of the income of the property mortgaged in payment of the mortgage-money.

(3) A definition of mortgages by deposit of title-deeds has been inserted as clause (f). This was formerly in sec. 59.

S. 58. (4) A definition of anomalous mortgages has been inserted as clause (g). This definition, before the amending Act, was incorporated in sec. 98.

Amendments not retrospective.—Sec. 63 of the Amending Act 20 of 1929 expressly enacts that the amendments in sec. 58 shall not have retrospective effect (*m*).

History of mortgages.—In ancient systems of law a mortgage was really a pledge—the property being a gage which was forfeited on default of payment. The transaction was effected either by delivery of possession or by conditional conveyance. In Roman law the earliest type of security was the *fiducia*, a conditional conveyance under which the property whatever its value was forfeited in case of non-payment. This was followed by the *pignus* which was a transfer not of ownership but of possession without liability to forfeiture. Then the last stage was the *hypotheca*, a form of pledge without delivery of possession under which the creditor acquired a power of sale. In Hindu and Mahomedan law mortgages underwent a similar process of evolution. A mortgage by conditional sale was a very early form of mortgage among Hindus. The usufructuary mortgage with neither power of sale nor of foreclosure corresponded to the Roman *pignus* and the simple mortgage was a later development corresponding to the Roman *hypotheca* (*n*). Among Mahomedans the mortgage by conditional sale was a device to evade the Islamic prohibition of interest. This was the *bye-bil-wafa*, literally a sale with a promise, so that the mortgagee enjoyed the rents and profits in lieu of interest and became absolute owner of the property if the debt was not paid. But the earliest form of Mahomedan security was the *rahn* or pledge with possession corresponding to the Roman *pignus*. This developed by slow degrees into the recognition of a pledge without possession with a power of sale (*o*). The development was slower than in Hindu law because interest not being added, the security was always sufficient. In England it seems certain that the original mortgage at common law was rather a pledge than a mortgage (*p*). The transfer was not of title, but of possession. When the creditor took the profits in discharge of both principal and interest, the transaction was said to be a *vivum vadium* or living pledge since it worked out its own redemption. When the creditor took the profits merely in satisfaction of interest it was called a *mortuum vadium* or dead pledge. This form of mortgage was similar to the usufructuary mortgage of this Act. At a later time which cannot be exactly ascertained the English mortgage took the modern form of a conditional conveyance. The condition was originally one of defeasance, that on repayment the grant determined and the land reverted to the mortgagor who was entitled to re-enter (*q*). Subsequently the condition became one of reconveyance on repayment as defined in cl. (e) of this section. After the common law mortgage became a mortgage by conditional conveyance it was modified by three principles of equity. These are—

1. that equity looks to the essence of the transaction and that a mortgage is in essence a borrowing transaction;

2. that the borrower is in need of protection and that a condition that penalizes him is void;

3. that a condition of forfeiture in default of payment on due date is a penalty.

These same equitable principles have been applied to the law of mortgages in India.

The last development of the law of mortgages in England is under the law of Property Act, 1925, by which the mortgage is a lease and the condition has again become one

(*m*) *Ram Khilawan* v. *Ghulam Hussain* (1933) 8 Luck. 190, 141 I.C. 464, ('33) A.O. 35; *Mt. Gomti* v. *Meghraj Singh* (1933) All. L.J. 907, 145 I.C. 147, ('33) A.A. 443; *Ma Sein Ngo* v. *Maung San Pe* (1935) 157 I.C. 179, ('35) A.R. 212.

(*n*) *Sib Chunder Ghose* v. *Russick Neoghy* (1842) Fult. 36.

(*o*) Hamilton's Hedaya, Vol. 4, p. 203.

(*p*) Glanv. Lib. 10 c. 6-8.

(*q*) Co. Litt. 205 (a).

of defeasance, there being a cesser of the term when the money secured by the mortgage has been discharged. See sec. 85, Law of Property Act, 1925.

Definition.—Mahmood, J., in *Gopal* v. *Parsotam* (r) says of the definition of mortgage in this section: "Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in section 58 of the Transfer of Property Act (IV 1882). That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text-books on Indian mortgages. Every word of the definition is borne out by the decisions of Indian Courts of Justice." The definition of simple mortgage would appear to be taken from Macpherson's Law of Mortgages (s). With reference to the definition of mortgage by conditional sale [cl. (c)] the Privy Council said that it may be assumed that the framers of the Transfer of Property Act in section 58, cl. (c), intended to state the existing law and practice of India (t).

The three forms of mortgage in section 58 (b), (c) and (d) were well-known in Hindu and Mahomedan law. Simple mortgages were called in Bengal—*Bhandhakikhat*; in the United Provinces—*Rehan, Ark, Mustagraq* (u); in Bombay—*Taran Gahan* or *Nasar Gahan* (v); in Madras—*Dhrista Bhandaka* or *Adaimana pattram* (w) or *Tanaka* (x) or *Panayam* (y). Mortgages by conditional sale were called in Bengal—*Khatkabala* or *Bye-bil-Wafa* (z); in the United Provinces—*Bye-bil-Wafa* (a); in Bombay—*Gahan Lahan* (b); in Madras—*Muddata Kriyam* (c) or *Peruarthum* (d). Usufructuary mortgages were called in Bengal—*Khai Khalasi* or *Bhagbandlak* or *Bandaknama* (e); in Madras—*Duggubhogyam* or *Swadhin Adhamanam* (f) or *Kanom* (g) or *Otti* (h). English mortgages were limited to the Presidency towns and to Europeans in the Mofussil.

Mortgage.—A mortgage is a transfer of an interest in specific immoveable property as security for the repayment of a debt. The nature of the right transferred depends upon the form of the mortgage. In a simple mortgage what is transferred is a power of sale which is one of the component rights that make up the aggregate of ownership. In a usufructuary mortgage what is transferred is a right of possession and enjoyment of the usufruct (i). In a conditional mortgage and in an English mortgage the right transferred is, in form, a transfer of a right of ownership subject to a condition. In each case, whatever be the form of the mortgage, there is a transfer of some interest only and not a transfer of the whole interest of the mortgagor (j).

The characteristic feature of mortgages is that the right in the property created by the transfer is accessory to the right to recover the debt (k). The debt subsists in a mortgage, while a transaction by which a debt is extinguished is not a mortgage but

(r) (1883) 5 All. 121, 137 F. B.

(s) 6th ed., p. 10; *Nabin* v. *Raj Coomar* (1905) 9 Cal. W. N. 1001.

(t) *Balkishen* v. *Legge* (1899) 22 All. 149, 27 I.A. 58, 66.

(u) *Kishanlal* v. *Ganga Ram* (1891) 13 All. 28; *Dalip Singh* v. *Bahadur Ram* (1912) 34 All. 446, 15 I.C. 435.

(v) *Motiram* v. *Vital* (1889) 13 Bom. 90; *Onkar* [illegible] (1890) 14 Bom. 577; *Dalig* v. *Vithu* (1896) [illegible] Bom. 408.

(w) *Ramaswami* v. [illegible] (1887) 10 Mad. 509.

(x) *Dakhata* v. *Sasnapuri* (1914) Mad. W. N. 270, 22 I.C. 524.

(y) *Ayyappan* v. *Raman* (1917) 33 Mad. L. J. 676, 42 I. C. 349.

(z) Preamble to Reg. 1 of 1798.

(a) *Ali Ahmad* v. *Rahmatullah* (1892) 14 All. 195.

(b) [illegible]bai v. *Kassibhai* (1872) 9 Bom. H. C. R. 69; *Krishnaji* v. *Ranji* (1872) 9 Bom. H. C. R. 79.

(c) *Lakshmi* v. *Krishna* (1871) 7 Mad. H. C. 6.

(d) *Shekari* v. *Mangalam* (1876) 1 Mad. 57.

(e) *Ishan Chandra* v. *Sujan Bibi* (1871) 7 Beng. L. R. 14.

(f) *Keshava* v. *Keshava* (1876) 2 Mad. 45.

(g) *Sridevi* v. *Viraraghavan* (1899) 22 Mad. 289.

(h) *Ali Hussain* v. *Nillah* [illegible] (1864) 1 H.C. 256.

(i) *Indar Sen* v. *Naubat Singh* (1885) 7 All. 553, 158 F.B. (The view taken in the [illegible] judgment of Sir Comer [illegible] that the usufructuary mortgagee is proprietor and followed in *Nemi Chand* v. *Ganesh* (1910) 7 All. L. J. 270, 5 I.C. 506 is [illegible]).

(j) *Ram Kinkar* v. *Satya Charan* [illegible] I.A. [illegible]; *Jagadishwara Loan Co.* v. [illegible], [illegible] I.A. 67.

(k) *Chetti Goundan* v. *Sundaram Pillai* (1864) 2 Mad. H. C. 51, 54.

S. 58 (a) a sale. This is well illustrated by the case of *Nidhasah* v. *Murli Dhar* (*l*), where the deed purported to be a deed of mortgage with possession of certain villages for a period of 14 years. The deed provided that at the expiry of the term the mortgagors were to come into possession of the mortgaged villages without settlement of accounts and that the mortgagee should then have no power whatever in respect of the said estate but should return the mortgage deed to the mortgagors without their repaying the mortgage money. The mortgagee refused to return such villages as he had, on the ground that he had not received the full number of villages, and had not been able to recoup himself. The Privy Council said that the deed was not a security for the payment of any money and that the transaction was not a mortgage but a grant of land for a fixed term free of rent and that, as the suit was not on contract but on title, the so-called mortgagors were entitled to recover possession.

Construction.—No particular form of words is necessary for the creation of a mortgage. The general rule laid down in *Hunooman Parsaud* v. *Mst. Babooee* (*m*) by the Privy Council for the construction of Indian deeds is that "the form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses." It is sufficient that the transfer should be originally intended as security for the debt. The Court will ascertain the intention by looking at the substance and essence of the transaction and not the mere form of the deeds. Even if the deed calls itself a mortgage its nature will be determined not by the name the parties give it, but by the jural relation constituted by it. Thus in a Bombay case (*n*) the deed was called *karzrokha* (or debt-note) but was held not to be a mortgage. On the other hand in an Allahabad case (*o*) the deed was construed as a mortgage although the word mortgage did not occur in it. Again in another Bombay case (*p*) the creditor was in possession under a previous mortgage and by the new deed was entitled to receive the profits in lieu of interest "so far as they would go" and to hold as a purchaser, and the debtor would not be liable to repay unless he adopted a son. The deed was called a mortgage but was construed to be a sale liable to be converted into a mortgage. But the name given by the parties is not to be lost sight of especially if the deed is *ambiguous* (*q*). In a Madras case a debtor who was not able to repay the amount of the debt granted to the creditor a right to occupy and enjoy certain land for a period of 20 years. It was held that the transaction was not a mortgage but a lease (*r*).

Covenant not to alienate.—A covenant not to alienate does not amount to a mortgage. If the debtor promises to repay the debt and covenants that until payment he will not alienate any property, the transaction does not amount to a mortgage, for there is no transfer of an interest in the property (*s*). In *Mohan Lal* v. *Indomati* (*t*), a full Bench of the Allahabad High Court held that "A covenant against alienation may be said to be a covenant divesting the executant of a document of a portion of his interest in the property in question, but it does not vest that interest in anyone else," and accordingly a bond in which the obligor covenanted not to transfer certain property and added the words "if I shall do so, then such transfer shall be invalid" was held not to be a mortgage. A covenant not to transfer, however, may be associated with words expressly making the property a security for the debt (*u*).

(*l*) (1903) 25 All. 115, 30 I.A. 54; cf. *Abdulbhai* v. *Kashi* (1887) 11 Bom. 462.

(*m*) (1856) 6 M. I. A. 393, 411, followed in *Rajkumar Ramgopal* v. *Ram Dutt* (1870) 5 Beng. L. R. 264 F. B.

(*n*) *Abdulbhai* v. *Kashi* (1887) 11 Bom. 462.

(*o*) *Jawahir Mal* v. *Indomati* (1914) 36 All. 201, 22 I. C. 973.

(*p*) *Subhabhat* v. *Vasudevbhat* (1878) 2 Bom. 113.

(*q*) *Tukaram* v. *Ramchand* (1902) 26 Bom. 252, 258; *Kalabhai* v. *Secretary of State* (1905) 29 Bom. 19, 28.

(*r*) *Kotayya* v. *Annapurnamma* (1945) A.M. 189.

(*s*) *Gunoo Singh* v. *Latafut* (1878) 3 Cal. 336; *Najibulla* v. *Nusir Mistri* (1881) 7 Cal. 196 (the case also proceeded on the ground that the property was not specifically described); *Bhupal* v. *Jag Ram* (1879) 2 All. 449.

(*t*) (1917) 39 All. 244, 250, 39 I.C. 18 F.B.

(*u*) *Surju Prasad* v. *Bhawani* (1899) 2 All. 481; *Sheoratan* v. *Mahipal* (1885) 7 All. 258 F. B.; *Anand Ram* v. *Dhanpat Singh* (1916) 1 Pat. L.J. 563, 38 I.C. 37; *Ponnuranga* v. *Thandavarya* (1915) M.W.N. 21, 26 I.C. 274.

Sale with a condition of retransfer.—A sale with a condition of retransfer is not a mortgage, for the relationship of debtor and creditor does not subsist and there is no debt for which the transfer is a security. It is not a partial transfer, but a transfer of all rights in the property reserving only a personal right of repurchase or pre-emption which is lost if not exercised within the stipulated time. This distinction was made in the case of *Alderson* v. *White* (v), and it was accepted by the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (w). Their Lordships quoted with approval the following passage from *Alderson* v. *White*:—

> "The rule of law on this subject is one dictated by common sense that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase."

But although the difference in the legal effect of a sale with a condition of repurchase and a mortgage by conditional sale is clear, it is often a matter of extreme difficulty to decide which of these two transactions a particular document or set of documents discloses (x). The distinction is purely one of intention—whether it was intended that the relation of debtor and creditor should subsist (y) and the question is what evidence is relevant to prove that intention. Before the Indian Evidence Act was passed in 1872, oral evidence and other instruments were freely admitted to prove this intention (z), but this practice was even then condemned by the Privy Council (a). The Indian Evidence Act by sec. 92 excludes evidence of an inconsistent oral agreement and provides only for cases of fraud invalidating a document. The section does not provide for the case where there is no fraud at the time of execution of the deed, but the grantee subsequently insist that an ostensible sale is a real sale. The Indian Courts nevertheless on the authority of *Lincoln* v. *Wright* (b) admitted evidence of acts and conduct of the parties to show that a deed which purported to be an absolute conveyance was intended to operate as a mortgage (c). In 1899, however, the Privy Council definitely ruled in *Balkishen* v. *Legge* (d) that the equitable doctrine of *Lincoln* v. *Wright* had no application in India. The following is the crucial passage in the judgment:—

> "Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties.

(v) (1858) 2 DeG. and J. 97.

(w) (1890) 12 All. 387, 17 I.A. 98.

(x) *Thakar Das* v. *Tekchand* (1944) A.L. 175.

(y) *Lakshmi* v. *Krishna* (1875) 7 Mad. H. C. 6; *Bapuji* v. *Senavaraji* (1878) 2 Bom. 231; *Bhao* v. *Sidu* (1883) P.J. 258; *Venkappa* v. *Akku* (1875) 7 Mad. H. C. 219; *Ayyavayyar* v. *Rahimanea* (1891) 14 Mad. 170; *Bhup Kuar* v. *Muhammadi* (1884) 6 All. 37; *Abdulbhai* v. *Kashi* (1887) 11 Bom. 462; *Vasudeo* v. *Bhau* (1896) 21 Bom. 528; *Muhammad* v. *Fakir* (1920) 42 All. 437, 58 I.C. 717; *Ranchod* v. *Bhikabai* (1897) 21 Bom. 704, 708; *Maruti* v. *Balaji* (1900) 2 Bom. L. R. 1058, 1068; *Kasturchand* v. *Jakhia* (1916) 40 Bom. 74, 31 I. C. 388; *Mohindra Man* v. *Maharaj Singh* (1923) 45 All. 72, 70 I.C. 132, ('23) A.A. 48; *Mathura Kurm* v. *Jagdeo Singh* (1927) 49 All. 405, 104 I.C. 504, ('27) A.A. 321; *Mathura Kurmi* v. *Jagdeo Singh* (1928) 50 All. 208, 107 I. C. 33, ('28) A.A. 61; *Mumtaz Begum* v. *Mst. Lachmi* (1929) 116 I.C. 807, ('29) A.A. 174; *Abdul Latif* v. *Abdul Gani* (1939) A.C. 790, 43 C.W.N. 1221, 185 I.C. 393.

(z) *Kasinath Roy* v. *Nowcowry* (1864) 1 W. R. 22; *Lakshmi* v. *Krishna* (1875) 7 Mad. H. C. 6; *Bholanath Khettri* v. *Kaliprasad* (1872) 8 Beng. L.R. 89.

(a) *Thumbasawmy* v. *Mahomed Hossain* (1875) 1 Mad. 1, 2 I. A. 241.

(b) (1859) 4 DeG. & J. 16.

(c) *Nundo Lall* v. *Prosunno* (1873) 19 W.R. 333; *Hasha Khand* v. *Jesha Premaji* (1880) 4 Bom. 609 note; *Govinda* v. *Jesha Premaji* (1883) 7 Bom. 73; *Bakeu* v. *Govinda* (1880) 4 Bom. 594; *Cutts* v. *Brown* (1879) 6 Cal. 328; *Mahadaji* v. *Vithal* (1883) 7 Bom. 78; *Hem Chunder* v. *Kally* (1883) 9 Cal. 528; *Kashi Nath* v. *Hurrihur* (1883) 9 Cal. 898; *Behary* v. *Tej Narain* (1884) 10 Cal. 764; *Rakken* v. *Alagappudayan* (1892) 16 Mad. 80; *Preonath* v. *Madhu Sudan* (1898) 25 Cal. 603 F.B.

(d) (1899) 22 All. 149, 27 I.A. 58, 65, followed in *Dattoo* v. *Ramchandra* (1906) 30 Bom. 119; *Abaji* v. *Laxman* (1906) 30 Bom. 426; *Maung Kyin* v. *Ma Shwe La* (1918) 45 Cal. 320, 44 I.A. 236, 42 I.C. 642; *Narasingerji* v. *Panuganti* (1924) 47 Mad. 729, 51 I. A. 305, 82 I. C. 993, ('24) A.PC. 226; *Shasadi* v. *Sheikh Jamal* (1913) 17 Cal. W. N. 1053, 21 I.C. 90; *Muhammad Shah* v. *Jiwan* (1929) 11 Lah. L. J. 161, 119 I.C. 767, ('29) A.L. 530; [illegible] *pal Khan* v. *Usirali Khan* (1933) [illegible] 167, 144 I.C. 220, ('33) A.L. [illegible]; *[illegible] Ram* v. *Gaja Mal* (1933) 141 I. C. 404, ('33) A.L. 104 but not followed in *Khanka* v. *Ali Hafez* (1901) 29 Cal. 256 and *Mahomed Ali* v. *Nazar* (1901) 28 Cal. 289.

By sec. 92 of the Indian Evidence Act, no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, or adding to, or subtracting from its terms subject to the exceptions contained in its several provisoes. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

The reference to extrinsic evidence showing in what way the language of the document is related to existing facts is the same exception as proviso (6) of sec. 92. That proviso is in these terms: "Any fact may be proved which shows in what manner the language of the document is related to existing facts." The question of admissibility of evidence must therefore be decided solely on the terms of sec. 92. The section, however, does not preclude oral evidence to contradict a recital of fact in a written contract. Thus it may be shown that no consideration was paid though payment may have been recited in the document (*e*). Again the contemporaneous conduct of parties may be proved if it is relevant under proviso (b) to sec. 92, and even in *Balkissen* v. *Legge* the fact that the parties ascertained the so-called price by calculating the amount due on a separate account between the parties and adding it to the balance due on a former mortgage was held to indicate that the transaction was a mortgage. But the subsequent conduct of the parties cannot be considered; for evidence of such conduct would only be relevant on the ground that it leads to the inference that there was a contemporaneous oral agreement that the sale deed should operate as a mortgage (*f*). In *Maung Kyin* v. *Ma Shwe La* (*g*) the Privy Council explained that though as between the parties to an absolute conveyance oral evidence was not admissible to prove that the transaction was a mortgage, yet it was open to a third party to produce evidence to show the real nature of the transaction. The Courts were therefore practically limited to the document itself, and devised various criteria for determining whether the intention was to mortgage or to sell. A number of these tests based on a passage in Butler's Preface to Coke on Littleton are set out in the undernoted cases (*h*). The following tests have been applied: (*i*) (1) the existence of a debt (*j*): (2) the period of repayment, a short period being indicative of a sale and a long period of a mortgage (*k*); (3) the continuance of the grantor in possession indicates a mortgage (*l*); (4) a stipulation for interest on repayment indicates a mortgage (*m*); (5) a price below

(*e*) *Sah Lal Chand* v. *Indarjit* (1900) 22 All. 370, 27 I. A. 93.

(*f*) *Achutaramaraju* v. *Subbaraju* (1902) 25 Mad. 7, dissenting from *Khankar* v. *Ali Hafez* (1901) 28 Cal. 256 and *Mahomed Ali* v. *Nazar Ali* (1901) 28 Cal. 289.

(*g*) (1918) 45 Cal. 320, 44 I. A. 236, 42 I. C. 642.

(*h*) *Madhu Sudan* v. *Rhidoy Moni* (1901) 6 Cal. W. N. 192; *Ram Das* v. *Brindaban* (1931) 29 All. L. J. 571, 129 I. C. 719, ('31) A. A. 115; *Kuppa* v. *Mhasti* (1931) 33 Bom. L.R. 633, 134 I.C. 337, ('31) A.B. 371.

(*i*) *Abdul Rahman* v. *Bismillah Begum* (1939) A. A. 589.

(*j*) *Jhanda Singh* v. *Sheik Wahiduddin* (1916) 38 All. 570, 36 I.C. 38 P.C.; *Appanayyar* v. *Rokkanna* (1891) 14 Mad. 170; *Wajid Ali Khan* v. *Shafakat* (1911) 33 All. 122, 7 I.C. 911; *Gurunath* v. *Yamanawa* (1911) 35 Bom. 253, 10 I.C. 814; *Marudhai* v. *Doraippa* (1916) 31 Mad. L. J. 375, 36 I. C. [illegible]; *Gnanasa* v. *Gnanasikhamani* (1924) 47 Mad. L. J. 335, ('25) A. M. 37. See also [illegible] in note (*g*), *supra*.

(*k*) *Venkappa* v. *Akku* (1875) 7 Mad. H. C. 219; *Ram Saran* v. *Amirta* ([illegible]) 8 All. 369; *Bhajan* v. *Mushtak* (1883) 5 All. 324; *Bhup Kuar* v. *Muhammad* (1884) 6 All. 37; *Sital* v. *Luchmi* (1883) 10 Cal. 30, 10 I. A. 129; *Mahindra Man Singh* v. *Maharaj Sing* (1923) 45 All. 72, 70 I.C. 132, ('23) A. A. 48; *Ma Tok* v. *Maung Cheik* (1927) 101 I.C. 904, ('27) A.R. 132.

(*l*) *Patel Ranchod* v. *Bhikhabhai* (1897) 21 Bom. 704; *Kasturchand* v. *Jakhia* (1916) 40 Bom. 74, 31 I.C. 383; *Kuppa* v. *Mhasti* (1931) 33 Bom. L. R. 633, 134 I.C. 337, ('31) A.B. 371.

(*m*) *Madhu Sudan* v. [illegible] *Maruti* v. *Balaji* (1[illegible] 1068; *Muhammad* v. [illegible] 18 All. L. J. 478, 5[illegible] I. C. 717; [illegible] *Prasad* v. *Jagdish Narain* (1927) 48 All. 787, 98 I.C. 861, ('27) A.A. 137.

S. 58(c)

the true value indicates a mortgage (n); (6) a contemporaneous deed stipulating for reconveyance indicates a mortgage (o), but one executed after a lapse of time points to a sale (p). In applying these tests the Courts put the onus on the party alleging that an ostensible sale deed was a mortgage (q); and in a case of ambiguity leant to the construction of a mortgage (r). It has been suggested that the test is whether the agreement to reconvey was part of the consideration of the transfer (s).

The effect of the proviso to cl. (c) added by the Amending Act 20 of 1929 is that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage (t). But it does not follow that if the condition is embodied in the same document, the transaction is a mortgage (u). *Prima facie* it would be a mortgage (v), but it is open to the other side to show that it was intended to be an out and out sale in which case the tests mentioned above would have to be applied (w).

In the Punjab where the Act is not in force, a sale deed and a separate and contemporaneous agreement of reconveyance may amount to a mortgage but only if the agreement is registered (x).

Agreement to mortgage.—An agreement to mortgage may in English law amount to an equitable mortgage which can be enforced according to its terms, but no such mortgage is recognised in Indian law (y). An agreement to mortgage gives rise only to a personal obligation which does not constitute either a mortgage or charge (z). An agreement to mortgage is not capable of specific performance, for the Court will not enforce an agreement

---

(n) *Maruti* v. *Balaji*, *supra*; *Madhavrao* v. *Sahebrao* (1915) 39 Bom. 119, 26 I.C. 751; *Narasingerji* v. *Panuganti* (1924) 47 Mad. 729, 51 I.A. 305, 82 I.C. 993, ('24) A.P.C. 226; *Usman* v. *Abdul Rahaman* (1925) 42 Cal. L.J. 74, 90 I.C. 100, ('25) A.C. 1151; *Fatima* v. *Abdul Ghaffur* (1924) 78 I.C. 171, ('24) A.A. 743 (full price but reconveyance to only one of the vendors—not a mortgage.)

(o) *Ramayya* v. *Krishnamma* (1900) 23 Mad. 114; *Kalka Prasad* v. *Bhuiyan Din* (1909) 31 All. 300, 2 I.C. 180; *Muhammad* v. *Fakir Chand* (1920) 42 All. 437, 58 I.C. 717; *Nagindas* v. *Nanabhai* (1914) 16 Bom. L.R. 774, 26 I.C. 753; *Kasturchand* v. *Jakhia* (1916) 40 Bom. 74, 31 I.C. 888; *Madhavrao* v. *Sahebrao* (1915) 39 Bom. 119, 26 I.C. 751; *Palaniappa* v. *Subbaraya* (1914) Mad. W.N. 222, 22 I.C. 4; *Ram Charan Lal* v. *Dharam Singh* (1924) 46 All. 173, 79 I.C. 626, ('24) A.A. 444; *Narasingerji* v. *Panuganti* (1924) 47 Mad. 729, 51 I.A. 305, 82 I.C. 993, ('24) A.P.C. 226; *Maung Po Gyi* v. *Hakim Ally* (1924) 2 Rang. 113, 80 I.C. 759, ('24) A.R. 235; *Wajid Ali* v. *Shafakat* (1911) 33 All. 122, 7 I.C. 911; *Mathura Kurmi* v. *Jagdeo Singh* (1927) 49 All. 405, 104 I.C. 504, ('27) A.A. 321; *L*[illegible] v. *Jagdish Narain* (1927) 48 All. 787, 98 I.C. 961, ('27) A.A. 137; *J*[illegible] v. *Gauri Shankar* (1926) 24 All. L.J. 813, 96 I.C. 230, ('26) A.A. 670; *Kirpal Singh* v. *Sheonandan Singh* (1930) 28 All. L.J. 910, 126 I.C. 864, ('30) A.A. 233; *Mahabir* v. *Bharat Bihari* (1924) 78 I.C. 426, ('24) A.O. 417; *Mt. Gomti* v. *Majboraj* [illegible] L.J. 907, 145 I.C. 147,

(p) *Uthandi* v. *Raganachari* (1906) 29 Mad. 307; *Muthuvelu* v. *Vythilinga* (1919) 42 Mad. 407, 50 I.C. 305 F.B.; *Bandio* v. *B*[illegible] (1895) 17 All. 481; *Narayana Rau*[illegible] v. *Vigneshwar* (1916) 40 Bom. 378, 34 I.C. 414.

(q) *Ram Din* v. *Rang Lal*, *supra*; *Ayyavayyar* v. *Rahimansa* (1891) 14 Mad. 170, 172; *Ghulam Nabi* v. *Niazunnisa* (1911) 33 All. 337, 9 I.C. 140; *Muthuvelu* v. *Vythilinga* (1919) 42 Mad. 407, 50 I.C. 305; *Ganesa* v. *Gnanasikhamani* (1924) 47 Mad. L. J. 385, 84 I.C. 505, ('25) A.M. 87; *Ahmad Husain* v. *Azhar Ali* (1944) A.O. 305.

(r) *Singaram* v. *Kalyanam Subdara* (1914) Mad. W. N. 735, 26 I.C. 1.

(s) *Lalta Prasad* v. *Jagdish Narain* (1927) 48 All. 787, 98 I.C. 961, ('27) A.A. 137; *Ram Das* v. *Brindaban* (1931) 29 All. L. J. 571, 129 I.C. 719, ('31) A.A. 113.

(t) *Ma Sein Nyo* v. *Maung San Pe* (1935) 157 I.C. 179, ('35) A.R. 212; *Samsherkhan* v. *Vithaldas* (1946) A.N. 264; *Kasturi Venkata* v. *Bikkina* (1946) A.M. 456; *Nathu Lal* v. *Gomti Kuar* (1940) A.P.C. 160 (The suit was filed before the amendment of 1929).

(u) *Bishan Lal* v. *Banwari Lal* (1939) A.A. 713; *Shambhu Singh* v. *Jagdish Baksh* (1941) A.O. 532.

(v) *Man Singh* v. *Guman* (1929) 27 All. L.J. 387, 119 I.C. 106, ('29) A.A. 619; *Ram Dhani* v. *Ram Rikh Singh* (1931) 53 All. 607, 131 I.C. 545, ('31) A.A. 548.

(w) *Kuppa* v. *Mhasti* (1931) 33 Bom. L.R. 683, 134 I.C. 337, ('31) A.B. 371; *Ramnarayan* v. *Ram Ratan* (1934) 149 I.C. 864, ('34) A.N. 18.

(x) *Amir* v. *Inder Singh* (1934) 147 I.C. 1101, ('34) A.L. 452.

(y) *Manilal* v. *Saraspur Manufacturing Co.* (1927) 29 Bom. L.R. 286, 102 I.C. 144, ('27) A.B. 167.

(z) *Hukumchand* v. *Radha Ki*[illegible] Cal. W.N. 596, 123 I.C. 147, [illegible] 79; *Ram Kal* v. *Pokhar* [illegible] 237. 134 I.C. 1036, ('32) [illegible]

to make a loan of money whether on security or not (*a*). In *South African Territories Ld.* v. *Wallington* (*b*) Lord Macnaghten said "That specific performance of a contract to lend money cannot be enforced is so well established, and obviously so wholesome a rule, that it would be idle to say a word about it." The remedy for breach of an agreement to mortgage is damages (*c*). The measure of damages is the interest for the time the money is likely to lie idle, plus actual expenses incurred (*d*). But when the lender has advanced the money either in whole or in part on an agreement to mortgage and the borrower is not willing to repay the same at once the Court will specifically enforce the agreement (*e*). In the converse case of a mortgagor who has executed a mortgage, but has not been paid the full amount of the consideration, the mortgagor cannot sue for the balance but he may sue in damages or sue to redeem (*f*). In such a case the mortgage is valid for the amount advanced (*g*). On the other hand if the mortgage is usufructuary this rule is not applied and the mortgagor may sue for the unpaid balance of the mortgage money (*h*).

Transfer.—The transfer must be to a living person or persons—see section 5. Thus a security bond by which a person charges his property to secure performance of the decree is not a mortgage, for the Court to which it is given is not a juridical person (*i*). When the security bond was executed in favour of the Registrar of the Court, for the benefit of the decree holders it was held to be a mortgage (*j*). See Mulla's Code of Civil Procedure 10th Ed., P. 425.

Formal expression of transfer not necessary.—It is not necessary that the transfer should be formally expressed. If the transfer is not in express terms it is sufficient if the instrument taken as a whole operates as a transfer (*k*).

Transfer of an interest.—These words stand in contrast with the words transfer of ownership occurring in section 54 in the definition of sale. In a sale all the rights of ownership, which the transferor has, pass to the transferee. In a mortgage some rights are transferred to the mortgagee and some remain vested in the mortgagor. The transfer of the right to receive rents and profits from tenants for a term of years is a transfer of an interest in land and may constitute a mortgage (*l*). The words transfer of an interest

(*a*) *Sichel* v. *Mosenthal* (1862) 30 Beav. 371; *Rogers* v. *Challis* (1859) 27 Beav. 175; *Western Waggon and Property Co.* v. *West* (1892) 1 Ch. 271. See also section 21 (a) of the Specific Relief Act, Pollock & Mulla's Indian Contract Act, 6th Ed., p. 790.

(*b*) (1898) A. C. 309, 318.

(*c*) *Anakaran* v. *Saidamadath* (1879) 2 Mad. 79; *Seth Jaidayal* v. *Ram Sahe* (1890) 17 Cal. 432 P.C.; *Datubhai Ebrahim* v. *Abubaker* (1888) 12 Bom. 242; *Shaik Galim* v. *Sadanijam Bibi* (1916) 43 Cal. 59, 29 I.C. 621.

(*d*) *Datubhai* v. *Abubaker* (1888) 12 Bom. 242.

(*e*) *Meenakshisundara* v. *Rathnasami* (1918) 41 Mad. 959, 49 I.C. 291; *Gregson* v. *Aditya* (1890) 17 Cal. 223, 16 I.A. 221; *Hukumchand* v. *Pioneer Mills Co.* (1927) 2 Luck. 299, 99 I.C. 483, ('27) A.O. 55. But see the criticism of this case in *Hukumchand* v. *Radha Kishen* (1930) 34 Cal. W.N. 506, 123 I.C. 157, ('30) A.PO. 76.

(*f*) *Anakaran* v. *Saidamadath* (1879) 2 Mad. 79; *Sreenath* v. *Cally Doss* (1878) 5 Cal. 82; *Sheikh Galim* v. *Sadarjan* (1916) 43 Cal. 59, 29 I.C. 621; *Yadavendra* v. *Sirinivasa* (1924) 47 Mad. 698, 80 I.C. 5 ('25) A.M. 62; *Phul Chand* v. *Chand Mal* (1908) 30 All. 252; *South African Territories Ltd.* v. *Wallington* (1898) A.C. 309; *Rajagopala* v. *Sheikh Davood* (1918) 34 Mad. L.J. 342, 45 I.C. 161.

(*g*) *Munshi Bajrangi Sahai* v. *Udit Narain* (1905) 10 Cal. W. N. 932; *Rashik Lal* v. *Ram Narain* (1912) 34 All. 273, 13 I.C. 573; *Makhan Lal* v. *Hanuman* (1917) 2 Pat. L.J. 168, 38 I.C. 877; *Motichand* v. *Sagun* (1905) 29 Bom. 46; *Rajani Kumar* v. *Gaur Kishore* (1908) 35 Cal. 1051; *Zemindar* v. *Subbaraya* (1918) Mad. W.N. 146 48 I.C. 871; *Rajai Tirumal* v. *Pandla Muthial* (1912) 35 Mad. 11, 9 I.C. 289; Contra, *Subba Rau* v. *Devu Shetti* (1895) 18 Mad. 126 and *Gokalchand* v. *Rahiman* (1907) P.R. 59 are bad law.

(*h*) *Sheopati Singh* v. *Jagdeo Singh* (1931) 52 All. 761, 126 I.C. 361, ('31) A.A. 95; *Thakar Singh* v. *Jagat Singh* (1933) 140 I.C. 495, ('33) A.L. 1.

(*i*) *Shyam Sundar* v. *Bajpai* (1903) 30 Cal. 1060; *Raghubar Singh* v. *Jai Indra* (1919) 42 All. 158, 46 I.A. 228, 55 I.C. 550; *Syed Mehdi Ali Khan* v. *Chunni Lal* (1929) 27 All. L.J. 902, 119 I.C. 81, ('29) A. A. 834.

(*j*) *Girindra* v. *Bejoy* (1899) 26 Cal. 246; *Tokhan Singh* v. *Girwar* (1905) 32 Cal. 494.

(*k*) *Kola Venkatanarayana* v. *Vuppala* (1906) 29 Mad. 581; *Balasubramania* v. *Sivaguru* (1911) 21 Mad. L.J. 562, 11 I.C. 629; *Rama Brahman* v. *Venkatanarasu* (1912) 23 Mad. L.J. 131, 16 I.C. 209; *Venkatarama Iyer* v. *Suppa Nadan* (1914) M.W.N. 501, 24 I.C. 24; *Ryrappan* v. *Raman* (1917) 33 Mad. L.J. 679, 42 I.C. 349; *Har Prasad* v. *Ram Chandar* (1921) 44 All. 37, 63 I.C. 759, ('22) A.A. 174.

(*l*) *Anantha Iyer* v. *Mittadar* (1914) M.W.N. 891, 26 I.C. 71.

also distinguished a mortgage from an agreement to mortgage, and from a charge. In an agreement to mortgage no right *in rem* is transferred at all but only a personal obligation created. While in a charge also no right *in rem* is created but the right is something more than a personal obligation; for it is a *jus ad rem*, *i.e.*, a right to payment out of the property specified (*m*). There is therefore very little difference between a charge and a simple mortgage. The practical difference is that a simple mortgage being a right *in rem* is good against subsequent transferees while a charge is only good as against a subsequent transferee with notice or a volunteer with or without notice (*n*). An agreement which gives immoveable property as security for the satisfaction of a debt (*o*), or for payment of a maintenance allowance (*p*), without transferring any interest in the property constitutes a charge on the property and is not a mortgage (*p*). As a mortgage is a transfer of a right *in rem* a purchaser is not affected by a subsequent mortgage given by his vendor (*q*). In a Patna case (*r*) Das, J., said :—

> "Now the broad distinction between a mortgage and a charge is this: that whereas a charge only gives a right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immoveable property."

The interest of the mortgagor and of the mortgagee may each be the subject of another mortgage. The mortgagor may make a second or puisne mortgage of his right of redemption (*s*), and the mortgagee may make a submortgage of his own interest in the property (*t*).

Specific immoveable property.—In order to create a mortgage it is necessary to specify the immoveable property. The description must at least be sufficient to identify the property according to the requirements of sections 21 and 22 of the Registration Act. In one case (*u*) section 29 of the Contract Act and section 93 of the Indian Evidence Act were referred to, and in another (*v*) the maxim *id certum est quod certum reddi potest* was applied. But the word "specific" shows that the description should not only be free from ambiguity and uncertainty, but that it should be specific as distinguished from general. It has the same meaning in the phrase "specifically mortgaged" occurring in section 22 of the Dekkan Agriculturists' Relief Act 17 of 1879 (*w*). In a Madras case (*x*) it was said that it was sufficient if the indication of the *hypotheca* is sufficiently precise to enable the land to be determined even after a lapse of time.

The following descriptions were held to be sufficiently specific: "a house situated in Ghaziabad owned and possessed by us" (*y*); "our rights and property in the aforesaid taluka Rajapur" (*z*); "all the properties appertaining to entire bhag" (*a*), although the properties were wrongly described in the particulars; "our zamindari property" (*b*). A description by reference to a specific description in another deed is sufficient. So a mortgage of land and villages comprised in the sanad of a talukdari estate was held by the Privy Council to be sufficiently specific (*c*). On the other hand general descriptions such

(*m*) *Gobinda* v. *Dwarkanath* (1908) 35 Cal. 837; *Jawahir Mal* v. *Indomati* (1914) 36 All. 201, 22 I. C. 973.

(*n*) *Kishan Lal* v. *Ganga Ram* (1891) 13 All. 28, 44; *Royzuddi* v. *Kali Nath* (1906) 33 Cal. 985, 998. See also s. 100 of this Act.

(*o*) *Sher Singh* v. *Daya Ram* (1932) 13 Lah. 660, 139 I.C. 49, ('32) A.L. 465.

(*p*) *Matlub Hasan* v. *Mt. Kalawati* (1933) 147 I. C. 302, ('33) A.A. 934; *Mt. Khatun* v. *Tahira Khatun* (1913) 19 I. C. 661.

(*q*) *Govindrao* v. *Ravji* (1888) 12 Bom. 33.

(*r*) *Raja Sri Shiva Prasad* v. *Beni Madhab* (1922) 1 Pat. 387, 392, 70 I.C. 24, ('22) A.P. 529.

(*s*) *Khub Chand* v. *Kalian Das* (1876) 1 All. 240, 247; v. *Kutubuddin* (1895) 22 Cal. 33.

(*t*) *Ram Shankar* v. *Ganesh* (1907) 29 All. 385; *Muthu Vijia* v. *Venkatachellam* (1897) 20 Mad. 35; *Ram Shankar* v. *Ganesh* (1907) 29 All. 385, 391.

(*u*) *Deojit* v. *Pitambar* (1876) 1 All. 275.

(*v*) *Ramsidh* v. *Balgobind* (1887) 9 All. 158.

(*w*) *Balshet* v. *Dhondo* (1901) 26 Bom. 33.

(*x*) *Dakkata* v. *Saanapari* (1914) M.W.N. 270, 22 I. C. 524.

(*y*) *Phul Kuar* v. *Murli Dhar* (1879) 2 All. 527.

(*z*) *Bishen Dayal* v. *Udit Narain* (1886) 8 All. 486.

(*a*) *Tribhovandas* v. *Krishnaram* (1894) 18 Bom. 283.

(*b*) *Shadi Lal* v. *Thakur Das* (1890) 12 All. 175.

(*c*) *Land Mortgage Bank* v. *Abdul Karim* (1899) 26 Cal. 395 P.C.; *Kundan Lal* v. *Muhammad* (1883) 5 All. 11.

S. 58(a) as "my house and landed property" (*d*); "our property with all rights and interests therein" (*e*); "the whole of my property" (*f*) are bad. But the cases are not consistent, for in an Allahabad case (*g*) a mortgage of "all my wealth and property" was held to be valid. This is erroneous, for the mere fact that the debtor binds his general estate is not sufficient to create a mortgage (*h*). In another case (*i*) a mortgage of "our one biswa five-biswansi shares" was held valid and it was said that oral evidence was admissible to show that it meant the share in the mortgagor's village.

Purpose.—The purpose or object of a mortgage is to secure a debt. A transfer made for the purpose of discharging a debt is not a mortgage (*j*). Thus if *A* transfers land to *B* for a term of years in satisfaction of the debt, this is not a mortgage but a grant of land for a term free from rent (*k*). *A* recovers possession of the land at the end of the term on his title and not by way of redemption. The words of the definition "for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement that may give rise to a pecuniary liability" are a paraphrase of the words in section 2 of the English Conveyancing Act, 1881, now re-enacted in sec. 205 (1) (XVI) of the Law of Property Act, 1925, "for securing money or money's worth."

Money advanced or to be advanced.—A mortgage may not only be for a specific sum, but to secure a current account between the parties up to a limit named—see section 79. The burden of proof is on the party alleging a running security (*l*). It is sufficient if the money is left at the mortgagor's disposal in a Bank deposit (*m*). Where only part of the mortgage money is advanced, the mortgage is good security for the part advanced (*n*). In a Madras case it was said that the mortgagor in such a case had an option to cancel (*o*), but this is incorrect and ignores what Farran, C.J., in *Tatia* v. *Babaji* (*p*) calls "the radical distinction between a perfected conveyance and a contract."

Illustration.

A mortgaged property to *B* by a deed executed on the 3rd May. *B* advanced the money secured by the mortgage a week later on the 10th May. Meantime on the 7th May *A* sold the property to *C*. *C* contended that as the consideration had not been paid at the time of his sale, he was not bound by the mortgage. Held that the mortgage was effective from the date of execution, and that *C*'s purchase was subject to the mortgage: *Raghunath* v. *Amir Baksh* (1922) 1 Pat. 281, 65 I.C. 329, ('22) A.P. 299.

The Punjab view that non-payment of full consideration invalidates the mortgage (*q*) is incorrect, unless it is restricted to cases where the parties agree that the mortgage shall not be operative till the full amount is paid. If the mortgage money is not advanced in full the mortgagor's remedy is by way of redemption or damages. He cannot file a suit

(*d*) *Darshan Singh* v. *Hanwanta* (1877) 1 All. 274.

(*e*) *Deojit* v. *Pitambar, supra.*

(*f*) *Bheri* v. *Maddipatu* (1881) 3 Mad. 85; *Collector of Etawah* v. *Beti Maharani* 14 All. 162; *Kamayya* v. *Yerakota* 24 Mad. L.J. 479, 19 I.C. 221; *Rai* v. *Murli Rai* (1912) 10 All. L.J. 120, 16 I.C. 688.

(*g*) *Ramsidh* v. *Balgobind, supra.*

(*h*) *Norton* v. *Florence Land and Public Works Co.* (1877) 7 Ch. D. 332; *Jagatdhar* v. (1906) 33 Cal. 1123.

(*i*) *Ram Lal* v. *Harrison* (1880) 2 All. 832.

(*j*) *Nidha Sah* v. *Murli Dhar* (1903) 25 All. 115, 30 I. A. 54; *Abdulbhai* v. *Kashi* (1887) 11 Bom. 462.

(*k*) *Kotayya* v. *Annapurnamma* (1945) A.M. 189.

(*l*) *Re Boys, Eades* v. *Boys* (1870) L.R. 10 Eq. 467.

(*m*) *Hari Ram* v. *Sheodial* (1888) 11 All. 136, 16 I. A. 12.

(*n*) *Rashik Lal* v. *Ram Narain* (1912) 34 All. 273, 13 I.C. 572; *Rajai Tirumal* v. *Pandla Muthial* (1912) 35 Mad. 114, 9 I.C. 289; *Munshi Bajrangi Sahai* v. *Udit Narain* (1905) 10 Cal. W.N. 932; *Motichand* v. *Sagun* (1905) 29 Bom. 46; *Rajani* v. *Gour Kishore* (1908) 35 Cal. 1051; *Makhan Lal* v. *Hanuman* (1917) 2 Pat. L. J. 168, 38 I. C. 877.

(*o*) *Subba Rau* v. *Devu Shetti* (1895) 18 Mad. 126.

(*p*) (1896) 22 Bom. 176, 183.

(*q*) *Gokulchand* v. *Rahman* (1907) P.R. 59 F.B.

for specific performance of the agreement to lend the whole amount (r). If there is no consideration at all, the mortgage is a nullity (s).

Future debt.—The future debt referred to in the section may be a contingent liability, *e.g.*, a mortgage to secure the payment of the respondent's costs in an appeal (t) or to further secure a mortgage against the loss of his existing security (u).

Performance of an engagement.—The word "engagement" means a contract and the limitation to such "as may give rise to a pecuniary liability" includes cases in which there is a legal obligation to pay damages (v). This limitation does not occur in the definition of mortgages given in the Stamp Act.

Illustration.

A borrows paddy from another cultivator, *B*, and mortgages his field to secure repayment of the paddy and the payment of further paddy by way of interest. The engagement to return paddy is one which may give rise to a pecuniary liability and the transaction is a mortgage as defined in this section: *Ramchand* v. *Iswar Chandra* (1921) 48 Cal. 625, 61 I.C. 539, ('21) A.C. 172 F.B.

Mortgagor.—The word is explained in sec. 59A to include a person deriving title under a mortgagor—but even before the enactment of the section it was used in this sense. An absolute owner can mortgage unless he is under some disability, statutory or personal. One of several co-owners, whether tenants in common or joint tenants, can mortgage his share, but in the case of a joint tenancy, such a mortgage severs the joint tenancy (w). A minor being unable to contract cannot transfer by mortgage (x). As to whether a minor, who has falsely represented himself to be a major, can be estopped from pleading his minority, the cases were conflicting; some holding that the mortgage is validated by estoppel (y), others that it is not (z). But the point is now settled by the Privy Council decision in Sadiq Ali Khan v. Jai Kishore (a), that a deed executed by a minor being a nullity is incapable of founding a plea of estoppel. See note "Minor" under sec. 7. A mortgage by a judgment debtor of his property while it is under the management of the Collector to whom decrees against the judgment debtor have been transferred for execution is, under paragraph 11 of the Third Schedule to the Code of Civil Procedure, absolutely void and not merely void as against the Collector and those claiming under him (b) but the personal liability of the mortgagor is not affected (c). Even if the claim on personal covenant is abandoned the mortgagee is entitled to restitution under sec. 65 of the Contract Act (d). Guardians of minors and managers of estates of disqualified persons can mortgage subject to restrictions imposed by personal or statutory law. Thus the guardian

(r) *Phul Chand* v. *Chand Mal* (1908) 30 All. 252; *South African Territories* v. *Wallington* (1898) A.C. 309; *Anakaran* v. *Saidamadath* (1879) 2 Mad. 79; *Rajagopala* v. *Sheikh Dawood* (1918) 34 Mad. L.J. 342, 45 I.C. 161; *Sheikh Galim* v. *Sadarjan Bibi* (1916) 43 Cal. 59, 29 I.C. 621; *Yadavendra* v. *Srinivasa* (1924) 47 Mad. 696, 80 I.C. 5, ('25) A.M. 62.

(s) *Ramasami* v. *Sundara* (1914) 23 I.C. 805; *Kumarappan* v. *Narayana* (1916) 35 I.C. 455.

(t) *Girindra Nath* v. *Bejoy Gopal* (1899) 26 Cal. 246; *Tokhan* v. *Girwar Singh* (1905) 32 Cal. 494.

(u) *Nand Lal* v. *Dharamdas* (1925) 78 I.C. 457, ('25) A.P. 288.

(v) *Niaz Ahmed* v. *Mangalal* (1908) 5 All. L.J. 722 (mortgage to secure a covenant of indemnity); *Natesa Aiyar* v. *Subaramana* (1927) 53 Mad. L.J. 550, 103 I.C. 814, ('27) A.M. 778 (to secure payment to subscribers to chit fund); *Kotappa* v. *Vallur* (1902) 25 Mad. 50 (agreement to withdraw an appeal).

(w) *Re Pollard's Estate* (1863) 3 Deg. J. & Sm. 541 C.A.

(x) *Mohori Bibee* v. *Dhurmodas* (1903) 30 Cal. 539, 30 I.A. 114; *Balwant Singh* v. *Clancy* (1912) 34 All. 296, 39 I.A. 109, 14 I.C. 629.

(y) *Saral Chand* v. *Mohun* (1898) 25 Cal. 371; *Ganesh* v. *Bapu* (1895) 21 Bom. 198.

(z) *Brohmo Dutt* v. *Dharmo Das* (1899) 26 Cal. 381, 386.

(a) (1928) 30 Bom. L.R. 1346, 109 I.C. 387, ('28) A. PC. 152.

(b) *Gourishankar* v. *Chinnamaya* (1918) 45 I.A. 219, 46 Cal. 183 and other cases cited in Mulla C. P. C. at p. 1342.

(c) *Raja Mohan Manucha* v. *Niaz Ahmad* (1937) 12 Luck. 425, (1937) A.O. 97, 164 I.C. 945 on appeal to P. C. *Niaz Ahmad Khan* v. *Raja Mohan Manucha* (1940) 67 I.A. 421.

(d) *Raja Mohan Manucha* v. *King* (1943) 70 I.A. 1.

S. 58(a) of a minor's property under the Guardians and Wards Act may mortgage with the sanction of the Court (*e*): though a mortgage without such sanction is voidable and not void (*f*). A Hindu widow under Mitakshara Law cannot mortgage her husband's property so as to bind the reversionary heir except for legal necessity. An executor or administrator can make a valid mortgage and the mortgagee is not bound to see to the application of the mortgage money (*g*). Where executors who were authorised by the will to carry on the testator's business and on whom no restriction against alienation was imposed mortgaged some immoveable properties the Privy Council held that, assuming that, in a question between the executors and beneficiaries the executors were not entitled to use the immoveable properties for the purposes of the business, the mortgagees as prospective lenders had no duty to enquire into facts outside the will and they were not so put on enquiry that Constructive knowledge that executors were not entitled to use the immoveable properties for the purposes of the business must be imputed to them and that therefore they got a good title from the executors (*h*). Under sec. 19 (2) (g) of the Indian Partnership Act 9 of 1932, in the absence of a usage or a custom of trade to the contrary, the implied authority of a partner does not empower him to transfer immoveable property belonging to the firm. But a mortgage by a partner in a commercial firm of immoveable property to secure a partnership debt has been recognized by the Judicial Committee (*i*). The manager of a joint Hindu family firm can bind the coparceners by a mortgage of family property for the purposes of carrying on the family business (*j*). As to the requirements insisted upon by Courts in upholding mortgages by paradhashin ladies see the undernoted cases (*k*) as examples.

Who may be a mortgagee.—The word mortgagee is explained in sec. 59A to include a person deriving title under a mortgagee; and was so used even before the insertion of this section. Any person capable of holding property may be a mortgagee. The disability of a minor to contract does not disqualify him from being a transferee. See note "Disqualified to be a transferee" under sec. 6 (h). A minor may therefore be a mortgagee (*l*). Although a corporation may act *ultra vires* in accepting a mortgage, the corporation may be entitled to recover the money lent, though the charter of the corporation may be liable to forfeiture (*m*).

If no person is named as mortgagee, the instrument cannot be a mortgage. A security bond given to the Court cannot be enforced as a mortgage, for the Court is not a judicial person (*n*). See note "Transfer," *supra.*

Mortgage money.—This expression is defined in sec. 58 (a) as the principal money and the interest, the payment of which is secured for the time being. There were conflicting decisions as to whether the interest referred to in this section included interest after due date awarded by way of damages or under the Interest Act. Some Courts held that it did (*o*), while others held that it did not and that interest awarded by way of

(*e*) *Dattaram* v. *Gangaram* (1898) 23 Bom. 287: *Sinaya* v. *Munisami* (1899) 22 Mad. 289.
(*f*) *Sadashiv* v. *Trimbak* (1898) 23 Bom. 146.
(*g*) *Seale* v. *Brown* (1878) 1 All. 710 F.B. Section 307 of the Indian Succession Act.
(*h*) *Sunil Kumar Kerr* v. *Sisir Kumar Kerr* (1939) 67 I.A. 102.
(*i*) *Jugjeewandas* v. *Ramdas* (1841) 2 M.I.A. 487.
(*j*) *Bemola* v. *Mohun* (1880) 5 Cal. 792.
(*k*) *Bank of Khulna* v. *Jyoti Prokash Mitra* (1940) 67 I.A. 377; *Hemchandra Roy Chaudhary* v. *Suradhani Debya* (1940) 67 [illegible] 303.
(*l*) [illegible] *Chariar* v. *Srinivasa* (1867) 40 Mad. 26 I.C. 921 F.B. overruling *Navakotti* v. *Logalinga* (1910) 33 Mad. 312, 4 I.C. 388; *Madhab Koeri* v. *Baikuntha Karmaker* (1919) 4 Pat. L.J. 682, 52 I.C. 338; *Thakar Das* v. *Mst. Putli* (1924) 5 Lah. 317, 82 I.C. 96, ('24) A.L. 611; *Zafar Ahsan* v. *Zubaida Khatun* (1929) 27 All. L.J. 1114, 121 I.C. 398, ('29) A.A. 604.
(*m*) *Hardy* v. *Metropolitan Land Co.* (1872) 7 Ch. App. 427; *Re Coltman* (1881) 19 Ch. D. 64.
(*n*) *Raghubar Singh* v. *Jai Indra Bahadur Singh* (1919) 42 All. 158, 46 I.A. 228, 55 I.C. 550, ('19) A. PC. 55; *Syed Mehdi Ali* v. *Chunni Lal* (1929) 27 All. L. J. 902, 119 I.C. 81, ('29) A.A. 834.
(*o*) *Bikramjit Tewari* v. *Durga Dyal* (1894) 21 Cal. 274; *Moti Singh* v. *Ramohari Singh* (1897) 24 Cal. 699; *Rama Reddi* v. *Appaji Reddi* (1895) 18 Mad. 248; *Pawan Kumar* v. *Dul[illegible] Kuar* (1920) 1 Pat. L.T. 544, 58 I.[illegible] 216; *Matan Mal* v. *Muhammad* (1922) 3 Lah. 200, 66 I. C. 771, ('22) A.L. 254 F.B.

damages was not recoverable out of the mortgaged property, but was to be treated as a decree for damages (*p*). The amended Order 34, Rule 11, of the Code of Civil Procedure now makes it clear that such interest is included in "mortgage money." But there may be circumstances justifying the Court in refusing interest after the date fixed in the decree, as when the mortgagee filed an appeal which was pending for two years (*q*). The general rule is that in the absence of a contract to the contrary, the mortgagee is entitled to treat the interest due under the mortgage as a charge on the estate (*r*).

The mere fact that there is an express reference to interest in the personal covenant, but no express reference to interest in the hypothecation clause was held not to imply a contract to the contrary (*s*). Instances of contracts to the contrary excluding interest from the charge will be found in the undernoted cases (*t*).

Classification.—The section enumerates six classes of mortgage :—

1. Simple mortgage.
2. Mortgage by conditional sale.
3. Usufructuary mortgage.
4. English mortgage.
5. Equitable mortgage.
6. Anomalous mortgage.

Simple mortgage.—A simple mortgage consists of (1) a personal obligation, express or implied, to pay and (2) the transfer of a right to cause the property to be sold. The right transferred to the mortgagee is not ownership (*u*).

Binds himself personally to pay.—The personal liability to pay may be either express or implied for a promise to pay arises out of the acceptance of a loan (*v*). But the personal liability is excluded when the borrower binds himself to pay out of a particular fund (*w*). In *Ram Narayan Singh* v. *Adhindra Nath* (*x*) Lord Parker gave the following brief but adequate summary of the law :

(1) The loan *prima facie* involves a personal liability ;

(2) Such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest ;

(3) The nature and terms of the security may negative any personal liability on the part of the borrower.

It is accordingly a matter of construction whether the security is a simple mortgage. For a simple mortgage there must be a personal covenant either express or implied (*y*);

(*p*) *Narindra Bahadur* v. *Khadim Husain* (1895) 17 All. 581 ; *Rikki Ram* v. *Sheo Parshan* (1896) 18 All. 316.

(*q*) *Registered Jessore Loan Co.* v. *Shailajanath* (1932) 59 Cal. 722, 139 I.C. 455, ('32) A.C. 689.

(*r*) *Ganga Ram* v. *Natha Singh* (1924) 51 I.A. 377, 5 Lah. 425, 80 I.C. 820, ('24) A. PC. 183 ; *Ram Ratan* v. *Babu Aditya* (1928) 3 Luck. 459, 112 I.C. 481, ('27) A.O. 273 ; *Badhawa Ram* v. *Akbar Ali* (1927) 9 Lah. L.J. 428, 103 I.C. 752, ('27) A.L. 817 ; *Manghi* v. *Dial Chand* (1926) 7 Lah. 559, 96 I.C. 477, ('26) A.L. 624 ; *Abbas Khan* v. *Ram Das* (1928) 9 Lah. 140, 112 I.C. 153, ('28) A.L. 342.

(*s*) *Rang Raj Singh* v. *Sheonarain* (1928) 110 I.C. 594, ('28) A.P. 398.

(*t*) *Manikchand* v. *Rangappa* (1920) 45 523, 59 I. C. 765 ; *Nammalwar* [illegible] v. *Krishnasamy* (1923) 72 I.C. 987, (' A.M. 71 ; *Alla Khan* v. *Kanshi Ram* (1913) P.R. 45, 17 I.C. 677.

(*u*) *Papamma Rao* v. *Pratapa Korkonda* (1896) 19 Mad. 249, 252, 23 I.A. 32.

(*v*) *King* v. *King* (1735) 3 P. Wms. 358 ; v. *Sutton* (1882) 22 Ch.D. 511, 515 C.A.; *Kalee* v. *Raye Kishoree* (1873) 19 W.R. 231 ; *Yashvant* v. *Vithal* (1897) 21 Bom. 267, 270.

(*w*) *Narotam Das* v. *Sheo Pargash* (1883) 10 Cal. 740, 11 I.A. 33 ; *Kalka Singh* v. *Parasram* (1895) 22 Cal. 434, 22 I.A. 68 ; *Bunseedhur* v. *Sujaat* (1889) 16 Cal. 540 ; *Singjee* v. *Tiruvengadam* (1890) 13 Mad. 192 ; *Gopalasami* v. *Arunachella* (1892) 15 Mad. 304 ; *Kangaya* v. *Kalimuthu* (1904) 27 Mad. 526 ; *Chennapatnam* v. *Tada Kamalla* (1904) 27 Mad. 86 ; *Anglo-Indian Trading Co.* v. *Brierly* (1910) 8 I.C. 302 (covenant to pay out of sale proceeds of manganese ore).

(*x*) (1917) 44 Cal. 388, 400, 44 I.A. 87, 38 I.C. 988; *Om Prakash* v. *Mukhtar Ahmed* (1940) A.L. 486, 42 P.L.R. 990.

(*y*) *Wahid-un-Nissa* v. *Gobardhan* (1900) 22 All. 453, 461 ; *Abbakke* v. *Kinhiamma* (1906) 29 Mad. 491 ; [illegible] v. [illegible] (1907) 5 Cal. L.J. [illegible] ; [illegible] v. *Chandar Mal* (1906) [illegible] All. [illegible] ; *Ram Kishore* v. *Surajdeo* (1911) [illegible] Cal. L.J. 5, 1 I.C. 462.

S. 58 (c)

and in the absence of such a covenant the security is generally but not necessarily a charge (*z*).

No possession.—The characteristic of a simple mortgage is that possession is not given. If a simple mortgagee sues to enforce his security, a decree for possession would be illegal; and if passed, would not operate as a foreclosure but would make the simple mortgagee, a mortgagee with possession (*a*). A simple mortgage with possession is a simple mortgage usufructuary which is now included in the definition of an anomalous mortgage. In the undernoted case (*b*) the mortgage was a simple mortgage with a provision that if default was made in payment of interest the mortgagee should take possession. This was really a simple mortgage usufructuary or an anomalous mortgage though called a simple mortgage in the judgment.

Right to cause the property to be sold.—This right as already explained is a right *in rem* although it can only be enforced by the intervention of the Court (*c*). In fact the very words "cause the property to be sold" indicate that the power of sale is not to be exercised without the intervention of the Court (*d*). The transfer of this right may be express (*e*) or it may be implied (*f*); and in *Motiram* v. *Vitai* (*g*) Nanabhai Haridas, J., said that a power of sale is very seldom expressly given in a native mofussil mortgage. Any words pledging the property as security for the debt are sufficient to imply a right of sale (*h*). The word *Muakiza* (*i*) is not commonly used to denote a simple mortgage; but the words *Nazar Gahan* and *Taran Gahan* (*j*) import a power of sale. And so do words like *rehan*, *arh*, or *Mastagharag* (*k*). In a Madras case (*l*) the words "in default I shall on the security of the house site belonging to me.......pay and make good the principal and interest" were held to constitute a simple mortgage. The Privy Council in *Gokuldoss* v. *Kriparam* (*m*) held that the following words sufficed to create a simple mortgage: "If I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village to be made with you."

In a simple mortgage the security for the debt is therefore twofold (1) the personal obligation, and (2) the property (*n*).

Mortgage by conditional sale.—This is a mortgage in which the ostensible sale is conditional and intended as security for the debt. In case of payment at the time fixed the condition was that the sale became void or that the mortgagee executed a reconveyance. The distinction between a mortgage by conditional sale and a sale with a condition of repurchase has already been explained. [See note above "Sale with a condition of retransfer."] In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement; no debt subsists and no right to redeem is reserved by the debtor but only a personal right to repurchase. This personal right can only be enforced strictly

(*z*) *Maihub Hassan* v. *Mt. Kalawati* (1933) 147 I.C. 302, ('33) A.A. 934; *Sampuran Singh* v. *Ahmad Din* (1941) A.L. 274, 43 P.L.R. 277, 198 I.C. 100.

(*a*) *Papamma* v. *Pratapa* (1896) 19 Mad. 249, 23 I.A. 32.

(*b*) *Yashwant* v. *Vithal*, *supra*.

(*c*) *M. A. Hwin Yeik* v. *K. A. R. K. Chettyar Firm* (1939) 183 I.C. 728, (1939) A.R. 321 (F.B.).

(*d*) *Kishenlal* v. *Ganga Ram* (1891) 13 All 28.

(*e*) *Onkar Ramshet* v. *Govardhan* (1890) 14 Bom. 577.

(*f*) *Ram Brahman* v. *Venkatanarasu* (1912) 23 Mad. L.J. 131, 16 I.C. 299; *Ponnuranga* v. *Thandavaraya* (1915) Mad. W.N. 21, 26 I.C. 274.

(*g*) (1889) 13 Bom. 90, 92 F.B.

(*h*) *Lala Ramdhari Lal* v. *Janessar* (1870) 6 Beng. L.R. App. 14; *Ranguswami* v. *Muttukumarappa* (1887) 10 Mad. 509, 518; *Bishen* v. *Udit Narain* (1886) 8 All. 486, 489; *Sheoratan* v. *Mahipal* (1885) 7 All. 258, 264 F.B.; *Ponnuranga* v. *Thandavarya* (1915) Mad. W.N. 21, 26 I.C. 274.

(*i*) *Dalip Singh* v. *Bahadur Ram* (1912) 34 All. 446, 15 I.C. 485.

(*j*) *Datto Dudheshwar* v. *Vithu* (1896) 20 Bom. 408.

(*k*) *Gauhar Khan* v. *Ajudhia Singh* (1913) 20 I.C. 870.

(*l*) *Balasubramania* v. *Sivaguru* (1911) 21 Mad. L.J. 582, 11 I.C. 629.

(*m*) (1874) 13 Beng. L.R. 205 P.C.

(*n*) *Wahid-un-nissa* v. *Gobardhan* (1900) 22 All. 453.

S. [illegible]

according to the terms of the deed and at the time agreed upon (*o*). But in a mortgage by conditional sale the right of redemption subsists notwithstanding that the mortgagor has failed to pay at the time stated—see section 60 (*p*). This right arises from the fact that the property is considered to be merely a pledge for the loan (*q*). The mortgage by conditional sale was common in India from very early times and among Hindus it generally took the form of a mortgage which worked itself out in a sale on default of payment. Sadasiva Ayyar, J., in the undernoted case (*r*) suggested that this form of mortgage does not fall within the definition of mortgage by conditional sale in the Act. It is submitted however that there is no substance in this distinction, for in a mortgage by conditional sale the ostensible sale is really a mortgage and it matters not by what name it is called (*s*). The Hindu form of mortgage was treated as a mortgage by conditional sale in a Madras case (*t*) by Sir Charles Turner, C. J., a Member of the Second Indian Law Commission. Again this form of mortgage was recognised by the Privy Council as standing on the same footing as mortgages by conditional sale in *Balkishen Das* v. *Legge* (*u*). But the distinction made by Sadasiva Ayyar, J., has been followed in some subsequent cases (*v*). In the ancient law of India there was no equity of redemption in case of default in a mortgage by conditional sale any more than in an out and out sale with a condition of repurchase (*w*). The severity of this rule gave way to the equitable doctrine which regarded the forfeiture clause as a penalty. But it was a slow process and had a different history in each of the three great Presidencies.

Bengal.—In Bengal the Usury Regulations 15 of 1793 and 34 of 1802 required the mortgagee on redemption to give an account of rents and profits and to credit receipts in excess of legal interest to capital. Again Bengal Regulation I of 1798 empowered the mortgagor to pay the money into Court on the day named. But none of these Regulations extended the time for redemption, nor did they require any judicial procedure for foreclosure. This was effected by Bengal Regulation 17 of 1806. Under this Regulation it was necessary for the mortgagee to make an application for foreclosure to the District Judge before he could acquire an absolute title (section 8). The mortgagor had a right of redemption on payment or tender of the amount due or on making a deposit in the Court; and this right he could exercise within one year of service upon him of notice of the mortgagee's application for foreclosure. The provisions as to service of notice were imperative and not merely directory (*x*); and a notice that did not inform the mortgagor of the different courses open to him invalidated foreclosure proceedings (*y*). The mortgagee was not entitled to possession without taking foreclosure proceedings (*z*), and if he entered without taking proceedings for foreclosure, the mortgagor could eject him as a mere trespasser (*a*). The function of the Judge in the proceedings was ministerial (*b*) and if the mortgagee did not get possession after foreclosure he was obliged to file a suit

(*o*) *Williams* v. *Owen* (1840) 5 My. & Cr. 303, 305; *Kakerlapoody* v. *Vutsavoy* (1837) 2 M.I.A. 1; *Situl Pershad* v. *Luchmi* (1884) 10 Cal. 30, 10 I.A. 129; *Bhup Kuar* v. *Muhammadi* (1884) 6 All. 37; *Vasudeo* v. *Bhau* (1897) 21 Bom. 528.

(*p*) *Venkat Subbiah* v. *Juma Moosus* (1941) A.M. 666, (1194) 1 M.L.J. 754, 53 M.L.W. 731, (1941) M.W.N. 532.

(*q*) *Seton* v. *Slade*, *Hunter* v. *Seton* (1802) 7 Ves. 265, 273.

(*r*) *Srinivasa Ayyangar* v. *Radhakrishnam* (1915) 38 Mad. 667, 22 I.C. 54.

(*s*) *Sheorgun Singh* v. *Babu Singh* (1926) 48 All. 302, 94 I. C. 849, ('26) A. A. 493; *Ali Ahmad* v. *Rahmatullah* (1892) 14 All. 195.

(*t*) (1882) 4 —— 179.

(*u*) (1899) 22 All. 149, 27 I. A. 58; *Mohamed Haji* v. *Ramappa* (1929) 25 Nag. L.R. 187, 119 I.C. 684, ('29) A.N. 254 F.B.

(*v*) *Hakeem Patte Muhammad* v. *Shaik Dawood* (1916) 39 Mad. 1010, 30 I.C. 569; *Kandula Venkiah* v. *Donga Palleya* (1920) 43 Mad. 589, 57 I.C. 724; *Asvath* v. *Chimnabai* (1925) 27 Bom. L.R. 1246, 91 I.C. 330, ('26) A.B. 107.

(*w*) *Thumbusawmy* v. *Hossein* (1875) 1 Mad. 1, 2 I.A. 241; *Pattabhiramier* v. *Vencatarow* (1870) 13 M.I.A. 560; *Gobar Dhan* v. *Gobal Das* (1880) 2 All. 633; *Mallikarjunudu* v. *Mallikarjunudu* (1885) 8 Mad. 185.

(*x*) *Madho Pershad* v. *Gajadhar* (1884) 11 Cal. 111, 11 I.A. 186; *Mahesha Mal* v. *Gopal* (1933) 14 Lah. 640, 144 I. C. 390, ('33) A. L. 676.

(*y*) *Tarachand* v. *Chiman* (1912) 8 P.L.R. 1912, 12 I.C. 530.

(*z*) *Badri Das* v. *Basu* (1933) 145 I.C. 180, ('33) A.L. 174.

(*a*) *Sheikh Hub Ali* v. *Wazirunnissa* (1906) 28 All. 496, 33 I.A. 107.

(*b*) *Forbes* v. *Ameeroonissa Begum* (1865) 10 M.I.A. 340.

S. 58 (c) for the purpose (c). If he neglected to file a suit the mortgagor remaining in adverse possession for 12 years would acquire a prescriptive title which could not be displaced by a foreclosure proceeding under the Act (d). The effect of these Regulations was therefore to curtail the strict rights of the mortgagee on the analogy of English rules of equity. These Regulations were followed in the United and Central Provinces and Oudh and in the Punjab. They were extended to the Central Provinces by Act 20 of 1875. The Privy Council approved of their being followed in the Non-Regulation Provinces as being in accordance with the rule of equity and good conscience (e). The Transfer of Property Act does not affect any right, or any relief in respect of a right, under the repealed Regulation—section 2 (c). So when the mortgagee had given notice of foreclosure under the Regulations he could not treat the proceedings as a suit filed under the Transfer of Property Act (f), nor could he file a fresh suit under the Act (g). On the other hand if the suit is properly filed under the Act the mortgagor cannot claim the benefit of the one year's grace allowed in the repealed Regulation (h).

Madras.—In Madras before 1858 the ancient law of India was strictly followed and no right of redemption after due date was recognised. But after 1858 the right of redemption was admitted and the course of decisions assimilated to the English rules of equity (i). This was disapproved of by the Privy Council in the case of *Pattabhiramier* v. *Vencatarow* (j). Their Lordships observed that the doctrine that the time stipulated in a mortgage deed was not the essence of the contract, was unknown in the ancient law of India, and that if it could have been introduced by the decisions of the Courts of the East India Company there was no such course of decisions. Nevertheless the Madras High Court in *Rajah Lakshmi* v. *Krishna* (k) said that the decisions of the Sadar Court since 1850 had carried the doctrine so far that when security for money was the object of the transaction no sale could become absolute. But in 1875 *Thumbusawmy*'s case (l) was decided by the Privy Council and all the Madras and Bombay decisions were reviewed and condemned and *Pattabhiramier*'s case was reaffirmed. The Privy Council further suggested as a rule for future guidance that the right of redemption should only be recognised in the case of mortgages between 1858 and 1875 during which period the parties might be supposed to have contracted with reference to the Madras authorities. As regards mortgages executed before 1875 the Madras High Court followed *Thumbusawmy*'s case. So a conditional mortgage of 1846 where the time for payment was 1848 was held not to be redeemable (m) while a mortgage of 1865 was held to be redeemable (n). Again in a later case (o) a mortgage of 1832 for eight years was not redeemable after due date in spite of the fact that the duty to account was imposed upon the mortgagee by Madras Regulation 34 of 1802 corresponding to Bengal Regulation 15 of 1793. On the other hand a mortgage of 1820 was held redeemable as the conditional sale only became absolute in default of payment of the balance found due on taking an account, and no account had been taken (p). But as regards mortgages executed after 1875 the Madras High Court interpreted *Thumbusawmy*'s case as justifying the continuance of the right of redemption until the Legislature should intervene and settle the law as it did in the Transfer of

(c) *Norendra* v. *Dwarka Lal* (1873) 3 Cal. 397, 5 I.A. 18; *Kishori* v. *Gunga Bhau* (1896) 23 Cal. 228, 22 I.A. 183.

(d) *Srinath Das* v. *Kettermohun* (1889) 16 Cal. 693, 16 I.A. 85.

(e) *Gokuldas* v. *Kriparam* (1874) 13 Beng. L.R. 205 P.C.

(f) *Sitla Bakhsh* v. *Lalta Prasad* (1886) 8 All. 388.

(g) *Mohabir* v. *Gungadhur* (1887) 14 Cal. 599; *Umesh Chunder* v. *Chunchun* (1888) 15 Cal. 357.

(h) *Ganga S[illegible]* v. *Kish[illegible]* (1884) 6 All. 262; *Bhobo Sunda[illegible]* v. *Rakhal Chunder* (1886) 12 Cal. 583, disapproving *Peryash Koer* v. *Mahabir* (1885) 11 Cal. 582.

(i) *Venkata* v. *Parvati* (1863) 1 Mad. J.C. 460, 464; *Nallana* v. *Palani* (1865) 2 Mad. H.C. 420.

(j) (1870) 13 M.I.A. 560.

(k) (1871) 7 Mad. H. C. 6.

(l) *Thumbusawmy* v. *Hossein* (1875) 1 Mad. 1, 2 I.A. 241.

(m) *Bapirazu* v. *Kamarazu* (1881) 3 Mad. 26.

(n) *Ramasami* v. *Samiyappa* (1882) 4 Mad. 179.

(o) *Mallikarjunuda* v. *Mallikarjunuda* (1885) 8 Mad. 185.

(p) *Amirudin* v. *Sobhanadri* (1883) 6 Mad. 339.

Property Act. So in a suit in 1889 to redeem a mortgage of 1880 payable in 1882, redemption was decreed (*q*). S. 58 (c)

Bombay.—In Bombay the ancient law was followed and no right of redemption was recognised by the Sadar Adalat in *Gahan Lahan* mortgages. But the change came in 1864 when in *Ramji* v. *Chinto* (*r*) the Bombay High Court approved the leading Madras case (*s*) and allowed a right of redemption tempered with an allowance to the mortgagee for improvements effected under the mistaken impression that he had become a purchaser (*t*). As in Madras, this course of decisions persisted in spite of *Pattabhiramier's* case (*u*) and was justified by Westropp, C.J., after an exhaustive review of the case law in the under noted case (*v*). The Bombay High Court refused to alter this course of decisions even after *Thumbusawmy's* case (*w*) and two years after that case Westropp, C.J., in *Bapuji* v. *Senavaraji* (*x*) declared that the doctrine known as the equity of redemption was part of the ancient law of India and this was followed in subsequent cases (*y*).

The Transfer of Property Act, 1882, repealed the Regulations and removed the differences between the different High Courts and as to all mortgages executed after it came into force, the right of redemption is given by section 60.

Central Provinces.—In Central Provinces in the case of a *Gahan Lahan* mortgage, a Court can pass a decree either for foreclosure or sale (*z*).

Personal liability.—The definition does not mention a personal covenant to repay and the personal liability is not an essential ingredient of a mortgage by conditional sale (*a*). It has been said that this circumstance makes mortgages by conditional sale an exception to the rule "no debt no mortgage" (*b*). It is true that the test of a right of personal recovery applied by Westropp, C.J., in *Bapuji* v. *Senavaraji* fails because of the absence of a personal covenant. But this test would also fail in the case of a usufructuary mortgage (*c*) and Westropp, C.J., in the case cited applies the maxim "once a mortgage always a mortgage" to mortgages by conditional sale. It is therefore submitted that the debt subsists although the creditor's right of recovery is limited to the mortgaged property.

On a certain date.—In a Calcutta case (*d*), Maclean, C.J., said that "a certain date" was an essential element of a mortgage by conditional sale. In a later case (*e*) it was held by the same High Court that "on a certain date" means "on or before a certain date." The Madras High Court, however, has held that these words refer to the default in the second clause of sec. 58 (c), and not to the payment in the third or fourth clause (*f*).

Limitation for a suit on a simple mortgage.—The period of limitation is 12 years from the date when the money sued for becomes due (*g*); see Limitation Act, art. 132.

(*q*) *Venkatasubbayya* v. *Venkayya* (1892) 15 Mad. 230; *Ramayya* v. *Krishnamma* (1901) 23 Mad. 114 (mortgage of 1882).

(*r*) (1864) 1 Bom. H. C. 199.

(*s*) *Venkata* v. *Parvati* (1862) 1 Mad. H. C. 460.

(*t*) *Anandrav* v. *Ravji* (1866) 2 Bom. H. C. 214.

(*u*) (1870) 13 M. I. A. 560.

(*v*) *Shankarbhai* v. *Kassibhai* (1872) 9 Bom. H. C. 69.

(*w*) (1875) 1 Mad. 12 I.A. 241.

(*x*) (1877) 2 Bom. 236.

(*y*) *Kanayalal* v. [illegible]*vubai* (1883) 7 Bom. 139; [illegible] *Janardan* (1889) 14 Bom. 19; *Abdul Rahim* v. *Madhavrao* (1890) 14 Bom. 78.

(*z*) *Sitaram* v. *Krishnarao* (1940) 190 I.C. 641, (1940) A.N. 156.

(*a*) *Balkishen* v. *Legge* (1900) 22 All. 149, 159, 27 I. A. 58, 66; *Ramasami* v. *Samiyappa* (1882) 4 Mad. 179, 183; *Mahomed Haji* v. *Ramappa* (1929) 25 Nag. L. R. 187, 119 I.C. 654, ('29) A.N. 254 F.B.

(*b*) Ghose, p. 90; *Balkrishna Das* v. *Legge* (1897) 19 All. 434, 445.

(*c*) *Ram Narayan Singh* v. *Adhindra Nath* (1917) 44 Cal. 388, 44 I.A. 87, 39 I.C. 982.

(*d*) *Kinuram* v. *Nitya Chand* (1907) 11 Cal. W. N. 400.

(*e*) *Mahomed Mozaffer Ali* v. *Asraf Ali* (1915) 25 I. C. 93.

(*f*) *Padmanabha* v. *Sitarama* (1928) 54 Mad. L. J. 96, 106 I.C. 158, ('28) A.M. 23

(*g*) *Vasudeva* v. *Srinivasa* (1907) 30 Mad. 426, 34 I.A. 186.

S. 58(d). **Usufructuary mortgage.**—In a usufructuary mortgage the mortgagee is placed in possession and has a right to enjoy the rents and profits until the debt is paid. It is not necessary that the mortgagee should take physical possession, for the mortgagor may continue in possession as lessee of the mortgagee (*h*), or he may direct the tenants to pay rent to the mortgagee (*i*). A *lekha mukhi* mortgage in the Punjab is a usufructuary mortgage (*j*). The words "expressly or by implication binds himself to deliver possession" were inserted by the amending Act of 1929. They have the effect of overruling the case of *Subbama* v. *Narayya* (*k*) where the Madras High Court held that a usufructuary mortgagee who had not been given possession was not a usufructuary mortgagee and therefore could sue for sale for deprivation of his security. The case is erroneous for two reasons, (1) because sec. 68 (c) could not have applied unless the mortgage was usufructuary, and the mortgage could not be usufructuary for the purposes of sec. 68 and not usufructuary for the purposes of sec. 67, and (2) because the right of suit under sec. 68 is a personal right and does not import a right to realize the security (*l*). The fact that possession was not given cannot alter the character of the transaction (*m*) and the words now inserted make it clear that the mortgagee who is entitled to possession under the mortgage but who has not received possession is a usufructuary mortgagee.

How the rents and profits should be appropriated depends upon the terms of the deed. The definition has been widened by the addition of the words "or any part of such rents and profits." This would cover cases where the mortgagee is put in possession and retains part of the rents and profits in discharge of the debt and pays the residue as rent to the mortgagor. Thus in a Madras case (*n*) the plaintiff in return for a loan of Rs. 1,400 put the defendant in possession of premises of a rental value of Rs. 16-13-0 per mensem. The defendant retained Rs. 14 towards principal and interest and paid the plaintiff Rs. 2-12-0 as rent.

The rents and profits or part of the rents and profits may be appropriated (1) in lieu of interest, (2) in lieu of principal or (3) in lieu of principal and interest.

The first case resembles the Welsh mortgage and is the most common form where the borrower practically says to the creditor: "you lend the money and I lend the land; if either of us wants that which he has lent he shall restore that which was lent to him" (*o*). The mortgagor recovers possession when he pays the principal and there is no question of an account between the mortgagor and mortgagee—see sec. 77. In this case the mortgagee takes the chance of the rents and profits being greater or less than the interest (*p*).

In the second case the mortgagor continues to pay interest and is entitled to recover possession when the rents and profits received equal the amount of the principal. An account of the rents and profits is necessary for this purpose.

In the third case the mortgagor is not entitled to recover possession until the principal and interest are paid out of the rents and profits. This is a common form and an account

(*h*) *Feroz Shah* v. *Sobhat Khan* (1933) 60 I. A. 273, 14 Lah. 465, 1933 All. L. J. 1193, 37 Cal. W.N. 993, 58 Cal. L.J. 52, 65 Mad. L. J. 150, 35 Bom. L. R. 877, 143 I. C. 650, ('33) A.P.C. 178; *Raja Pertab Bahadur* v. *Gajadhar* (1902) 24 All. 521, 29 I. A. 148.

(*i*) *Venkataratnam* v. *Varahaliah* (1932) 63 Mad. L. J. 316, 139 I.C. 449, ('32) A. M. 766.

(*j*) *Gahi Mal* v. *Shera* (1881) P.R. 90; *Khandu Lal* v. *Fazal* (1920) 1 Lah. 89, 51 I. C. 953; *Karam Chand* v. *Shera* (1931) 133 I.C. 655, ('31) A. L. 496.

(*k*) (1918) 41 Mad. 259, 43 I.C. 4 F.B.

(*l*) *Arunachalam Chetti* v. *Ayyavayyan* (1898) 21 Mad. 476 F. B.; *Ayyasami Thevan* v. *Virappa* (1906) 29 Mad. 292.

(*m*) *Khunni Lal* v. *Madan Mohan* (1908) 31 All. 318, 322, 1 I.C. 208; *Madan Mohun* v. *Ashad Ally* (1884) 10 Cal. 68; *Ram Khilawan* v. *Gulam Hussain* (1932) 8 Luck. 190, 141 I.C. 464, ('33) A. O. 35; *Harnath Singh* v. *Maiya Ambika Devi* (1940) 193 I.C. 272, (1941) A.P. 307.

(*n*) *Venkateshwara* v. *Kesava* (1879) 2 Mad. 187; *Mashook Ameen* v. *Maram Reddy* (1875) 8 Mad. H. C. 31.

(*o*) *Vasseri* v. *Putanattil* (1865) 2 Mad. H. C. 352; *Sadashiv* v. *Vyankatrao* (1896) 20 Bom. 296.

(*p*) *Raja Pertab Bahadur Singh* v. *Gajadhar* (1902) 24 All. 521, 531, 29 I.A. 148.

S. [illegible]

is necessary to ascertain whether the principal and interest have been paid off. There are cases however in which the condition is that the rents and profits are taken in lieu of interest and defined portions of the principal—see sec. 77. Thus if the condition is that the rents and profits each year shall be taken in lieu of interest and one-tenth of the principal, the debt is discharged in ten years and no account is necessary.

The characteristics of a usufructuary mortgage as defined in this section are (1) that there is no personal liability on the mortgagor, (2) no time limit is fixed, (3) the mortgagee takes the whole or part of the rent and profits.

No personal liability.—The mortgagee takes possession and looks to the rent and profits to repay himself. The mortgagor cannot be sued personally for the debt (*q*). In a Calcutta case (*r*) the words were "having paid the principal money in the month of Chaitra 1297 we shall take back the documents and the land. In case we fail to repay the principal money at due date the *sudbharna* bond shall remain in force." But they were held to import no personal covenant. As there is no personal liability a debt secured by a usufructuary mortgage cannot be attached under Order 21, rule 46 of the Code of Civil Procedure as if it were a simple debt (*s*). The interest of such a mortgagee can only be attached under Order 21, rule 54.

This characteristic is lacking in many mortgages that are commonly called usufructuary. A personal covenant is often included in order to provide a personal remedy against the mortgagor. If the covenant does not import a right of sale it has been said that the character of the mortgage is not altered (*t*), but it is submitted that it is an anomalous mortgage. If it does import a right of sale it would still be an anomalous mortgage since the amending Act of 1929, but a simple mortgage usufructuary under the Act as it stood before the amendment.

No time limit.—The mortgagee retains possession until the mortgage money is paid. It has been held that this is an uncertain time dependent on the state of the account or the ability of the mortgagor to repay and that if a time limit is fixed the mortgage is not a mortgage "until payment of the mortgage money" and is therefore not a usufructuary mortgage (*u*). But this view does not seem to be correct. A time limit may be impliedly fixed when the agreement is that referred to in sec. 77, when the rent and profits are in lieu of interest and defined portion of the principal. In *Ram Narayan Singh* v. *Adhindra Nath* (*v*) a fixed date was appointed for restoration of possession after calculation of the time when the mortgage money would be discharged out of the usufruct, yet the Privy Council held that it was only a usufructuary mortgage. Again sec. 62 (b) expressly provides for a case where a term is prescribed for the payment of the mortgage money. However if the time limit imports a personal covenant to pay and a right of sale in default, the mortgage would not be a usufructuary mortgage but an anomalous mortgage

(*q*) *Chathu* v. *Kunjan* (1889) 12 Mad. 109, dissenting from *Venkatasami* v. *Subramanya* ([illegible]) 11 Mad. 88; *Sadashiv Abaji* v. [illegible] (1896) 20 Bom. 296; *Ram Narayan* v. *Adhindra* (1917) 44 Cal. [illegible] 44 I.A. 87, 38 I. C. 982, ('16) A. PC. 119.

(*r*) *Luchmeshur* v. *Dookh* (1897) 24 Cal. 677, followed in *Kamal Nayan* v. *Ram Nayan* (1930) 120 I.C. 305, ('30) A.P. 152.

(*s*) *Manilal Ranchod* v. *Motibhai* (1911) 35 Bom. 288, 10 I.C. 812; *Subraya Pai* v. *Subramania Pattar* (1928) 111 I. C. 218, ('28) A. M. 642—See *Ramaswami* v. *Srinivasa* (1916) 39 Mad. 389, 28 I.C. 384.

(*t*) [illegible] v. [illegible] (1906) 28 All. 157; *Krishna Khushal* v. *Hari* (1908) 10 Bom. L. R. 615; *Mohammad Abdullah* v. *Mohammad Yasin* (1933) 141 I.C. 877, ('33) A. L. 151.

(*u*) *Hikmatulla* v. *Imam Ali* (1890) 12 All. 203 (mortgage of land for 4 years, the mortgagee to credit the rents and profits to interest and the balance to capital and the mortgagor to pay the deficiency at the end of the term); *Viraulinga* v. *Palaniappa* (1898) 21 Mad. 1; *Tukaram* v. *Ramchand* (1902) 26 Bom. 252; *Krishna* v. *Hari* (1908) 10 Bom. L. R. 615; cf. *Shaik Idrus* v. *Abdul Rahiman* ([illegible]) 16 Bom. 303 (a case under Reg. 5 of 1827); contra *Vaddiparthi* v. [illegible] (1921) 41 Mad. L.J. [illegible], [illegible] 717, ('21) A.M. 517.

(*v*) (1916) 44 I.A. 87, 44 Cal. 388, 38 I.C. 982.

of the species "simple mortgage usufructuary" (w). If at the expiry of the time limit the mortgage is to become a mortgage by conditional sale, it is an anomalous mortgage of the species "mortgage usufructuary by conditional sale" (x).

Usury Regulations.—Usufructuary mortgages were a cloak for usurious transaction, the rent being taken in lieu of exorbitant interest. The Usury Regulations (y) were designed to check this practice by limiting the mortgagee to interest at 12 per cent. and by making him liable to account for rents and profits notwithstanding the terms of the contract and allowing redemption before the expiry of the period fixed in the deed (z). Usufructuary mortgages executed while these Regulations were in force are controlled by them, even though the suit be filed under the Transfer of Property Act (a). Thus in one case redemption was allowed before the expiry of the period fixed (b). But in a case where the contract was not usurious the Privy Council held that a condition exonerating the mortgagee from filing accounts was valid although it was governed by the Regulations (c).

Zuripeshgi leases.—Zuripeshgi leases bear a close resemblance to usufructuary mortgages, but are not mortgages unless the lease is for the purpose of securing a debt. The word Zuripeshgi means lease for a premium—the premium being the original loan. Mortgages were given in this form in order to evade the prohibition against usury in the Koran and in the Usury Regulations. The usual form of such a mortgage was a loan repayable on the day the lease should expire, and the rent is either wholly the interest or partly the interest and partly repayment of principal with a proviso that the lessee should continue in possession till the loan should be repaid (d). Once you get a debt with the security of land for its repayment then the arrangement is a mortgage by whatever name it is called (e). Where, however, a lease does not intend to create the relationship of debtor and creditor and reserves no right of redemption to the lessor, but simply asks the lessee to quit the land without any payment on the part of the lessor at the expiry of the term of the lease, it is a Zuripeshgi lease and not mortgage (f). The Privy Council in the *Bengal Indigo Company* v. *Mohunt Roghubur Das* (g) described the possession of the lessees under a Zuripeshgi lease as being "in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them by means of their security." The case of *Venkateshwara* v. *Kesava* (h) is a good illustration of such a transaction. The plaintiff borrowed Rs. 1,400 from the defendant and leased him a piece of land and a warehouse for eight years. It was agreed that the rent of the warehouse should be Rs. 16-12-0 per mensem and that the defendant should retain Rs. 14 as interest on the advance and pay Rs. 2-12-0 as rent to the plaintiff. The warehouse was destroyed by fire after four years,

(w) *Pargan Panday* v. *Mahatam Mahto* (1907) 6 Cal. L. J. 148; *Pitamber Parkait* v. *Madhu Sudan* (1910) 6 I. C. 158; *Dattambhat Rambhat* v. *Krishnabhat* (1910) 34 Bom. 462, 7 I.C. 446; *Jag Sahu* v. *Musst. Ram Sakhi* (1922) 1 Pat. 350, 65 I. C. 666, ('22) A.P. 58; *Sivakami Ammal* v. *Gopala* (1894) 17 Mad. 131; *Udayana Pillai* v. *Senthivelu* (1896) 19 Mad. 411; *Mahadaji* v. *Joti* (1893) 17 Bom. 425; *Madhava Sidhanta* v. *Venkataramanjulu* (1903) 26 Mad. 662; *Kangaya Gurukal* v. *Kalimuthu* (1904) 27 Mad. 526 F.B.; *Chhathi Lal* v. *Bindeshwari Prasad* (1929) 8 Pat. 16, 120 I.C. 82, ('29) A.P. 605; *Sarajbashini Ghose* v. *Baijnath Pandey* (1938) 176 I.C. 292, (1938) A.P. 338.

(x) Macpherson, p. 13, *Ramasami* v. *Samiyappanayakan* (1882) 4 Mad. 179, 183; *Girwar Singh* v. *Thakur Narain* (1887) 14 Cal. 730, 737 F.B.

(y) Bengal Regulation 15 of 1793, 34 of 1803, 17 of 1806; Madras Regulation 34 of 1802, 2 of 1825; Bombay Regulation 1 of 1814.

(z) *Shah Mukhun Lall* v. *Baboo Sree Kishen* (1869) 12 M. I. A. 157.

(a) *Samar Ali* v. *Karimullah* (1886) 8 All. 402.

(b) *Tippayya* v. *Venkata* (1883) 6 Mad. 74 dissenting from *Periathali* v. *Mankude* (1881) 4 Mad. 113.

(c) *Badri Parshad* v. *Babu Murlidhur* (1882) 2 All. 593, 7 I.A. 51.

(d) *Ruttan Singh* v. *Greedharee* (1868) 8 W. R. 310; *Sheo Golam Singh* v. *Roy Dinkur* (1869) 12 W. R. 215; *Ram Doolary* v. *Thaccor Roy* (1879) 4 Cal. 61; *Tukaram* v. *Ramchand* (1902) 26 Bom. 252; *The Bengal Indigo Co.* v. *Mohunt Roghubur Das* (1896) 24 Cal. 272, 23 I. A. 158; *Chennapatnam* v. *Tadakamalla* (1904) 72 Mad. 86; *Mahmad Musa* v. *Bagas* (1908) 32 Bom. 569.

(e) Ghose on Mortgages, Vol. I, p. 102; *Immani Seshayya* v. *Dronamraju* (1930) 57 Mad. L. J. 800, 124 I. C. 282, ('30) A.M. 160; *Rameshwar Narain* v. *Panil Ram* (1934) A. P. 217.

(f) *Tulsi Ram* v. *Muna Kear* (1936) 12 Luck. 161, 162 I.C. 225 (1937) A.O. 146.

(g) (1896) 24 Cal. 272, 23 I.A. 158, 165.

(h) (1879) 2 Mad. 187, 191.

the defendant ceased to pay Rs. 2-12-0 as rent, and the plaintiff sued to recover possession for non-payment of rent. The suit was dismissed on the ground that the defendant was entitled to possession as mortgagee. Innes, J., said—"The gist of the agreement was not a letting of the premises with a rent reserved, but a usufructuary mortgage of the premises with a certain small portion of the income of it made payable to the plaintiff." S. 58(d)-(e)

As the lease is security for the loan it has been said that Zuripeshgi leases are construed as mortgages, when there is a right of redemption expressly or impliedly reserved (*i*). In *Maharaja Kesho Prasad* v. *Chandrika Prasad* (*j*) Dawson Miller, C.J., said—"I think the result of the authorities as well as of the text-books is that the test in such cases must be whether there is a secured debt and a right of redemption." In a mortgage by Zuripeshgi lease for a fixed term, a personal covenant to repay is implied (*k*). If the lease is not security for the loan, the transaction would not be a mortgage but a lease and an ordinary money debt (*l*). If the original premium is not an advance which is repayable, the transaction is a lease and not a mortgage (*m*).

In a mortgage by Zuripeshgi lease, the lease and the mortgage may or may not be separable transactions and it is purely a question of construction whether the remedies can or cannot be separately pursued (*n*). The undernoted case (*o*) is an instance of a combined lease and mortgage. The lease was of a coal mine and the mortgage was of the leasehold premises to secure an advance made by the lessee to the lessor and the mortgagee-lessee had also the right to appropriate the royalties to the discharge of the principal money secured by the mortgage. These were separate transactions and the mortgaged property was sold subject to the lease. In a Punjab case (*p*) where the lease was merely a means of realising the interest of the mortgage which was executed the same day, a suit for rent was held to bar a subsequent suit for recovery of the principal and interest under Order II, rule 2 of the Code of Civil Procedure.

In a Zuripeshgi lease the mortgagee is the lessee and has physical possession. But a usufructuary mortgagee may lease the mortgaged property to the mortgagor and put him in phy ical possession. In such cases the lease and mortgage are distinct (*q*).

English mortgage.—In an English mortgage, as defined in sec. 58 (e), there is, in form, a transfer of ownership to the mortgagee, with a covenant to repay the debt on a certain date, and a proviso that on this condition being performed the mortgagee will retransfer the property to the mortgagor. Options as regards earlier payment or extension of time for repayment are matters of grace which do not affect the undertaking to repay at a certain date (*r*). In *Narayana* v. *Venkataramana* (*s*) the Madras High Court said—"The three essentials of an English mortgage are (1) that the mortgagor should bind himself to repay the mortgage money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be

(*i*) *Basant Lal* v. *Tapeshri* (1881) 3 All. 1; *Gopal* v. *Desai* (1882) 6 Bom. 674.

(*j*) (1923) 2 Pat. 217-229, 68 I.C. 394, ('23) A.P. 122; *Hussain Ali Shah* v. *Sardar Ali Shah* (1933), 149 I.C. 509, ('33) A. L. 786.

(*k*) *Chhathi Lal* v. *Bindeshwari Prasad* (1929) 8 Pat. 16, 120 I.C. 32, ('29) A.P. 605.

(*l*) *Kammara Peda* v. *Kararua Chennapa* (1915) 28 Mad. L.J. 308, 28 I. C. 842; *Choley Lal* v. *Mohanlan* (1930) 28 All. L.J. 332, 127 I.C. 425, ('30) A.A. 375; *Mahadeo* v. *Ramsekar* (1935) All. L.J. 275, 157 I.C. 362, ('35) A.A. 150.

(*m*) *Abdulbhai* v. *Kashi* (1887) 11 Bom. 462.

(*n*) *Khuda Buksh* v. *Alimunnissa* (1905) 27 All. 313; *Chimman Lal* v. *Bahadur* (1901) 23 All. 338; *Altaf Ali* v. *Lalta Prasad* (1897) 19 All. 496; *Baghelin* v. *Mathura Prasad* (1882) 4 All. 430; *Imdad Hasan* v. *Badri Prasad* (1898) 20 All. 401; *Madhwa Sidhanta* v. *Venkataramanjulu* (1903) 26 Mad. 662; *Meenakshisundara* v. *Rathnasami* (1918) 41 Mad. 959, 49 I. C. 291; *Kishundayal* v. *Mahabir* (1920) 5 Pat. L. J., 492, 58 I. C. 291; *Karamat Ali Khan* v. *Ganeshi Lal* (1927) 49 All. 658, 101 I.C. 516, ('27) A.A. 552.

(*o*) *Baraboni Coal Concern Ltd.* v. *Deb Prasanna Mukerji* (1934) 38 Cal. W. N. 481, 59 Cal. L. J. 207, 66 Mad. L. J. 479, 154 I. C. 596, ('34) A.PC. 119.

(*p*) *Natha Singh* v. *Chuni Lal* (1918) P.R. 69, 47 I. C. 364.

(*q*) *Chimman Lal* v. *Bahadur* (1901) 23 All. 338; *Uttam Chandra* v. *Rajkrishna* (1920) 47 Cal. 377, 55 I.C. 517; *Asa Ram* v. *Kishan Chand* (1930) 120 I. C. 185, ('30) A.L. 386; *Abdul Rahim* v. *Raghunath* (1931) 130 I. C. 581, ('31) A. P. 22.

(*r*) *Raja Janki Nath* v. *Syed Saad Ram* (1935) 14 Pat. 560.

(*s*) (1902) 25 Mad. 220, 225 F.B.

S. 58 (e) made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage money, on the day on which the mortgagor bound himself to repay the same." Accordingly a deed in the following terms :—"In consideration of the sum of Rs. 7,000 paid to the mortgagors by the mortgagee they, the mortgagors, do hereby covenant with the mortgagee that they will pay to the mortgagee the sum of Rs. 7,000 on the 31st December 1882 and will pay interest for the same in the meantime and until final payment of all monies due hereinunder at the rate of 10 per cent. per annum . . . . . . In consideration of the premises the mortgagors hereby mortgage and assign to the mortgagee the coffee estates . . . . Upon repayment to the mortgagee of all sums due to him by the mortgagors, the mortgagee shall reconvey the said property "—was held not to be an English mortgage (1) because it was doubtful if the words "mortgage and assign" amounted to an absolute transfer, and (2) because the proviso for reconveyance was not on payment on a fixed date.

The question arises whether this requirement that the property should be transferred absolutely is a mere matter of form or is a matter of substance so that the whole of the estate of the mortgagor must pass to the mortgagee. The word "absolutely" in the definition of an English mortgage in clause (e) seems inconsistent with the general definition in clause (a) that "a mortgage is a transfer of an interest" in the property. If a mortgage is a transfer of an interest in property, it is not an absolute transfer. Rankin, C.J., in *Bengal National Bank* v. *Janaki Nath Roy* (t) suggested that clause (e) and clause (a) might be reconciled on the reasoning of Dallas, C. J., in *Williams* v. *Bosanquet* (u) that the estate vests absolutely in the mortgagee and that the assignment is not the less absolute because the mortgagee is under a covenant to reconvey. It was accordingly held that a mortgage by a lessee by way of an English mortgage operated as an absolute assignment of the lease and established privity of estate between the assignee and the lessor, so as to entitle the lessor to claim rent from the assignee. The reasoning of the learned Chief Justice was, however, doubted in a later Calcutta case (v) where with reference to this inconsistency Mukerji, J., said:—"The definition of an English mortgage as given in the Transfer of Property Act sec. 58(e) must be read subject to the definition of a mortgage as given in clause (a) of that section, and consequently, an English mortgage in India can hardly be regarded as the transfer of the entire estate of the mortgagor to the mortgagee. It is correct, however, not to regard what is left in the mortgagor as an equitable estate, but it is nevertheless some estate, an interest only in the estate having been transferred under the mortgage. In our opinion, therefore, it is not easy to say of an assignment by way of an English mortgage in India executed by a lessee that the whole of the estate passes under the mortgage to the mortgagee." The reasoning adopted by Mukerji, J., found favour with the Judicial Committee in *Ramkinkar* v. *Satyacharan* (w) where the nature of an English mortgage as defined in sec. 58 (e) has been clearly explained.

In *Ramkinkar* v. *Satyacharan*, *supra*, the question that was ultimately raised was whether a lessor could sue a mortgagee from a lessee for rent. This he could do if there was a privity of estate between him and the mortgagee. There could be privity of estate between the lessor and the mortgagee if the mortgage operated as an absolute assignment of the lease by the lessee to the mortgagee. The contention of the plaintiff in that case was that as the mortgage there was by way of an English mortgage there was an absolute transfer of the lease and accordingly on the principle established in England in *Williams* v. *Bosanquet*, *supra*, a privity of estate was created as between the lessor and the mortgagee. This contention was repelled by the Judicial Committee. Referring to the nature and incidents of a mortgage in England prior to the passing of the Law of Property

(t) (1927) 54 Cal. 813, 104 I. C. 484, ('27) A.C. 729.

(u) (1819) 1 Br. & B. 238; *Tancred* v. *Delagoa Bay and East Africa Rly.* (1889) 23 Q.B.D. 239, 242.

(v) *Falakrishna Pal* v. *Jagannath Marwari* (1932) 59 Cal. 1314, 1330, 36 Cal. W.N. 709, 56 Cal. L.J. 187, 140 I.C. 730 ('32) A.C. 775.

(w) 66 I.A. 50.

Act 1925 their Lordships of the Judicial Committee observed at pp. 58-59: "Until 1925 the form of mortgage usually adopted in England in the case of a fee simple, and occasionally adopted in the case of a lease, was the transfer by assignment of the mortgagor's interest in the property, with a proviso for reassignment upon payment of the mortgage money by a particular date. After that date had passed, the mortgagor's rights at law had determined and the mortgagee was in law the absolute owner of the property. But in equity the mortgagor still retained a right to redeem and upon payment of the debt and interest to have the property reconveyed to him. This right he retained unless and until by judgment for foreclosure, or (possibly) by the operation of the Statute of Limitations, the character of the creditor was changed for that of owner, or until the interest of the mortgagee was destroyed by sale either under the process of the Courts or of a power contained in the mortgage itself. This right was an equitable right and under English law did not prevent the whole legal interest of the mortgagor passing to the mortgagee despite his retention of the equity of redemption. The whole legal estate passed, but nevertheless the right which he retained, though equitable only, was an estate in the land and was not merely a personal contract on the part of the transferor." Such being the position of a mortgagor in England prior to 1925 the question was: What was the position of a mortgagor in India? Their Lordships referred to the cases of Vithal Narayan (x), *Thethalan* v. *The Eralpad Raja* (y), *Bengal National Bank* v. *Janaki*, *supra*, and *Falakrishna Pal* v. *Jagannath, Marwari*, *supra*, and held that since the passing of the Transfer of Property Act the distinction drawn in England between law and equity in such cases did not exist in India. What, then, was the position of a mortgagor in India? The question was answered as follows: "The Indian mortgagor, however, retains some rights, though the English rules of equity do not apply. He retains a right to a reconveyance of the land and a right to transfer such right by way of sale or second mortgage (see ss. 81, 82, 91 and 94), and this right in India is a legal right." The interest which remains in the mortgagor, being thus a legal interest, its retention will, therefore, prevent the whole of the mortgagor's interest from passing to the mortgagee. That this is the correct position is also indicated by the fact that sec. 54 which deals with sale speaks of a sale as a transfer of ownership as opposed to the transfer of interest spoken of in sec. 58 (a) in the case of a mortgage. The word "interest", it is pointed out, is, when used in opposition to ownership, more appropriate to a limited right. The difference in the position of a mortgagor in the two systems marks a difference in outlook which has a far reaching effect. Thus under the English law prior to 1925 when a lessee mortgaged his leasehold interest in the ordinary form he parted with his whole legal estate and retained only an equitable interest and the mortgagee to whom the legal estate was transferred was by that transfer brought into direct relationship with the lessor by privity of estate and so became liable for the rent. As has been stated above under the Indian Act no equitable rights or equitable estates exist and the right retained by the mortgagor is a legal right. What is the nature of this legal right? Is it a mere contractual right to have the property reconveyed? If it is, then under sec. 54 such contractual right does not create any interest in the property and the mortgagor cannot possibly assign his right of redemption or create a second mortgage so as to bind the property. But secs. 81, 82, 91 and 94 recognise second mortgagor. It follows, therefore, that the right of a mortgagor in India is more than a mere contractual right and must be a legal right in the property itself. If it is a legal right in the property which remains with the mortgagor it clearly follows that the mortgagor has not parted with the whole of his rights. How, then, can one reconcile this position with the language of sec. 58 (c) which speaks of absolute transfer of the mortgage property to the mortgagee? Referring to that section their Lordships observed: "In using those words does it mean that no interest or no legal interest in the property remains in the mortgagor? Their

S. 58

(x) 29 ... 291. (y) 40 Mad. 1111.

S. 58 (e) Lordships cannot think so. If the sub-section stopped at the word "mortgagee" it might be necessary to put this construction upon it, but it does not stop there: it adds the proviso that the mortgagee "will retransfer" the property "upon payment of the mortgage money as agreed". Their Lordships think that with this addition the sub-section upon its true construction does not declare "an English mortgage" to be an absolute transfer of the property. It declares only that such a mortgage would be absolute were it not for the proviso for retransfer. It does not determine what legal effect follows from the use of a particular form of words; it merely prescribes the form of words necessary to constitute what is known in India as an English mortgage. Sec. 58 (e) deals with form, not substance. The substantial rights are dealt with in secs. 58 (a) and 60. Whatever form is used, nothing more than an interest is transferred and that interest is subject to the right of redemption. After laying down the principles and construing sec. 58 (e) their Lordships concluded as follows : "In England the mortgagor has an equitable interest in the property both before and after that date (meaning date of payment) has elapsed : before, because he has a contractual right to have the property reconveyed : after, because in equity time is not of the essence of the transaction In each case he has an equitable estate though in the former he has not yet an equity of redemption : *See Kreglinger* v. *New Patagonia Meat etc. Co* (z) Per Lord Parker. In India the same distinction exists between the position before and after the date of payment. Before that date the mortgagor has an interest in the land which for the reasons given above is legal and not equitable. After that date he has the legal right of redemption given him by sec. 60 of the Statute. In each case he retains a legal interest in the property. There Lordships therefore think that in India a mortgagor when he assigns his interest under a lease to a mortgagee does not under any of the forms specified in sec. 58 of the Act transfer an absolute interest within the principle established in England by the case of *Williams* v. *Bosanquet* and consequently the mortgagee is not liable by privity of estate for the burdens of the lease." In *Jagadanba Loan Co. Ld.* v. *Raja Shiba Prosad* (a) the Judicial Committee reiterated and applied the above principles and held that the fact that the mortgagee had not entered into possession did not make any difference. In the light of these two decisions should be read the earlier Indian cases where it has been held that in Indian law also the right of redemption remaining in the mortgagor is an estate in land (b). Under the Law of Property Act, 1925, both the mortgagor and the mortgagee have a legal estate, *e.g.*, in a mortgage of freeholds the mortgagor has the legal estate in fee simple and the mortgagee in the mortgage term. In Indian law the right of redemption is conferred by sec. 60 of this Act.

In an English mortgage the personal debt remains, and notwithstanding the conveyance the debtor is personally liable for the debt (c). Such a mortgage includes a personal covenant to which is generally annexed a power of sale—see sec. 69. The mortgagee acquires the right to take possession as soon as the mortgage is executed whether a right of entry is expressly covenanted for or not (d). If the mortgagee allows the mortgagor to remain in possession, the latter is at law merely a tenant on sufferance (e) liable to be ejected at any time. These decisions are based on the principle that an English mortgage transfers the whole legal estate to the mortgagee as in England and therefore the mortgagee as the owner of the legal estate is entitled to possession and to eject even the mortgagor. In view of the above-mentioned decisions of the Judicial Committee that under the Indian law a mortgagor retains some legal interest in the property and the whole legal interest is not passed to the mortgagee, interesting questions may arise as to whether these old decisions, that the mortgagee is entitled to eject the mortgagor, which are based on the English principles,

(z) (1914) A.C. 25.

(a) 68 I.A. 67. revising 17 Pat. 490, (1939) A.P. 146.

(b) *Lalla Kanhoo Lal* v. *Must. Manki* (1901) 6 Cal. W.N. 601 ; *Tana Pana* v. *Mammakanta Kath* (1916) 34 I.C. 24.

(c) *Barnet* v. *Glenton* (1899) 1 Q.B. 885.

(d) *Rukmini Kanta* v. *Baldeo Das* (1924) 28 Cal. W.N. 920, 927, 81 I.C. 1025, ('25) A.C. 77 ; *Lutchmiput Singh* v. *Land Mortgage Bank* (1887) 14 Cal. 464.

(e) *Scoble* v. *Ollins* (1895) 1 Q.B. 375.

S. [illegible] can be supported to the fullest extent. As long as the mortgagor is in possession, he, *i.e.*, the mortgagor, is entitled to take for his own benefit the rents and profits of the land and is not liable to account for them to the mortgagee (*f*). The English mortgagee does not forfeit his right to payment by allowing the mortgagor to take the rents and profits (*g*); but if the mortgagee has notice of a subsequent encumbrance (entitling such subsequent encumbrancer to the rents and profits) and permits the mortgagor to recover the rents and profits, he exposes himself to the claim of that encumbrancer and will be postponed to the encumbrancer in respect of rents and profits received by the mortgagor (*h*).

In order to avoid the liability to account on the footing of wilful default [illegible] mortgage usually provides for the appointment of a receiver by the mortgagee on behalf of the mortgagor so that the receiver is agent of the mortgagor and possession remains with the mortgagor. See note "Receiver" under sec. 69A. When one of the terms of a mortgage was that the mortgagor should execute an irrevocable power of attorney authorizing the mortgagee to collect the rents, either himself or by a substitute, on behalf of the mortgagor, this provision was held to be equivalent to placing a receiver in possession as agent of the mortgagor. It had not the effect of delivering possession to the mortgagee, or of converting the mortgage into a usufructuary mortgage, or of making the mortgagee liable to account for more than sums actually received by him (*i*).

Mortgage by deposit of title deeds.—This is called in English law an equitable mortgage. Lord Cairns in *Shaw* v. *Foster* (*j*) said—"It is a well established rule of equity that a deposit of a document of title without more, without writing, without word of mouth, will create in Equity a charge upon the property referred to." The term equitable mortgage is not appropriate in India for the law of India knows nothing of the distinction between legal and equitable estates (*k*). But the phrases "equitable mortgage" and "equity of redemption" are commonly used in Courts in India. The phrase "equity of redemption" is now in view of the two decisions of the Judicial Committee mentioned above, less appropriate than the phrase "right of redemption." The phrase "equitable mortgage" might have been formerly justified in India on the ground that it was an inchoate mortgage perfected by equity. Equitable mortgages or mortgages by deposit of title deeds were accepted in India as equivalent to simple mortgages after the Privy Council decision in *Varden Seth* v. *Luckpathy* (*l*) and this is still the case in districts to which the Transfer of Property Act has not been extended (*m*). For this reason a mortgage by deposit of title deeds in the Punjab is valid (*n*). But if the deeds are deposited in a cantonment area in the Punjab to which sec. 59 of the Act (as it was before the amending Act of 1929) has been extended the mortgage is invalid (*o*). The Act recognizes such mortgages as equivalent to simple mortgages—sec. 96—but restricts their operation to certain centres of commerce. This has been done as a matter of convenience to the mercantile community to enable them to borrow money without the delay of investigation of title and the publicity of registration. Such mortgages are however at variance with the policy of publicity of transfer underlying

(*f*) *Trent* v. *Hunt* (1853) 9 Exch. 14; *Wilson* v. *Wilson* (1872) 14 Eq. 30; *Ma Joo Teean* v. *The Collector of Rangoon* (1934) 12 Rang. 437, 155 I.C. 776, ('34) A.R. 321.

(*g*) ________ v. *Ramdas* (1841) 2 M. I. A. 7, 500.

(*h*) *Jeewandas* v. *Ramdas*, *supra*; *Berney* v. *Sewell* (1820) 1 Jac. and W. 647, 650.

(*i*) *Raja Janki Nath* v. *Syed Asad Raza* (1935) 14 Pat. 560.

(*j*) (1872) L.R. 5 H. L. 321, 340.

(*k*) *Webb* v. *Macpherson* (1904) 31 Cal. 57, 30 I. A. 238, 245. See also *Rani Chatra Kumari's case* 58 I. A. 279 and the cases cited under footnotes (*u*), (*v*), (*x*) and (*y*) supra.

(*l*) (1864) 9 M. I. A. 307; *Manekji* v. *Rustomji* (1890) 14 Bom. 269; *Himalaya Bank* v. *Quarry* (1896) 17 All. 262.

(*m*) *Moti Ram* v. *Bharat National Bank* (1921) 3 Lah. L. J. 378, 67 I. C. 421, ('21) A. L. 253; *Stewart* v. *Bank of Upper India* (1916) P. R. 31, 34 I. C. 987; *Shaikh* v. *Hajee Bee Bee* (1919) 12 Bur. L. J. 184, 55 I. C. 248.

(*n*) *Paras Ram* v. [illegible] (1944) A. PC. 22.

(*o*) *Gurdas Mal* v. [illegible] (1933) 147 I. [illegible] 973; *Punjab and* [illegible] *Ishar Singh* (1933) A. L. ('33) 1001.

this Act and the Registration Act. The Privy Council in *Imperial Bank of India* v. *U Rai Gyaw Thu* (p) held that although there was no formal conveyance, an equitable mortgage effected a transfer of an interest in property and for purposes of priority stood on the same footing as a mortgage by deed. A proviso to this effect has been added to sec. 48 of the Registration Act by the Amending Act 21 of 1929.

Territorial restrictions.—The restriction to the towns named refers to the place where the deeds are delivered, and not to the situation of the property mortgaged (q). The Transfer of Property Act has been applied to the Civil and Military Station of Bangalore "so far as the same may be applicable" by a Foreign Jurisdiction Order in Council and an equitable mortgage may be made of immoveable property situate in that Station by deposit of title deeds in Madras (r). But it matters not that the property is outside British India, for a mortgage of property in Baroda may be effected by a deposit of title deeds in Bombay (s). The properties mortgaged may be outside the towns named, or partly within and partly without, provided the transaction is made within the area specified (t). A deposit of deeds outside the specified towns will create neither a mortgage nor a charge (u). In a case where the deeds were deposited outside Calcutta with the attorney of the intending mortgagee, who was in Calcutta, it was held that the deposit did not create a mortgage (v).

In any other town.—See the footnote appended to "town" in the text of the Act printed at the end of this commentary.

Requisites of a mortgage by deposit of title deeds.—The requisites of an equitable mortgage are, (1) a debt, (2) a deposit of title deeds, and (3) an intention that the deeds shall be security for the debt (w).

1. *Debt.*—The debt may be an existing debt or a future debt. The deposit may be to cover a present as well as future advances (x), or a general balance that might be due on an account (y). The mortgage may be extended to cover further advances. In *Ex parte Kensington* (z) Lord Eldon said that it was unnecessary to require the deeds to be put back in the hands of the original owner and then redeposited by him as security for the former as well as the further advance and this has been followed in India (a).

2. *Deposit of title deeds.*—It has been held in England that it is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title and that it is not necessary that all the deeds should be deposited (b). These cases have been followed in India (c). But Page, C.J., in a Full Bench decision of the Rangoon High

(p) (1923) 1 Rang. 637, 50 I. A. 283, 76 I. C. 910, ('23) A. PC. 211; *Gokul Dass* v. *Eastern Mortgage, etc., Co.* (1906) 33 Cal. 410.

(q) *Madho Das* v. *Ram Kishen* (1892) 14 All. 236; *Miller* v. *Babu Madho Dass* (1897) 19 All. 76, 23 I. A. 106; *Gokul Das* v. *Eastern Mortgage, etc., Co.* (1906) 33 Cal. 410; *Behram* v. *Sorabji* (1914) 38 Bom. 372, 23 I. C. 140.

(r) *Papiah Naidu* v. *Naganatha* (1932) 59 Cal. 439, 58 I. A. 333, 35 Cal. W. N. 1061, 54 Cal. L. J. 194, 61 Mad. L. J. 408, 35 Bom. L. R. 1351, 134 I. C. 328, ('31) A. PC. 239.

(s) *Central Bank of India* v. *Nusserwanji* (1933) 57 Bom. 234, 34 Bom. L. R. 1334, 142 I. C. 130, ('32) A. B. 642.

(t) *Shrinath Roy* v. *Godadhur* (1897) 24 Cal. 348; *Imperial Bank of India* v. *U Rai Gyaw*, (1923) 1 Rang. 637, 50 I. A. 283, 76 I. C. 910, ('23) A.PC. 211.

(u) *Konchadi* v. *Shiva* (1905) 28 Mad. 54; *Darbari Lal* v. *Khetra Chandra* (1927) 97 I. C. 391, ('27) A. P. 41; *Basant Lal* v. *Commissioner of Income Tax* (1932) 142 I. C. 364, ('33) A. A. 451.

(v) *Surajmull Shroff* v. *Gopeeram* (1932) 36 Cal. W. N. 1028, 141 I. C. 257, ('32) C. A. 823.

(w) *Behram* v. *Sorabji*, *supra*.

(x) *Imperial Bank of India* v. *U Rai Gyaw*, *supra*; *Himalaya Bank* v. *Quarry* (1895) 17 All. 252; *Girendro Coomar* v. *Kumud* (1898) 25 Cal. 611.

(y) *Marcar* v. *Sigg* (1886) 2 Mad. 239 P. C.

(z) (1813) 2 Ves. and B. 79.

(a) *Himalaya Bank* v. *Quarry*, *supra*; *Girendro Coomar* v. *Kumud*, *supra*; *V. M. R. V. Chettyar Firm* v. *Asha Bibi* (1929) 118 I. C. 407, ('29) A. R. 107.

(b) *Ex parte Wetherell* (1805) 11 Ves. 389; *Roberts* v. *Croft* (1857) 24 Beav. 223; *Lacon* v. *Allen* (1856) 3 Drew 579; *Dixon* v. *Muckleston* (1872) 8 Ch. App. 155.

(c) *Bhupendra* v. *Wajibunnessa* (1917) 2 Pat. L. J. 298, 39 I. C. 564; *Elizabeth May* ... *ey* v. *Bhupendra Bose* (1928) 7 Pat. ... 111 I. C. 57, ('28) A. P. 394; *Firm A. R. M.* v. *A. K. R. M. M. K. Firm* (1929) 7 Rang. 26, 116 I. C. 475, ('29) A. R. ... *Chaudhri* v. ... 59 Cal. 781, 36 Cal. W. N. 420, 662, ('32) A. C. 589.

Court (*d*) held that the documents must not only relate to the property but must also be such as to show a *prima facie* or apparent title in the [illegible]. If the deeds are lost copies may be deposited (*e*). If the deposit is a[illegible] by a memorandum in writing, the written bargain determines what is the scope and extent of the security, otherwise the scope of the security is the scope of the title (*f*). If a share of an indigo concern is mortgaged, it is sufficient to deposit the title deeds under which the share was acquired and if the mortgagee's sale takes place at some subsequent date the share will pass as it stands at the date of sale, *i.e.*, not only what is called accession but changes in good will, rights under contract, and so forth (*g*). S. 58 (f)

Illustration.

A had purchased two plots of leasehold land. *A*'s title deeds were the [illegible] deed of both plots and two leases, one of each plot, on each of which was an en[illegible]ment showing that *A* was the purchaser. *A* made a mortgage by deposit of the sale deed and one lease with *B*. Sixteen months later *A* made a mortgage by deposit of the other lease with *C*. *B's* mortgage was a valid mortgage of both plots and *C*'s mortgage was a valid mortgage of one plot, but *B*'s mortgage being earlier had priority: *V. E. A. R. M. Firm* v. *A. K. R. M. M. K. Firm* (1929) 7 Rang. 28, 116 I.C. 475, ('29) A.R. 65.

As already explained if the deeds are already deposited by way of mortgage, they can by oral agreement be made security for a further advance. It is not necessary that they should be handed back and redeposited. See Note (1) Debt, *supra*.

Machinery in a mortgaged building does not form part of the security, unless it is attached to the building for the permanent beneficial enjoyment thereof (*h*).

If the documents deposited show no kind of title no mortgage is created (*i*). A tax receipt and a plan are not documents of title and their deposit does not create a mortgage (*j*). A deposit of an expired lease creates a mortgage of the leasehold when the mortgagor obtains a renewal of the lease (*k*). It has been said that a patta of lands in the mofussil is usually a document of title (*l*) but this would depend upon the circumstances under which it was issued (*m*). A mortgage is not a deed of title of the mortgagor, for it only shows that the mortgagor has dealt with the property as his (*n*). But a mortgage is a document of title of the mortgagee and a mortgagee can effect an equitable submortgage by deposit of his mortgage deed (*o*).

3. *Intention.*—The intention that the title deeds shall be the security for the debt is the essence of the transaction. In *Heng Moh* v. *Lim Saw Yeen* (*p*) the managing partner admitted that he had received title deeds from the other partner in the capacity of manager and the Privy Council held that the delivery of the deeds was a mere partnership transaction and did not give the managing partner the rights of an equitable mortgagee.

(*d*) *V. E. R. M. A. R. Chettyar Firm* v. *Ma Joo Teen* (1933) 11 Rang. 239, 147 I. C. 1105, ('33) A. R. 299.

(*e*) *Stewart* v. *Bank of Upper India* (1916) P. R. 21, 34 I. C. 987.

(*f*) *Pranjivandas Mehta* v. *Chan Ma Phee* (1916) 43 Cal. 895, 43 I. A. 122, 35 I. C. 190.

(*g*) [illegible] v. *Wallis*

(*h*) [illegible] v. *Ma Tin* (1926) 98 I. C. 1011, ('26) A. R. 250 following *Narayana Sa* v. *Balaguruswami* (1924) 46 Mad. L.J. 385, 79 I. C. 838, ('24) A. M. 197.

(*i*) *Venkataramayya* v. *Narasinga Rao* (1911) [illegible] I.C. 309.

(*j*) *V. E. R. M. A. R. Chettyar Firm* v. *Ma Joo Teen*, *supra*, affirming *Ma Joo Teen* v. *Ma Thein Nyun* (1932) 10 Rang. 403, 140 I. C. 487, ('32) A. R. 155.

(*k*) *Villa* v. *Paley* (1934) 148 I. C. 721, ('34) A. R. 51.

(*l*) *Official Assignee* v. *Badri Narayan* (1925) 48 Mad. 454, 86 I. C. 401, ('25) A. M. 782.

(*m*) See *Doraswami* v. *Jamunamma* (1921) Mad. W. N. 603, 138 I. C. 783, ('31) A. M. 612.

(*n*) *Nagamma* v. *Srinivasa* (1926) 94 I. C. 487, [illegible]) A. M. 743.

(*o*) [illegible] *Das* v. *Eastern Mortgage and Agency* (1906) 33 Cal. 419.

(*p*) (1922) 1 Rang. 545, 75 I. C. 897, ('23)

The intention cannot be presumed from possession, for mere possession of the deeds is not enough without evidence as to the manner in which the possession originated so that a contract may be inferred (*q*). In *Jethibai* v. *Putlibai* (*r*) it was said that mere possession of title deeds by the creditors, coupled with the existence of a debt, does not necessarily lead to the presumption of a mortgage. This may be so when the title deeds are produced by the creditor after the lapse of many years without explanation as in *Chapman* v. *Chapman* (*s*); but the better opinion seems to be that as between creditor and debtor the fact of possession of deeds raises the presumption of a mortgage (*t*).

If it is in the contemplation of parties to have a legal mortgage prepared and if the title deeds are deposited for that purpose only, the deposit does not create an equitable mortgage (*u*). In *Jaitha Bhima* v. *Haji Abdul* (*v*) the deeds were delivered for the preparation of a legal mortgage; the legal mortgage was prepared and executed but not registered; and the creditor then contended that he had abandoned the idea of taking a legal mortgage and claimed as mortgagee by deposit of title deeds. This plea was disallowed, for the Court found that there was no antecedent debt at the time of the delivery of the deed and that the creditor would not have advanced the money if the debtor had not been ready to execute the deed. But although the deposit is for the purpose of the preparation of a legal mortgage there may also be an intention to give an immediate security, in which case the deposit creates an equitable mortgage (*w*). This distinction appears to have been overlooked in two Bombay cases, which seem to assume that if there is a present debt, a deposit of title deed for the special purpose of preparing a legal mortgage creates an immediate equitable mortgage (*x*).

The equitable mortgage created by deposit of title deeds is extinguished by merger when the legal mortgage is executed (*y*). This again is a point which seems to have been overlooked in a Bombay case (*z*).

Registration.—A mortgage by deposit of title deeds does not require any writing (*a*) and being an oral transaction is not affected by the law of Registration. But it is usual for the deposit to be accompanied by a memorandum in writing (*b*). If this writing is the contract of mortgage so that it creates the mortgage it must be registered—and oral evidence to contradict it is not admissible (*c*). But registration is not necessary if the mortgage is complete without the writing and the writing is merely a statement that the

(*q*) *Miller* v. *Babu Madho Das* (1896) 19 All. 76, 23 I. A. 106; *Behram* v. *Sorabji* (1914) 38 Bom. 372, 23 I. C. 140; *Ganpat* v. *Adarji* (1877) 3 Bom. 312, 329; *Chapman* v. *Chapman* (1851) 13 Beav. 308; *Wardle* v. *Oakley* (1864) 36 Beav. 27; *Dixon* v. *Muckleston* (1872) 8 Ch. App. 155.

(*r*) (1912) 14 Bom. L. R. 1020.

(*s*) (1851) 13 Beav. 308.

(*t*) *Ex parte Mountfort* (1808) 14 Ves. 606; *Ex parte Langstone* (1810) 17 Ves. 227, 230.

(*u*) *Norris* v. *Wilkinson* (1806) 12 Ves. 192; *Lloyd* v. *Attwood* (1859) 3 DeG & J. 614, 651; *Madras Deposit Co.* v. *Oonnamalai* (1898) 18 Mad. 29.

(*v*) (1886) 10 Bom. 634.

(*w*) *Edge* v. *Worthington* (1876) 1 Cox Eq. Cas. 211; *Ex parte Bruce* (1813) 1 Rose 374; *Ex parte Wright* (1829) 19 Ves. 255; *Hockley* v. *Bantock* (1826) 1 Russ. 141; *Keys* v. *Williams* (1838) 3 Y. & C. (Ex.) 55.

(*x*) *Dayal Jairaj* v. *Jivraj* (1877) 1 Bom. 237; *Jaitha Bhima* v. *Haji Abdul* (1886) 10 Bom. 634.

(*y*) *Re Annesley, Vaughan* v. *Vanderstegen* (1854) 2 Eq. Rep. 1257.

(*z*) *Jaitha Bhima* v. *Haji Abdul*, *supra*.

(*a*) *Shaw* v. *Foster* (1872) L. R. 5 H. L. 321; *Jivandas* v. *Framji* (1870) 7 Bom. H.C.R. 45 O. C. J.; *Oo Noung* v. *Moung* (1886) 13 Cal. 322; *Behram* v. *Sorabji*, *supra*.

(*b*) *Miller* v. *Madho Das*, *supra*.

(*c*) *Pranjivandas* v. *Chan Ma Phee* (1916) 43 Cal. 895, 43 I. A. 122, 35 I. C. 190. (When the bargain is a written bargain it alone must determine what is the scope and extent of the security); *Chunilal* v. *Vithaldas* (1922) 24 Bom. L. R. 502, 68 I. C. 1065, ('22) A. B. 449; *Subramonian* v. *Lutchman* (1923) 50 Cal. 338, 50 I. A. 77, 71 I. C. 650, ('23) A.PC. 50. (The test is did the document constitute the bargain between the parties or was it merely the record of an already completed transaction); *Kedarnath* v. *Harsukdas* (1927) 31 Cal. W. N. 703, 102 I. C. 971, ('27) A. C. 553.

mortgage has been effected, or a statement of facts from which the contract of mortgage can be inferred. In *Obla Sundaracharior* v. *Narayanna Ayyar* (d) the memorandum was merely a list of the deeds deposited and it did not need registration although it was deposited before the money was advanced. Their Lordships of the Judicial Committee said—"No such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties." The necessity for registration therefore depends upon the construction of the memorandum in the light of the surrounding circumstances (e) and if it is loosely worded the distinction is very fine. A good illustration is the leading case of *Kedarnath Dutt* v. *Shamloll Khettry* (f). Shankerlal had advanced Rs. 1,200 to the borrower who deposited the title deeds and executed the promissory note for the amount. On the promissory note he made the following endorsement: "For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with Shamloll Khettry, as a collateral security by way of equitable mortgage title deeds of my property." Sir Richard Couch in giving judgment pointed out that if there had been no endorsement at all on the promissory note there would have been a complete equitable mortgage and that the endorsement was merely a recital of the fact of the deposit from which the contract of mortgage is inferred so that though the writing was not registered there was a valid equitable mortgage. This case may be contrasted with *Bhairab Chandra* v. *Anath Nath De* (g). The defendant had mortgaged his house to the plaintiff and had delivered his title deeds to him for the purpose of that mortgage. He then took a fresh advance of Rs. 1,500, executed a promissory note for that amount and on the same date sent the plaintiff a letter in these terms: "For the payment of the sum of Rs. 1,500 with interest I have borrowed from you on a promissory note of date, I hereby put it on record that the title deeds re my premises already deposited with you shall be held by you as collateral security." It was held that the letter constituted the mortgage contract and that it was inadmissible for want of registration. The distinction between the two cases lies in the fact that in *Kedarnath*'s case the loan and deposit were completed irrespective of the endorsement, while in *Bhairab Chandra*'s case there was no completed contract of mortgage before the letter passed and it was by the letter that the deeds were made security for the fresh loan. Indeed in all cases in which a deposit is made by a letter which explains why the deeds are deposited the letter must be registered, for there is nothing but the letter to connect the deposit with the debt (h). Cases cited in footnote (i) are instances in which registration was held to be necessary and

(d) (1931) 54 Mad. 257, 264, 58 I.A. 68, 131 I.C. 328, ('31) A.PC. 36.

(e) *Ram Ratan* v. *Mt. Sew Kumari* (1938) A.C. 823; *Ebrahim Hazi* v. *Official Trustee* (1937) A.C. 741; *Ram Sarup* v. *Shiv Dayal* (1940) A.L. 285.

(f) (1873) 11 Beng. L.R. 405, 406, 20 W.R. 150.

(g) (1920) 24 Cal. W. N. 599, 57 I. C. 686.

(h) *Dwarkanath Mitter* v. *S. M. Sarat Kumari* (1871) 7 Beng. L. R. 55; *Jagganadham* v. *Official Assignee* (1931) 60 Mad. L.J. 309, 129 I.C. 814, ('31) A.M. 124; *Swami Chetty* v. *Ethirajulu* (1917) 40 Mad. 547, 34 I.C. 853; *Alwar Chetty* v. *Jagannatha* (1928) 54 Mad. L.J. 109, 108 I.C. 291.

(i) *Ganpat* v. *Adarji* (1879) 3 Bom. 312; *Behram* v. *Sorabji* (1914) 38 Bom. 372, 23 I.C. 140; *Chunilal* v. *Vithaldas* (1922) 24 Bom. L.R. 292, 68 I.C. 1005, ('22) A.B. 440; *Krishnayya* v. *Ponnuswami* (1924) 47 Mad. 398, 84 I.C. 629, ('24) A.M. 547; *Subramanian* v. *Lutchman* (1923) 50 Cal. 338, 50 I.A. 77, 71 I.C. 650, ('23) A.PC. 50; *Muthia Chetty* v. *Kothandaramaswami* (1916) 31 Mad. L.J. 347, 35 I.C. 864; *Nageswara* v. *Srinivasa* (1926) 94 I.C. 427, ('26) A.M. 743; *Arunachallam Chetty* v. *Jagannatha Pillai* (1926) 98 I.C. 872, ('26) A.M. 1188; *Bairab Chandra Bose* v. *Anath Nath De* (1919) 24 Cal. W. N. 599, 51 I.C. 686; *Shailendranath* v. *Hada Kase Mane* (1932) 59 Cal. 586, 137 I.C. 500, ('32) A.C. 356; *National Bank of India* v. *Nasir Co.* (1932) 34 Bom. L.R. 748, 139 I.C. 745, ('32) A.B. 401; *Ebrahim Haji* v. *Official Trustee* (1937) A.C. 741; *Kedarnath* v. *Hari Shanker* (1936) A.C. 308 (1937) 2 Cal. 586, 175 I.C. 578, affirmed on appeal by the Privy Council in 66 I.A. 184 (*sub-nom. Hari Sankar* v. *Kedarnath*); *Krishna Swami* v. *Gouriamma* (1936) A.M. 256, (1936) M.W.N. 307, 162 I.C. 195; *Ram Sarup* v. *Shiv Dayal* (1940) A.L. 285.

S. 58(f). (f)

those cited in footnote (j) are instances in which registration was held to be not necessary.

Limitation for suit on mortgage by deposit of title deeds.—The period of limitation is 12 years: see art. 132 of the Limitation Act as amended by Act 21 of 1929.

Transfer of equitable mortgage.—The transfer of an equitable mortgage falls under sec. 54 and requires a registered instrument (*k*).

Anomalous mortgages.—Before the amending Act of 1929 the definition of anomalous mortgages was embodied in sec. 98 and it excluded mortgages which are a combination of a simple mortgage and an usufructuary mortgage, or of an usufructuary mortgage and a mortgage by conditional sale (*l*). Under the definition inserted as clause (f) of sec. 58 it is a mortgage which does not fall within any of the other five classes enumerated. The definition therefore includes simple mortgages usufructuary and mortgages usufructuary by conditional sale in the term anomalous mortgage. Even before the amendment these combinations of the simple forms were sometimes described as anomalous mortgages (*m*).

Anomalous mortgages take innumerable forms moulded either by custom or the caprice of the creditor—some are combinations of the simple forms, others are customary mortgages prevalent in particular districts, and to these special incidents are attached by local usage. Such are the *kanom, otti,* and *peruartham* mortgages of Madras and the *san* mortgage of Gujerat (*n*).

Simple mortgage usufructuary.—This is now one class of anomalous mortgage, and it is a combination of a simple mortgage and a usufructuary mortgage. The mortgagee is in possession and pays himself the debt out of the rents and profits and there is also a personal covenant with an express or implied right of sale. The property is only collaterally pledged as in the case of a simple mortgage, but the mortgagee is given the usufruct of it either by allowing him to take the rents and profits or by giving him a lease for a fixed period. Instances of such mortgages are the cases cited in the footnote (*o*). The Bombay case of *Amarchand* v. *Kila Morar* (*p*) is a typical simple mortgage

(*j*) *Oo Noung* v. *Moung* (1886) 13 Cal. 322; *Gokul Dass* v. *Eastern Mortgage, etc., Co.* (1906) 33 Cal. 410; *Esther* v. *Martu* (1917) 25 Cal. L.J. 160, 37 I.C. 117; *Haripada* v. *Anath Nath* (1918) 22 Cal. W. N. 758, 44 I.C. 211; *Vadamalai* v. *Subramania* (1923) 71 I.C. 180, ('23) A.M. 262; *Umrao Singh* v. *Punjab National Bank* (1921) 3 Lah. L.J. 44, 59 I.C. 578, ('21) A.L. 274; *Motiram* v. *Bharat National Bank* (1921) 3 Lah. L.J. 373, 67 I.C. 421, ('21) A.L. 253; *Bhuban Mohan* v. *Co-operative Hindusthan Bank* (1925) 29 C.W.N. 784, 88 I.C. 866, ('25) A.C. 973; *Krishn* v. *Ponnuswami Aiyar* (1924) 47 Mad. ..., 84 I.C. 629, ('24) A.M. 547; *Ma Sein Bye* v. *S. R. M. M. R. M. Chetty Firm* (1925) 3 Rang. 443, 91 I.C. 663, ('26) A.R. 10; *Kshetranath* v. *Marasukdas* (1927) 31 Cal. W.N. 703, 102 I.C. 871, ('27) A.C. 533; *Ramakrishna* v. *Kesavalu* (1927) 53 Mad. L.J. 179, 102 I.C. 34, ('27) A.M. 1145; *Tyabali* v. *Parbatibai* (1932) 26 S.L.R. 92, ('32) A.S. 73; *Sundaracharier* v. *Narayana Ayyar* (1931) 58 I.A. 68, 54 Mad. 257, 35 Cal. W.N. 494, 53 Cal. L.J. 396, 131 I.C. 328, ('31) A.PC. 36; *Surendra Mohan Roy Chaudhri* v. *Mohendranath Banerji* (1932) 59 Cal. 781, 36 Cal. W.N. 420, 140 I.C. 662, ('32) A.C. 589; *S.P.K.R.R.M. Chettyar Firm* v. *Administrator General of Bengal* (1933) 11 Rang. 431, 149 I.C. 457, ('... 307; *Jaimal Singh* v. *People's ... of Northern India* (1933) 141 I.C. 541, ('33) A. Pesh. 35; *Central Bank* v. *Jawahir Singh* (1936) A.L. 65; *Ram Ratan* v. *Mt. Sew Kumari* (1938) A.C. 823.

(*k*) *Elumalai* v. *Balkrishna* (1921) 44 Mad. 965, 968, 60 I.C. 168, ('22) A.M. 344.

(*l*) *Narsingh Partab* v. *Mohammad Yaqub* (1929) 4 Luck. 363, 56 I.A. 299, 116 I.C. 414, ('29) A.PC. 139.

(*m*) *Motiram* v. *Vitai* (1889) 13 Bom. 90 F.B.; *Yashvant* v. *Vithal* (1895) 21 Bom. 267; *Amarchand* v. *Kila Morar* (1903) 27 Bom. 600.

(*n*) See other instances. *Chadumrai* v. *Rani Navli* (1943) A.A. 337 F.B.; *Suresh Chandra* v. *Jadas Chandra* (1940) A.C. 372, 189 I.C. 866; *Mir Singh* v. *Raghuvir Singh* (1939) A.A. 615.

(*o*) *Nanu* v. *Raman* (1893) 16 Mad. 335; *Mahadaji* v. *Joti* (1892) 17 Bom. 425; *Jafar Hasan* v. *Ranjit Singh* (1899) 21 All. 4; *Sivakami* v. *Gopala* (1894) 17 Mad. 131; *Phul Kuar* v. *Murli Dhar* (1879) 2 All. 527; *Kangaya* v. *Kalimuthu* (1904) 27 Mad. 526 [F.B.]; *Dattambhat* v. *Krishnabhat* (1910) 34 Bom. 462, 7 I.C. 446; *U. San* v. *Maung Sein* (1936) 14 Rang. 85, 169 I.C. 295 (1937) A.R. 151.

(*p*) (1903) 27 Bom. 600. See also *Udayana Pillai* v. *S...* (1896) 19 Mad. 411; *Madhava Sidhanti* v. *Venkataramanajulu* (1903) 26 Mad. 662.

usufructuary. The mortgagee was put in possession and authorized to retain till payment of the mortgage money; there was a personal covenant to pay and an [illegible] that the debt was recoverable from the mortgaged land and from the mortgagor personally. This was wrongly described in the judgment as an anomalous mortgage (*q*), though under the present Act it is an anomalous mortgage. In a simple mortgage usufructuary the mortgagee may sue for sale though merely as usufructuary mortgagee he could not have done so (*r*). The case of *Narsingh Partab* v. *Mohammad Yaqub* (*s*) is an instance of a simple mortgage usufructuary, and the Privy Council held that its character as such was not affected by the fact that the mortgagor had reserved the right to act as manager and to enhance the rents of the property given into the possession of the mortgagee.

It has been said that the right of sale is not to be implied merely from the personal covenant to repay (*t*). But usually the personal covenant is held to have this effect (*u*). In *Jag Sahu* v. *Mst. Ram Sakhi* (*v*) the Court quoted with approval the following passage from the judgment in a Calcutta case (*w*): "It is well settled that where an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent and the mortgagee may sue for sale although he may have given up possession and the right accrues immediately after due date is passed."

Again, a simple mortgage usufructuary may be primarily a simple mortgage with a right to take possession in case of default superadded. In such a case a suit for sale is always permissible (*x*). In *Deputy Commissioner of Rae Barelli* v. *Lal Rampal Singh* (*y*) there was a mortgage of a village for a sum payable within a certain period by instalments with a provision that the mortgagee should take possession in default of payment, but the last clause of the deed was as follows:—"Should on the expiration of the term of this instrument any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this then as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of instalment by sale of the villages." The Privy Council construed the documents as a whole as a simple mortgage usufructuary, the mortgagee having an absolute right to take possession and to sell if the mortgagor objected to the application of the rents and profits to reduction of interest.

In *Jawahir Singh* v. *Someshar* (*z*) there was a mortgage with possession and (1) a stipulation for interest and the appropriation of the usufruct to the interest and (2) a clause that if the rent and profits do not cover the interest the mortgagor would

(*q*) See the criticism in *Srinivasa* v. *Radhakrishnam* (1915) 38 Mad. 667, 22 I.C. 54.

(*r*) *Jugal Kishore* v. *Ram Sahai* (1886) A.W.N. 212; *Umrao* v. *Valiullah* (1888) A.W.N. 171; *Ramayya* v. *Garuva* (1891) 14 Mad. 232; *Sivakami* v. *Gopala* (1894) 17 Mad. 131; *Jafar Husan* v. *Ranjit Singh* (1899) 21 All. 4; *Narpat* v. *Ram Saran* (1908) 30 All. 162; *Chintaman* v. *Dulari* (1910) 7 All. L.J. 1087, 8 I.C. 570; *Dattambhat* v. *Krishnabhat* (1910) 34 Bom. 462, 7 I.C. 446; *Fida Ali* v. *Ismailji* (1909) 6 Nag. L.R. 20, 5 I.C. 701; *Ram Khilawan* v. *Ghulam Hussain* (1933) 8 Luck. 190, 141 I.C. 464, ('33) A.O. 25.

(*s*) (1929) 4 Luck. 363, 56 I.A. 299, 116 I.C. 614, ('29) A.PC. 139.

(*t*) *Kashi Ram* v. *Sardar Singh* (1906) 28 All. 157; *Krishna* v. *Hari* (1908) 10 Bom. L.R. 615; *Mohammad Abdullah* v. *Mohammad Yasin* (1933) 141 I.C. 377, ('33) A.L. 151; *Ram Lal* v. *Mt. Ganda* (1942) A.A. 226, (1942) All. 818, [illegible] A.L.J. 441, 203 I.C. 125.

(*u*) [illegible]mayya v. *Garuva*, *supra*; *Sivakami* v. *Gopala*, *supra*; *Srinivasa* v. *Radhakrishnam*, *supra*; *Parga Panday* v. *Mahatom Mahto* (1907) 6 Cal. L.J. 142.

(*v*) (1922) 1 Pat. 350, 355, 65 I.C. 666, ('22) A.P. 167.

(*w*) *Pitambar Purkait* v. *Madhu Sudan* (1910) 6 I.C. 152.

(*x*) *Motiram* v. *Vital* (1889) 13 Bom. 90; *Yashvant* v. *Vithal* (1895) 21 Bom. 267; *Deputy Commissioner* v. *Lal Rampal Singh* (1885) 11 Cal. 237, 12 I.A. 1; *Jawahir Singh* v. *Someshar* (1906) 28 All. 225, 33 I.A. 42; *Lingam Krishna* v. *Maharaja of Vizianagram* (1911) 13 Bom. L.R. 447, 10 I.C. 272 P.C.; *Ramayya* v. [illegible]rama (1908) 18 Mad. L.J. 2; *Lala* [illegible] v. *Hari Lal* (1912) 16 O.C. 90, 19 I.C. 748; *Pandit Ram Lochan Prasad* v. *Musammat Ram Rati* (1935) 10 Luck. 10, 148 I.C. 1197, ('34) A.O. [illegible].

(*y*) (1885) 11 Cal. 237 P.C. 12 I.A. 1.

(*z*) (1906) 28 All. 225, 33 I.A. 42; *Bhola Das* v. *Bishnath* (1912) 10 All. L.J. 182, 18 I.C. [illegible]

S. 98(g)

make good the deficiency out of his own pocket. The Privy Council held that under the latter clause the mortgagor was personally liable to the mortgagee for principal and interest.

In *Panaganti Ramarayanimgar* v. *Maharaja of Venkatagiri* (a) the mortgage was with possession with covenants to pay both principal and interest and there was a contemporaneous lease of the mortgaged property for a rent equivalent to the interest and the lease made the rent a charge on the property. The Privy Council construed the mortgage and lease as one transaction of anomalous mortgage of the type simple mortgage usufructuary and held that the assignee of the equity of redemption was entitled to a decree for redemption of both the mortgage and the charge.

Mortgage usufructuary by conditional sale.—This is another composite mortgage which is now classed as anomalous. The mortgagee is in possession as usufructuary mortgagee for a fixed period and if the debt is not discharged at the expiry of that period he is a mortgagee by conditional sale (b). He has therefore a right of foreclosure. A typical instance is a Madras case (c) where the mortgage was with possession, the usufruct to be set-off against interest and the principal to be repaid in five years and if not paid the mortgage to work out into a sale at the expiry of twenty years. The Privy Council case of *Abid Husain* v. *Kanis Fatima* (d) is another instance, for there a usufructuary mortgage was consolidated with a subsequent mortgage by conditional sale. *Sita Nath* v. *Thakurdas* (e) was also a case of a usufructuary mortgage for a fixed period with profits in lieu of interest, with a condition that if the principal was not paid at the end of the period the mortgagee was to have a right of foreclosure.

In some cases a usufructuary mortgage has a time limit and a condition that in default of redemption the property shall be sold for the amount then due. In such a case the stipulation for sale is invalid as a clog on the equity of redemption (f). But before the Privy Council decision in *Mohammad Sher Khan* v. *Seth Swami Dayal* (g) that the doctrine of clog on the equity of redemption applied to all mortgages, such mortgages were sometimes wrongly classed as anomalous. Thus in a Madras case (h) the term of the mortgage were as follows:—"Within these limits a house site together with a thatched house thereon we have mortgaged—that is we have kept it as a possessory mortgage and have received Rs. 10 from you. So having paid the principal and interest pertaining to these ten rupees within the end of a year from the said date we shall take possession of our house and site. If we do not act accordingly to the said condition we shall quit the land and house as if this is a sale." This was construed as an anomalous mortgage but it is clear that it was a usufructuary mortgage and that the condition as to sale was void as a clog on redemption. This was so held in another very similar case (i).

Customary mortgages.—Customary mortgages are mortgages to which specia incidents are attached by local usage. Thus *otti* and *Kanom* mortgages cannot be redeemed before the expiry of twelve years in the absence of a special agreement to the

(a) (1927) 50 Mad. 180, 54 I.A. 68, 100 I.C. 86, ('27) A.PC. 32.

(b) *Ramasami* v. *Samiyappanayakan* (1882) 4 Mad. 179, 183; *Girwar Singh* v. *Thakur Narain* (1887) 14 Cal. 730, 737; *Mohini Mohan* v. *Sarat* (1925) 86 I.C. 358, ('25) A.C. 862.

(c) *Vaddiparthi* v. *Appalan* (1921) 41 Mad. L.J. 568, 68 I.C. 717, ('21) A.M. 517.

(d) (1924) 46 All. 269, 51 I.A. 157, 80 I.C. 1019, ('24) A.PC. 102.

(e) (1919) 46 Cal. 448, 52 I.C. 433.

(f) *Chellakutti Naicken* v. *Vengappa* (1925) [illegible] v. *Donga Pillay* (1920) 43 Mad. 589, 57 I.C. 724; *Pandiyan* v. *Vellayappa* (1917) 33 Mad. L.J. 316, 42 I.C. 488; *Vaddiparthi* v. *Appalanarasimhulu*, *supra*.

(g) (1922) 44 All. 185, 49 I.A. 60, 66 I.C. 583, ('22) A.PC. 17.

(h) *Hakeem Patta Muhammad* v. *Shaik Davood* (1915) [illegible], 30 I.C. 569.

(i) *Kondula* [illegible] v. *Donga Pillay* (1920) 43 Mad. [illegible], 57 I.C. 724.

contrary (*j*). The *otti-holder* has a right of pre-emption (*k*). The *Kanom* partakes of the character of a mortgage and a lease (*l*). A *peruartham* mortgage is redeemable for the market value of the land at the time of redemption (*m*). S. 98 (c)

Other anomalous mortgages.—Other anomalous mortgages are very varied. Some are usufructuary mortgages with a covenant to pay (*n*) or with a time limit but which do not fall within the class of simple mortgage usufructuary because neither the covenant nor the time limit imports a right of sale. Instances of such mortgages are a mortgage with possession for three years the land to be redeemed without payment at the expiry of that period (*o*) or a mortgage with possession for four years, the mortgagee to credit the rents and profits first to interest and then the balance, if any, to principal and the mortgagor to pay the deficiency at the end of the term (*p*); or a mortgage with possession for ten years the rent and profits to be in lieu of principal and interest and the mortgagee's right to cease at the end of the term (*q*); or a simple mortgage repayable in three years' time but with a condition giving the mortgagee power to foreclose at any time if a creditor brought a suit against the mortgagor or attempted to attach his property (*r*) or to obtain proprietary possession of the mortgaged property by bringing a suit for a decree for foreclosure (*s*).

Other instances of anomalous mortgages are a mortgage where possession was only partly given and there was no personal covenant to pay (*t*); and a mortgage which combines the elements of a simple mortgage, a usufructuary mortgage, and a mortgage by conditional sale (*u*). In the case last cited there was a mortgage for three years; in default of redemption at the end of that term the mortgagee to be in possession for four years and to take the rents and profits in lieu of interest; in default of redemption at the end of four years the mortgage to work itself out into a sale. In a Rangoon case (*v*) a mortgage with a covenant to pay interest but no covenant to pay principal was treated as an anomalous mortgage. It is submitted however that the covenant to pay interest implied a covenant to pay principal. But the report does not disclose the terms of the deed. In another anomalous mortgage (*w*) the mortgagee was to have possession and appropriate rents and profits towards the satisfaction of a certain rate of interest; the mortgagor was to redeem within eight years and in default the mortgagee was to have the right to recover the total amount through the Court by sale of the property mortgaged and by sale of the other property of the mortgagor.

Attestation.—An anomalous mortgage deed requires attestation (*x*).

Sub-mortgages.—As already explained (*y*) the interest of the mortgagor and of the mortgagee may each be the subject of assignment either absolutely or by way of security. The mortgagor may assign his equity absolutely to a purchaser or he may make a second or puisne mortgage of his equity of redemption. The mortgagee may also assign his interests absolutely to a purchaser or may make a sub-mortgage of his mortgagee's interest. The rights and liabilities of puisne mortgagees are dealt with in secs. 91 to 94. The Act

(*j*) *Edathil* v. *Kopashon* (1862) 1 Mad. H.C. 122; *Kunnini* v. *Parikam* (1868) 1 Mad. H.C. 261; *Keshava* v. *Keshava* (1878) 2 Mad. 45; *Kelu Nedungadi* v. *Krishnan* (1903) 26 Mad. 727 F. B.

(*k*) *Edathil* v. *Kopashon*, *supra*.

(*l*) *Kanna Karup* v. *Sankara* (1921) 44 Mad. 344, 62 I.C. 396, ('21) A.M 243.

(*m*) *Shekari Varma* v. *Manguiem* (1876) 1 Mad. 57.

(*n*) *Akbarali* v. *Mafizuddin* (1942) A.C. 55, 74 C.L.J. 370, 45 C.W.N. 823, 198 I.C. 674.

(*o*) *Virasalinga* v. *Palaniappa* (1895) 21 Mad. 1.

(*p*) *Hikmatullah* v. *Imam Ali* (1890) 12 All. 206.

(*q*) *Tukaram* v. *Ramcha*[illegible] 26 Bom. 252; *cf. Shaik Idrus* v. [illegible] *Rahiman* (1892) 16 Bom. 303 a case under Reg. 5 of 1827.

(*r*) *Solema Bibi* v. *Hafez Mahammad* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.C. 836.

(*s*) *Ujagar Lal* v. *Lokendra Singh* (1941) A.A. 169, (1941) All. 240, (1941) A.L.J. 111, 194 I.C. 520.

(*t*) *Madho Ram* v. *Gulam Mohiuddin* (1920) 15 Nag. L.R. 184, 56 I.C. 717, ('19) A.PC. 121.

(*u*) *Sunder Dei* v. *Thakur Baldeo* (1915) 18 O.C. 10, 28 I.C. 161.

(*v*) *Gopia* v. *Administrator General* (1927) 5 Rang. 555, 105 I.C. 586, ('28) A.R. 16.

(*w*) *Gajadhar* v. *Sibananda* (1923) 28 Cal. W. N. 532, 81 I.C. 768, ('24) A.C. 562.

(*x*) *Kanna Karup* v. *Sankara*, *supra*.

(*y*) See note *supra* "Transfer of an Interest."

S. 58 (a). does not, however, deal with sub-mortgages. A sub-mortgagee does not stand in a higher position than the mortgagee. He is bound by the state of accounts between the mortgagor and mortgagee (z). An assignment of the mortgagee's interest either absolutely or by way of sub-mortgage is a transfer of immoveable property and requires registration (a). See note "Debts" under sec. 8. A sub-mortgage being a mortgage requires attestation (b).

Under sec. 3 a mortgage debt is not an actionable claim and the transfer is not subject to secs. 130, 131 or 132 of this Act.

In England although a mortgage debt is a chose in action yet the assignee of a mortgage debt is in a stronger position than the assignee of an unsecured debt. The law on this point is summarised by Sterling, L.J., in his judgment in *Taylor* v. *London and County Banking Company* (c) as follows:—

> "Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land" and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personality."

The reason is thus stated by Sir William Grant in *Jones* v. *Gibbons* (d): "a mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate the assignment"—that is of the mortgage—"is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt."

So in a Bombay case (e) the sub-mortgage was in 1896 and the mortgagor without notice of the sub-mortgage made a final payment to the mortgagee which discharged the mortgage in 1900. The payment was held to be valid as against the sub-mortgagee and the fact that the sub-mortgage was registered did not imply notice. When a mortgagee sub-mortgages his mortgage to another person without the knowledge of the original mortgagor, and the original mortgagor pays off the amount to the mortgagee the sub-mortgagee's rights against the land are extinguished. The sub-mortgage is only good to the extent of the amount due on the mortgage and the payment of the mortgage debt extinguishes the sub-mortgagee's security (f). But if the original mortgagor has notice of the sub-mortgage he cannot dispossess the sub-mortgagee without redeeming him (g).

Again, as sec. 132 does not apply, the assignee of the mortgage debt is not under that section subject to all the equities to which the assignor the mortgagee was subject.

(z) *Bhagwati Prasad* v. *Dullan Singh* (1939) A.A. 719.

(a) *Perumal Ammal* v. *Perumal* (1921) 44 Mad. 196, 61 I. C. 461, ('21) A.M. 187; *Official Receiver* v. *Lakshman* (1921) 41 Mad. L.J. 463, 68 I. C. 752, ('21) A.M. 681; *Bank of Upper India* v. *Fanny Skinner* (1929) 51 All. 494, 119 I.C. 241, ('29) A.A. 161, on app. *Fanny Skinner* v. *Bank of Upper India* (1935) 62 I. A. 115, 57 All. 314, 155 I. C. 743, ('35) A.PC. 108.

(b) *William Arratoon Lucas* v. *Bank of Bengal* (1926) 31 Cal. W. N. 179, 98 I.C. 925, ('26) A. PC. 29.

(c) (1901) 2 Ch. 231, 254.

(d) (1804) 9 Ves. 407, 410.

(e) *Sahadev Ravji* v. *Shekh Papa Mya* (1905) 29 Bom. 199; cf. *Norrish* v. *Marshall* (1821) 5 Mad. 475; *In re Lord Southampton's Estate* (1880) 16 Ch. D. 178.

(f) *Maung Shan* v. *U Po* (1927) 5 Rang. 749, 105 I. C. 474, ('28) A. R. 30; *Nga Kye* v. *Nga Po Min* (1906) U. B. R. sub-mortgage 1; *Viswanatha* v. *Chinnapakotti* (1932) 55 Mad. 390, 62 Mad. L. J. 272, 135 I. C. 535, ('32) A. M. 115. But see *Papala Chakrapani* v. *Latchmi* (1918) 35 Mad. L. J. 309, 45 I. C. 769.

(g) *Ma Myat Gyi* v. *Ma Me Nyun* (1924) 2 Rang. 561, 84 I. C. 984, ('25) A. R. 140; [illegible] (1908) 18 Mad. L. J. [illegible] *Nga Kye* v. *Nga Po Min* (1906) [illegible] sub-mortgage 1.

So in a Madras case (*h*) the Court refused to allow as against the assignee of a mortgage a right of equitable set off which would have been available against the mortgagee. S. [illegible] (g)

But although the assignee is not subject to the equities available against the assignor still he takes subject to the liabilities of the mortgagee and obviously the transfer by the mortgagee must be subject to the rights of the mortgagor (*i*). Cozens Hardy, J., in the case cited below (*j*) said—"It is well settled that where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and the mortgagee at the date of the transfer: *Mathews* v. *Wallwyn*" (*k*). This rule was applied in a case where the mortgagee retained the mortgage money and undertook to apply it to the payment of debts of the mortgagor. The mortgagee only utilized part of the money for that purpose and assigned the mortgage to a third person. The mortgagor was obliged to pay the rest of the debts himself and then sued the mortgagee in damages for the deficit. The suit was decreed against the mortgagee; and as against the transferee who was a party to the proceedings, the Court made a declaration that if the mortgagee do not pay the sum which may be due to the mortgagor on account of the money which the mortgagee failed to pay, the mortgage in the hands of the transferee will be good only for the amount actually paid for the mortgage with interest (*l*).

As the transfer is subject to the rights of the mortgagor, it follows that if the mortgage is void the sub-mortgage is also void. Thus in an English mortgage when a mortgage was void on account of champerty the sub-mortgage was also void (*m*). But when a minor obtained a decree setting aside a mortgage by his guardian and did not make the sub-mortgagee a party it was held that the sub-mortgagee's rights were not affected (*n*).

As regards the debt the mortgagee has been said to be very much in the situation of a surety for the sub-mortgagee because even if he is unable to recover his debt from the mortgagor he is liable for what may not be recovered, to the sub-mortgagee, and the sub-mortgagee cannot restrain the mortgagee from recovering the mortgage debt and at the same time hold him liable for the sub-mortgage debt (*o*).

The mortgagee may effect an equitable sub-mortgage by deposit of the mortgage deed (*p*).

The rights of redemption and sale in the case of successive mortgages are dealt with in sec. 94 but the case of a sub-mortgage has been omitted.

If

A mortgages to *B*

B sub-mortgages to *C*

then as between *B* and *C* the rights of redemption and of sale or foreclosure are the same as in a mortgage, *B* may redeem *C* and *C* may foreclose or bring to sale *B* without making *A* a party (*q*). The subject-matter of this mortgage are the rights of *B* as existing at the time of the sub-mortgage.

If *A* sues to redeem *B*, he must make *C* a party, for *C* is interested in the mortgage security as assignee of *B* (*r*).

(*h*) *Subramania Ayyar* v. *Subramania Pattar* (1917) 40 Mad. 683, 34 I.C. 859.

(*i*) *Chinnayya Rasudan* v. *Chidambaram Chetti* (1880) 2 Mad. 212. See note "Mortgage Debt" under s. 132 *post*.

Dixon v. *Winch* (1900) 1 Ch. 736.

(1798) 4 Ves. 118.

Chinnayya Rasudan v. *Chidambaram Chetti* (1880) 2 Mad. 212.

(*m*) *Cockell* v. *Taylor* (1851) 15 Beav. 103.

(*n*) *Govindan* v. *Nagayan* (1922) Mad. W. N. 160, 128 I. C. [illegible], ('22) A. M. [illegible].

(*o*) *Gurney* v. *Seppings* (1846) [illegible] 40; *Mohidin Pichai* v. [illegible] (1927) A.M. [illegible].

(*p*) *Gokul Dass* v. *Eastern Mortgage and Agency Company* (1906) 33 Cal. 410; *Maung Thanag* v. *M. M. Chettyar Firm* (1936) 164 I.C. 724, (1936) A.R. 366.

(*q*) *Someshwar* v. *Naranbhai* (1911) 13 [illegible] L.R. 90, 9 I.C. 765; *Ganesh* v. *Vasudeo* (1922) 24 Bom. L.R. 911, 66 I.C. 741, ('22) A.B. 424.

(*r*) *Venkataramani Ayyar* v. *Ranganatha* 101 I.C. 728, ('27) A.M. 798; [illegible] (1864) 23 [illegible] *Samvat Das* v. *Sajid Ali* [illegible] L.J. 1018, 8 I.C. [illegible], ('25) 17 All.

S. 58(g)

If *B* sues to foreclose or brings to sale *A* then he, *B*, must make *C* a party for the same reason.

Again *C* may foreclose or bring to sale *A*, and if he does, he must make *B* a party, for *B* is interested in the equity of redemption as assignee of *A*. The authority for this in England is *Hobart* v. *Abbot* (*s*) and the form of decree is given in sec. 12, Chapter 47 of Seton on Decrees. The Indian Form is No. 11 of Appendix D of the Code of Civil Procedure, 1908.

Narayan Vithal v. *Ganoji* (*t*) is an instance of a suit for redemption of land which has been sub-mortgaged by the mortgagee. Sir Charles Sargent, C. J., said "In the case of a derivative mortgage or sub-mortgage the judgment directs an account of what is due to the original mortgagee or his assignee, and then of what is due to the derivative or sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor." In a later Bombay case (*u*) a suit for redemption of a mortgage which had been sub-mortgaged was rightly dismissed because the deceased mortgagee's legal representatives had not been made parties. The judgment, however, says that there is no privity, between the mortgagor and the sub-mortgagee. This is not correct for there is privity of estate as they each have rights in the same property (*v*). The Rangoon High Court has, however, held that the right given to a sub-mortgagee is in default of payment to sell the interest mortgaged to him and to sell it through the medium of a court. He has no privity of contract or privity of estate with the original mortgagor (*w*).

Muthu Vijia Raghunatha v. *Venkatachallam* (*x*) is an instance of a sub-mortgagee bringing to sale the interest of the mortgagor. This right was admitted by the Allahabad High Court in the Full Bench case of *Ram Shankar Lal* v. *Ganesh Prasad* (*y*). It had been previously denied by the Allahadad High Court (*z*) owing to the erroneous interpretation put upon the word "property" as actual physical objects and not including rights to and in physical objects. Indeed under this construction there could be no such transaction as a sub-mortgage; but the Allahabad Court had not carried their doctrine to this extremity, for it had held that when the mortgagee acquired the equity of redemption such accession enured for the benefit of the sub-mortgagee (*a*) and that a sub-mortgagee was entitled to redeem a prior mortgagee (*b*).

Mortgage of moveable property.—The Transfer of Property Act refers to mortgages of immoveable property (*c*) and the Indian Contract Act refers to pledges of moveable property. But neither Act deals with mortgages of moveable property. A mortgagee of moveable property is entitled to a decree for sale just as much as a mortgagee of immoveable property (*d*). A mortgagee of moveable property, if in possession has a right to sell the property without the intervention of the Court, if

(*s*) (1731) 2 P. Wms. 642.

(*t*) (1891) 15 Bom. 692, 698 followed in *Gokul Das* v. *Debi Prasad* (1906) 28 All. 638 *Vengannan Chettiar & Sons* v. *Ramaswami* (1943) A.M. 498, (1943) 1 M.L.J. 362.

(*u*) *Padgaya* v. *Baji* (1896) 20 Bom. 549.

(*v*) See the criticism of this case by Subramania Ayyar, J., in *Muthu Vijia Raghunatha* v. *Venkatachallam* (1897) 20 Mad. 35, 39.

(*w*) *Maung Po* v. *Ma Ngwe* (1936) 167 I.C. 449, (1937) A.R. 56.

(*x*) (1897) 20 Mad. 35; *Chela Ram* v. *Walidad* (1900) P.R. 31 F.B.

(*y*) (1907) 29 All. 385 F.B. See also *Vengannan's case*, *supra*.

(*z*) *Ganga Prasad* v. *Chunni Lal* (1896) 18 All. 113; *Misri Lal* v. *Abdul Aziz* (1902) A.W.N. 216; *Ram Jatan Rai* v. *Ramhit Singh* (1905) 27 All. 511.

(*a*) *Ajudhia Prasad* v. *Man Singh* (1903) 25 All. 46.

(*b*) *Ram Subhag* v. *Nar Singh* (1905) 27 All. 472.

(*c*) *Jati Kar* v. *Mukunda Deb* (1912) 39 Cal. 227, 230, 11 I.C. 884.

(*d*) *Basavireddi* v. *Kamaraju* (1933) 64 Mad. L.J. 86, 142 I.C. 96, ('33) A.M. 241.

after proper notice the mortgagor fails to repay the mortgage money (e). But delivery of possession is not necessary to constitute a mortgage of moveable property, and a hypothecation of moveable property though not accompanied with delivery of possession is vaild and recognized in Indian law (f). As a transfer of moveable property is not complete without delivery of possession, such hypothecations have been described as creating an equitable charge (g). For the same reason a mortgage of moveables is liable to be defeated if the mortgagor in possession sells the goods to a *bona fide* purchaser without notice (h). On the same principle a mortgagee of moveables without possession has been postponed to a subsequent mortgagee with possession and without notice of the first mortgage (i). As between two mortgagees of moveables both without possession the mortgagee who came to court first has been given priority on the principle *qui prior est tempore potior est jure* (j). As between a mortgagee of moveables without possession and a judgment creditor of the mortgagor it has been held that the judgment creditor does not get priority over such a mortgagee merely by filing his application for attachment and that if the mortgagee takes possession before actual attachment, the judgment creditor gets no prior rights (k). In some cases, however, it has been held—it is submitted incorrectly—that the mortgage will prevail against a *bona fide* purchaser without notice (l). The preference given to the innocent purchaser is sometimes put on the ground of prevention of fraud and in *Narasiah* v. *Venkataramiah* (m) the Madras High Court said—"When goods are left in the possession of the mortgagor, a wide door is left open for fraud, and when the equities between the innocent purchaser and the mortgagee have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has by his omission to secure possession of the goods facilitated the commission of the fraud." In England mortgages of chattels are generally governed by the Bills of Sales Acts, 1878 and 1882 as amended by the Acts of 1890 and 1891 which contain stringent provisions designed to protect creditors and prevent fraud. S. 58 (g)

No particular formality is necessary in India for the creation of a security on moveable property and a parole mortgage of goods is valid. Order 34 of the Code of Civil Procedure does not apply to a mortgage of moveable property and so O. 34, r. 14 does not enable a mortgagee of moveable property who has obtained a personal decree for the mortgage money to sue afterwards on the mortgage (n).

(e) *In re Ahmed Alimahomed* (1932) 34 Bom. L.R. 1398, 142 I.C. 56, ('32) A.B. 613; *Deverges* v. *Sandeman Clark & Co.* (1903) 1 Ch. 579 C.A.

(f) *Deans* v. *Richardson* (1871) 3 N.W.P. 54; *Sham Sundar* v. *Cheita* (1871) 3 N.W.P. 71; *Ko Kyoetnee* v. *Ko Koung* (1866) 5 W.R. 189 (mortgage of floating logs of timber); *Reference* (1885) 8 Mad. 104 F.B. (mortgage of a coffee crop); *Shivram* v. *Dhau* (1902) 4 Bom. L.R. 577 (mortgage of bullocks); *Shrish Chandra* v. *Mungri Bewa* (1905) 9 Cal. W.N. 14; *Damodar* v. *Atmaram* (1906) 8 Bom. L.R. 344 (mortgage of a fishing boat); *In the matter of Ko Shway Aung* v. *Strang Steel & Co.* (1894) 21 Cal. 241 (mortgage of paddy boats); *In the matter of Ambrose Summers* (1896) 23 Cal. 592 (mortgage of stock in trade) v. *Bhashyam* (1902) 25 Mad. 406 *Khorasanee* v. *Ahmed Esmail* (1928) 5 Rang. 633, 106 I.C. 355, ('28) A.R. 28 (mortgage of stock in trade); *Tahilram* v. *D'Mello* (1916) 18 Bom. L.R. 387, 37 I.C. 231 (a mortgage of a printing press); *Venkatachalam* v. *Venkataraman* (1940) A.M. 929, (1940) 2 M.L.J. 484, 52 M.L.W. 455, (1940) M.W.N. 455.

(g) *In the matter of Ambrose Summers* (1896) 23 Cal. 592.

(h) *Sreeram* v. *Bammireddi* (1918) 35 Mad. L.J. 450, 47 I.C. 976; *Nankuji* v. *Chimna* (1911) 7 Nag. L.R. 72, 10 I.C. 869; *Manekjee Pallanjee* v. *S. A. Mayappa Chetty* (1915) 28 I.C. 462; *Backer Khorasanee* v. *Ahmed Esmail* (1928) 5 Rang. 633, 106 I.C. 355, ('28) A.R. 28; *Dayalji Pragji* v. *Karachi Electric Supply Corporation* (1939) 190 I.C. 790, (1940) A.S. 177.

(i) *The Co-operative Hindustan Bank* v. *Surendra* (1931) 36 Cwn. 263; *Manmohon Mukherji* v. *Kesrichand Gulabchand* (1935) 62 Cal. 1046; *Moosa Abdul Habib* v. *Maung Tun* (1931), 9 Rang. 182.

(j) *Bibhuti Bhusan* v. *Baidya Nath* (1933) 40 C.W.N. 625.

(k) *Manmohan Mukherjee* v. *Kesrichand* (1935) 62 Cal. 1046.

(l) *Sham Sundar* v. *Cheita* (1871) 3 N.W.P. 71; *Ko Kyratnee* v. *Ko Koung* (1866) 5 W.R. 189.

(m) (1919) 42 Mad. 59, 47 I.C. 976.

(n) *Official Assignee of Bombay* v. *Chimniram Motilal* (1933) 57 Bom. 346, 34 Bom. L.R. 1615, 142 I.C. 370, ('33) A.B. 51.

Ss. 58 (g), 59

Mortgage of moveables not in existence.—A mortgage of moveable property, which is to come into existence in future, has also been recognized. Such mortgages are equitable assignments fastening on the property when it comes into existence under the rule in *Holroyd* v. *Marshall* (o) and *Collyer* v. *Isaacs* (p). Instances of such mortgages are mortgages of future crops (q) or of indigo cakes to be manufactured (r) or a future decree (s) or future dues for work to be done (t). Such mortgages cannot be enforced against a purchaser for value without notice (u). It is, however, held that a mortgage of profits accruing from year to year from immoveable property *e.g.* profits from a sugar refinery is not valid as it is neither moveable property nor goods (v).

Pawn or pledge of moveables.—A pledge is a bailment of moveable property by way of security. Possession is given and the transaction involves a transfer of special property in the subject of the security. The distinction between a mortgage and a pledge is explained by Story in his book on Bailments as follows:

"A mortgage of goods is at Common Law distinguished from a mere pawn. By a grant or conveyance of goods in gage or mortgage the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated the title becomes absolute at law, although equity will interfere to compel a redemption. But in a pledge a special property only, as we shall presently see, passes to the pledgee the general property remaining in the pledgor. There is also another distinction. In the case of a pledge of personal property the right of the pledgee is not consummated except by possession; and ordinarily when that possession is relinquished, the right of the pledgee is extinguished or waived. But in the case of a mortgage of personal property the right of property passes by the conveyance to the pledgee and possession is not, or may not, be essential to create or support the title."

In a mortgage there is a conditional transfer of general title subject to being divested by a subsequent sale by the mortgagor to a *bona fide* purchaser without notice. In a pledge the pledgee is in possession and has a special property in the goods which he is entitled to detain to secure repayment. A subsequent pledge will have priority over a previous hypothecation (w).

Mortgage when to be by assurance.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage *other than a mortgage by deposit of title-deeds* can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a

(o) (1862) 10 H.L. 191.

(p) (1881) 19 Ch.D. 342; *Tailby* v. *Official Receiver* (1888) 13 A.C. 523.

(q) *Bansidhar* v. *Sant Lal* (1888) 10 All. 133; *Misri Lal* v. *Mozhar Hossein* (1886) 13 Cal. 262; *Ram Sarup* v. *Mohan Lal* (1924) 75 I.C. 816, ('24) A.A. 823; *Babu Ram* v. *Ram Sarup* (1926) 89 I.C. 410, ('26) A.A. 164.

(r) *Baldeo Prasad* v. *Miller* (1904) 31 Cal. 667.

(s) *Palaniappa* v. *Lakshmanan* (1896) 16 Mad. 429.

(t) *Sonaram* v. *Sitaram* (1940) 45 C.W.N. 50: *Tripura Modern Bank* v. *Nabadwip* (1945) 49 C.W.N. 494.

(u) *Co-operative Hindustan Bank* v. *Surendra Nath* (1932) 59 Cal. 667, 36 Cal. W.N. 263, 138 I.C. 852, ('32) A.C. 524.

(v) *Punjab National Bank* v. *Punjab Corporation Bank* (1939) A.L. 15, 41 P.L.R. 239, 179 I.C. 968 in which the P.C. did not decide the point.

(w) *Chumman Khan* v. *Mody* (1874) P.R. 70; *Co-operative Hindustan Bank* v. *Surendra Nath* (1932) 59 Cal. 667, 36 Cal. W.N. 263, 138 I.C. 852, ('32) A.C. 524.

registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property. S. 59

Amendments.—The words "other than a mortgage by deposit of title deeds" were inserted by the Amending Act 20 of 1929. The amendment makes no change in the law.

Before the Amending Act 20 of 1929 there was a third clause referring to mortgages by deposit of title deeds. This has been transferred to sec. 58. That clause was as follows :—

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab and in any other town which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Mode of transfer.—Besides deposit of title deeds there are only two ways in which property may be transferred by way of mortgage, and these are: (1) Registered instrument and (2) Delivery of possession. As in the case of sales the first overlaps the second, for a mortgage for less than Rs. 100 may also be made by registered instrument. If the principal money secured is less than Rs. 100 a mortgage may be made by delivery of possession. But of course this would not apply to a simple mortgage, for in such a mortgage the mortgagor does not part with possession. A simple mortgage must always be registered (*x*). An oral mortgage effected by delivery of possession is entitled to precedence over a subsequent registered mortgage (*y*)—see sec. 48 of the Registration Act.

Transfer when complete.—In the absence of a contract to the contrary the completion of the mortgage does not depend upon the payment of consideration. The transfer takes effect on the execution of the deed of mortgage (*z*), or where there is no deed, when possession is delivered.

Principal money secured.—These words show that interest is not to be taken into account in estimating the amount secured (*a*). This is also the rule under the Registration Act.

Registered Instrument.—In the case of a mortgage other than a mortgage by deposit of title deeds, if the principal money secured is Rs. 100 or upwards, a registered instrument is necessary. The deeds must be—

(1) signed by the mortgagor,

(2) attested by at least two witnesses,

(3) registered.

Signed by the mortgagor.—The section does not expressly empower the mortgagor to sign by an agent as does sec. 123 a donor. But this is implied (*b*). The

(*x*) *Maung Shwe Bye* v. *Chasuri Mutu* (1911) 12 I.C. 25.

(*y*) *Bahadur* v. *Grattan* (1871) P.R. 47.

(*z*) *Raghunath* v. *Amir Baksh* (1922) 1 Pat. 231, 65 I.C. 329, ('22) A.P. 299; *Allah Ditta* v. *Nasar Din* (1916) P.R. 33, 33 I.C. 474.

(*a*) *Jodh Ram* v. *Lalta Ram* (1913) 11 All. L.J. 729, 21 I.C. 78; *Kunhi Amma* v. *Ahmad* (1900) 23 Mad. 195; *Nana* v. *Anant* (1878) 2 Bom. 353; *Ram Doolary* v. *Thacoor* (1878) 4 Cal. 61; *Panchi Das* v. *Ahmedulla* (1883) 12 Cal. L.R. 444; *Habibullah* v. *Nakched Rai* (1883) 5 All. 447.

(*b*) *Deo Narain* v. *Kukur Bind* (1902) 24 All. 319 F.B. overruling *Moti Begum* v. *Zorawar* (1899) A.W.N. 196; *Sasi Bhusan* v. *Chandra* (1906) 33 Cal. 861, 865; —— —— v. *Bihari Lal* (1909) 12 O.C. 257, 2 I.C. 915; *Lal Bahadur Singh* v. *Ramsahay Prasad* (1928) 3 Luck. 112, 106 I.C. 581, ('27) A.O. 510.

signature may be made by means of types or by a facsimile (*c*) or, it may be a mark of an illiterate person (*d*). But a literate person cannot sign by making a mark (*e*).

Attested.—The requisition as to attestation was first made by this Act (*f*). It is now clear that the requisition applies to anomalous mortgages and this was so decided (*g*) before anomalous mortgages were included in the definition in sec. 58. The word "attested" is now defined in sec. 3 of the Act and as the definition requires that attestation shall be by two or more witnesses, the requirement of at least two witnesses in this section seems superfluous.

The definition includes attestation on admission of execution and is retrospective: see note "Attested" under sec. 3. The attesting witness must sign in the presence of the executant (*h*); otherwise the deed is not validly attested even though the attestor did actually witness execution (*i*).

If the witness signs before execution of the deed, that is no attestation (*j*).

In some cases it has been held that the signature of the Registrar on the endorsement of registration can be treated as an attestation (*k*); but this would depend upon whether he signed in the presence of the mortgagor (*l*) and there are decisions to the contrary (*m*). The attesting witness must sign as a witness to execution. When a Hindu husband signs a deed of sale or mortgage executed by his wife to express his approval, that is not an attestation (*n*). Accordingly a scribe who signs the deed as writer is not an attesting witness even though he may in fact have witnessed execution (*o*). Some cases allow it to be proved by evidence that a scribe who has signed as a writer did so with the

(*c*) *Nirmal Chunder* v. *Saratmoni* (1898) 25 Cal. 911 (a case of a will).

(*d*) General Clauses Act, s. 3 (52); *Govind* v. *Bhau* (1916) 41 Bom. 384, 39 I.C. 61.

(*e*) *Sadananda Pal* v. *Emperor* (1905) 32 Cal. 550 [Criminal case].

(*f*) *Ahmad Raza* v. *Abid Husain* (1916) 38 All. 494, 43 I.A. 264, 39 I.C. 11; *Jati Kar* v. *Mukemda Bastia* (1912) 39 Cal. 227, 11 I.C. 884; *Mt. Rangili* v. *Peary Lal* (1940) A.A. 101, (1939) A.L.J. 1056, 186 I.C. 515.

(*g*) *Kanna Kurup* v. *Sankara* (1921) 44 Mad. 344, 62 I.C. 368, ('21) A.M. 243.

(*h*) *Abinash Chandra* v. *Dasarath* (1929) 56 Cal. 598, 114 I.C. 84, ('29) A.C. 123; *Zamindar of Polavaram* v. *Maharaja of Pittapuram* (1931) 54 Mad. 163, 135 I.C. 17, ('31) A.M. 140; *Ramanathan* v. *Delhi Batcha* (1931) 60 Mad. L.J. 302, 131 I.C. 840, ('31) A.M. 335; *Venkataramayya* v. *Nagamura* (1931) 136 I.C. 343, ('32) A.M. 272; *Bhikari Charan* v. *Sudhir Chandra* (1938) A.C. 702, 42 C.W.N. 1055, 178 I.C. 992.

(*i*) *Jadunandan* v. *Surajdeo* (1930) 52 All. 434, 132 I.C. 37, ('30) A.A. 223.

(*j*) *Pran Nath* v. *Jadu Nath* (1905) 32 Cal. 729.

(*k*) *Veerappa* v. *Subramania* (1929) 52 Mad. 123, 116 I.C. 667, ('29) A.M. 1 F.B.; *Ram Charan* v. *Bhairam* (1931) 53 All. 1, 131 I.C. 241, ('31) A.A. 101; *Sarada Prasad* v. *Triguna Charan* (1922) 1 Pat. 300, 90 I.C. 402, ('22) A.P. 402; *Ramanathan* v. *Delhi Batcha*, *supra*; *Venkataramayya* v. *Nagamma*, *supra*; *Neelima Basu* v. *Joharlal Sarkar* (1934) 61 Cal. 525, 38 Cal. W.N. 753, 151 I.C. 1068, ('34) A.C. 772.

(*l*) *Abinash Chandra* v. *Dasarath*, *supra*; criticising *Radha Mohan* v. *Nripendra Nath* (1928) 47 Cal. L.J. 118, 105 I.C. 422, ('28) A.C. 154; *Haripada* v. *Annada* (1930) 129 I.C. 97, ('30) A.C. 750.

(*m*) *Tofaluddi Peada* v. *Mahar Ali* (1899) 26 Cal. 78; *Ranu* v. *Luxmanrao* (1909) 33 Bom. 44, 1 I.C. 464; *Mst. Chandrani* v. *Lala Sheo Nath* (1931) 8 O.W.N. 104, 132 I.C. 337, ('31) A.O. 146; *Lachman Singh* v. *Surendra Bahadur Singh* (1932) 54 All. 1051, 1932 All. L. J. [illegible], 139 I. C. 1, ('32) A.A. 527; *Mushraf Begam* v. *Lala Kundan Lal* (1933) 9 Luck. 12, 144 I.C. 860, ('33) A.O. 365; *Surendra Bahadur* v. *Behari Singh* (1939) A.PC. 90.

(*n*) *Sarkar Barnard* v. *Alak Manjary* (1924) 26 Bom. L.R. 737, 83 I.C. 170, ('25) A.PC. 89.

(*o*) *Badri Prasad* v. *Abdul Karim* (1913) 35 All. 254, 19 I.C. 451; *Ranu* v. *Luxmanrao* (1909) 33 Bom. 44, 1 I. C. 464; *Rambahadur Singh* v. *Ajodhya* (1916) 1 Pat. L.J. 129, 34 I.C. 370; *Dalichand* v. *Lotu* (1920) 44 Bom. 405, 55 I.C. 616—Contra, *Radha Kishen* v. *Fateh Ali* (1898) 20 All. 532; *Raj Narain Ghosh* v. *Abdur Rahim* (1901) 5 Cal. W.N. 454; *Jagannath* v. [illegible] 48 Cal. 61, 62 I.C. 97, ('21) A.C. [illegible] *dayan* v. *Muthukaruppan* [illegible] L. J. 534, 19 I. C. 589; [illegible] *Kylasam* (1915) 26 I.C. 409.

intention of witnessing execution (*p*). But other cases will not permit this and the scribe must have signed as an attesting witness in order to be treated as such (*q*).

An illiterate person may attest the signature of the executant by making his mark (*r*), or the scribe may sign for him if so authorized (*s*), but not otherwise (*t*).

A party to a deed cannot be an attesting witness, for the object of attestation is protection against fraud and undue influence (*u*). A person interested in money advanced may be an attesting witness if he is not a party (*v*); and the person who advanced the money may attest a mortgage in favour of his benamidar (*w*). A scribe who has signed on behalf of a party, *e.g.*, an illiterate mortgagor cannot be an attesting witness, for that would amount to attestation of his own signature (*x*). But where an illiterate mortgagor has made his mark himself and the scribe wrote a description of the mark beside it he was held to be competent to sign as an attesting witness (*y*).

Proof of an attested instrument is according to secs. 68 to 71 of the Indian Evidence Act. The amendment of sec. 68 by Act 31 of 1926 makes it unnecessary to call any attesting witness in the case of a mortgage deed unless the execution of the mortgage by the person by whom it purports to have been executed (*z*) is specifically denied. If execution is specifically denied, one attesting witness at least must be called to prove the deed if there be one alive and subject to the process of the Court. This is not necessary if execution is admitted (*a*); and the admission must be not only of execution but of due execution (*b*); for an admission will not render valid a document which the evidence shows to be invalid in law (*c*). But even if execution is admitted it is still incumbent on the plaintiff to prove the mortgage in the form prescribed by s. 59, *i.e.*, he must prove that it was attested by at least two witnesses (*d*). In a case from Patna a pardahnashin lady admitted execution of a deed of mortgage, and the Patna High Court relying on sec. 70 of the Indian Evidence Act held the deed proved although the attesting witnesses were on the other side of the purdha and did not actually

(*p*) *Muhammad Ali* v. *Jaffar Khan* (1897) A.W.N. 146; *Raj Narain* v. *Abdur Rahim*, *supra*; *Dinamoyee* v. *Bon Behari* (1902) 7 Cal. W.N. 160; *Paramasiva* v. *Krishna* (1918) 41 Mad. 535, 43 I.C. 983; *Nageshwar Prasad* v. *Bachu Singh* (1919) 4 Pat. L.J. 511, 53 I.C. 79 (but the onus of proof is heavily on the scribe); *Dharamdas* v. *Ramoomal* (1927) 101 I.C. 715, ('27) A.S. 118; *Veerapudayan* v. *Muthukarappan*, *supra*; *Jogendranath Nath* v. *Nitai Churn* (1903) 7 Cal. W.N. 384; *Jagannath* v. *Bajrang*, *supra*; *V.R.M.R.M. Firm* v. *Muhammad Kasim* (1926) 98 I.C. 205, ('26) A.R. 145.

(*q*) *Ramu* v. *Luxmanrao*, *supra*; *Dalichand* v. *Lotu*, *supra*; *Jadunandan* v. *Surajdeo* (1930) 52 All. 434, 132 I.C. 37, ('30) A.A. 223; *Abinash Chandra* v. *Dasrath* (1929) 56 Cal. 598, 114 I.C. 84, ('29) A.C. 123 (per Rankin, C.J.).

(*r*) *Nagamma* v. *Venkataramayya* (1935) 58 Mad. 220, 154 I.C. 777, ('35) A.M. 178; *Chiranji Lal* v. *Poorna* (1914) 12 All. L. J. 1114, 26 I.C. 84; *Hiralal* v. *Gokul* (1944) A.A. 61.

(*s*) *Sasi Bhusan* v. *Chandra* (1906) 33 Cal. 861; *Lal Bahadur* v. *Rameshwar Prasad* (1928) 3 Luck. 113, 105 I.C. 581, ('27) A.O. 510.

(*t*) *Param Hans* v. *Randhir Singh* (1916) 38 All. 461, 35 I.C. 748.

(*u*) *Peary Mohan* v. *Sreenath* (1909) 14 Cal. W. N. 1046, 7 I.C. 735; *Seurur Jigar Begum* v. *Barada Kanta Mitter* (1910) 37 Cal. 526, 5 I.C. 529; *Debendra* v. *Behari* (1911) 16 Cal. W.N. 1075, 15 I.C. 666.

(*v*) *Balu* v. *Gopal* (1911) 13 Bom. L. R. 944, 12 I.C. 531; *Durga Din* v. *Suraj Bakhsh* (1931) 7 Luck. 41, 134 I.C. 402, ('31) A.O. 285 F.B.

(*w*) *Durga Din* v. *Suraj Bakhsh*, *supra*.

(*x*) *Rajani Kanta* v. *Panchananda* (1918) 46 Cal. 522, 48 I.C. 820 also cited as *Upendra* v. *Hukum Chand*; *Sristidhar* v. *Rakshakali* (1922) 49 Cal. 438, 63 I.C. 507, ('22) A.C. 166; *Paban* v. *Badal* (1921) 26 Cal. W.N. 951, 66 I.C. 906, ('21) A. C. 276; *Ram Samujh* v. *Mst. Mainath* (1925) 91 I.C. 176, ('25) A.O. 737.

(*y*) *Govind Bhikaji* v. *Bhau Gopal* (1917) 41 Bom. 384, 39 I. C. 61; *Dinamoyee* v. *Bon Behari* (1902) 7 Cal. W.N. 160.

(*z*) *Yacubkhan* v. *Guljarkhan* (1928) 52 Bom. 219, 111 I.C. 287, ('28) A.B. 267; *Bisvanath* v. *Kayastha, etc., Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.B. 422.

(*a*) *Satish Chandra* v. *Jogendra Nath* (1916) 20 Cal. W.N. 1044, 34 I.C. 862; *Nageshwar Prasad* v. *Bachu Singh* (1919) 4 Pat. L.J. 511, 53 I.C. 79; *Jagannath* v. *Ravji* (1923) 47 Bom. 137, 76 I.C. 73, ('23) A.B. 90.

(*b*) *Arjun* v. *Kailas* (1922) 27 Cal. W.N. 268, 70 I.C. 532, ('23) A.C. 149.

(*c*) *Sheik Kachu* v. *Mahammad Ali* (1927) 45 Cal. L.J. 577, 105 I.C. 28, ('27) A.C. 986.

(*d*) *R.M.A.R.M. Chettyar Firm* v. *U Hlaw* (1933) 11 Rang. 26, 141 I.C. 700, ('33) A.R. 6 dissenting from a dictum in *Bisvanath* v. *Kayastha Trading, etc. Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.P. 422.

S. 59

see her sign (e). But the Privy Council reversed the decision saying that sec. 70 of the Evidence Act only applied to a document that was duly attested, and that as the mortgage deed was not attested within the meaning of sec. 59 of the Transfer of Property Act, it was invalid as against her in spite of her admission (f). The admission by one mortgagor will not dispense with the necessity of proof as against the other (g). It matters not that the unattested deed has been put in without objection in the lower Court, for sec. 59 enacts a rule of law and not a rule of evidence (h); but if the objection involves a question of fact it cannot be raised in second appeal (i). If the attesting witnesses are dead their signatures can be proved by evidence of handwriting (j).

If attestation is invalid the deed cannot operate as a mortgage. Nor can it operate as a charge, for the words in sec. 100 "and the transaction does not amount to a mortgage" do not mean that a transaction which purports to be a mortgage becomes, by reason of defective execution a charge (k). But the invalidly attested deed is admissible as evidence to the personal covenant to pay (l), and if there is no personal covenant, the obligee may sue for compensation or pursue his remedy under sec. 68 of the Act, for the Privy Council said that "the position of the mortgagor under this section cannot, by reason of the non-attestation of the deed, be better than it would have been if the mortgage had been duly attested" (m). But if the deed is validly attested it cannot be proved except by the strict mode of proof required by sec. 68 of the Indian Evidence Act, and in default of such proof it cannot be used even as evidence of the personal obligation (n).

Registration.—Before the Act a mortgage was not required to be in writing and usufructuary mortgages in the mofussil were generally made without writing by simple delivery of possession (o). The Act as originally enacted made registration compulsory for all mortgages of Rs. 100 and over, but as to mortgages for less than Rs.100, allowed either an instrument registered or unregistered or an oral transfer by delivery of possession where the mortgage was not a simple mortgage. This corresponded with the provision for optional registration in the Registration Act of 1877. And under both Acts interest

(e) *Mst. Hira Bibi* v *Ramdhan Pal* (1922) 6 Pat. L.J. 465, 62 I.C. 540, ('22) A.P. 70, reversed in *Hira Bibi* v. *Ram Hari Lal* (1925) 52 I.A. 362, 5 Pat. 58, 89 I.C. 659, ('25) A.PC. 203.

(f) *Hira Bibi* v. *Ram Hari Lal*, *supra*; *Maung Po Gyi* v. *Maung Min Din* (1927) 5 Rang. 561, 104 I.C. 386, ('27) A.R. 233; *Mushrafi Begum* v. *Lala Kundan Lal* (1933) 9 Luck. 12, 144 I.C. 860, ('33) A.O. 365.

(g) *Satish Chandra* v. *Jogendranath* (1916) 44 Cal. 345, 34 I.C. 862.

(h) *Banwari Prasad* v. *Musst. Bigni* (1927) 101 I.C. 277, ('27) A.P. 131.

(i) *Sricharan* v. *Makhan Lal* (1919) 51 I.C. 378; *Rangaswami* v. *Veeraraghava* (1924) 46 Mad. L.J. 56, 76 I.C. 1003, ('24) A.M. 513; *Raja Venkataramayya* v. *Kamisetti* (1927) 53 Mad. L.J. 216, 101 I.C. 498, ('27) A.M. 662.

(j) Sec. 69, Indian Evidence Act; *Shankarrao* v. *Ramji* (1904) 28 Bom. 58; *Uttam Singh* v. *Hukam Singh* (1917) 39 All. 112, 38 I.C. 651; *Raja Venkataramayya* v. *Kamisetti*, *supra*.

(k) *Pran Nath* v. *Jadu Nath* (1905) 32 Cal. 729; *Tofaluddi* v. *Mahar Ali* (1899) 26 Cal. 78, 81; *Roysuddi* v. *Kalinath* (1906) 33 Cal. 985; *Samoo Patter* v. *Abdul Sammad* (1908) 31 Mad. 337; *Anantarama* v. *Yusuffjee* (1916) 31 Mad. L. J. 133, 36 I. C. 908 disapproving *Nelakantam* v. *Madasami* (1907) 17 Mad. L. J. 39; *Param Hans* v. *Randhir* (1916) 38 All. 461, 35 I.C. 748; *Collector of Mirzapur* v. *Bhagwan Prasad* (1913) 35 All. 164, 18 I. C. 311; *Narayan* v. *Lakshmandas* (1905) 7 Bom. L.R. 934; *Debendra Chandra* v. *Behari Lal* (1911) 16 Cal. W.N. 1075, 15 I.C. 666; *Sreemutty Rani* v. *Rajah Sri Nath* (1896) 1 Cal. W.N. 81; *Khemchand* v. *Malloo* (1915) 10 Nag. L.R. 81, 26 I.C. 601.

(l) *Pulaka Veetil Muthalakulangara* v. *Thiruthipalli* (1909) 32 Mad. 410, 1 I.C. 1 F. B. approving *Sada Kavaur* v. *Tadepally* (1907) 30 Mad. 284 and overrulling *Madras Deposit, etc.* v. *Oonnamalai* (1895) 18 Mad. 29; *Tofaluddi* v. *Mahar Ali*, *supra*; *Sonatun* v. *Dino Nath* (1899) 26 Cal. 222; *Mathura Prasad* v. *Cheddi Lal* (1915) 13 All. L.J. 553, 29 I.C. 363; *Dhana Mohammed* v. *Nastulla* (1926) 92 I.C. 948, ('26) A.O. 637; *Sama Rao* v. *Vannajee* (1923) 46 Mad. 64, 71 I.C. 153, ('23) A.M. 36; *Mahadeo Prasad* v. *Gairaj Singh* (1916) 34 I.C. 397; *Zamindar of Polavaram* v. *Maharaja of Pittapuram* (1931) 54 Mad. 163, 135 I.C. 17, ('31) A.M. 140.

(m) *Ram Narain Singh* v. *Adhindra Nath* (1917) 44 Cal. 388, 38 I.C. 932.

(n) *Shib Chandra* v. *Gour Chandra* (1922) 27 Cal. W.N. 134, 68 I.C. 86, ('22) A.C. 160; *Veerappa* v. *Chinna Muthu* (1907) 30 Mad. 251.

(o) *Ahmad Raza* v. *Abid Husain* (1916) 38 All. 494, 43 I.A. 264, 39 I.C. 11.

was not calculated in computing the value of the security (*p*). A simple mortgage for less than Rs. 100 could therefore be made by an unregistered instrument (*q*).

But the word "registered" was inserted in the second clause of sec. 59 by Act 6 of 1904 which came into force on the 11th March 1904. The amendment was made because the rule of priority of registered over unregistered instruments enacted in sec. 48 of the Registration Acts had been construed by the Courts as subject to the doctrine of notice. This doctrine had been expressly abolished as regards the early Registration Regulations by Act 1 of 1843, but the Courts treated it as revived as subsequent Registration Acts did not expressly exclude it (*r*). The Legislature considered that the application of the doctrine of notice opened the door to perjuries and other malpractices and virtually abolished it by requiring all deeds of mortgage to be registered. The Amending Act 6 of 1904 thus abolished optional registration as regards mortgage deeds and the competition between registered and unregistered deeds under sec. 50 of the Registration Act cannot arise in respect of instruments of mortgage executed after the 11th March 1904. Such competition may, however, still arise in places where the Transfer of Property Act is not in force. In the Punjab a mortgage for less than Rs. 100 may be made by unregistered instrument. The Lahore High Court has held that a subsequent registered mortgagee loses priority over a previous unregistered mortgagee if he receives notice of it before registration of his mortgage, even though he had no notice of it at the time of execution (*s*).

Registration must be valid.—The registration must be valid according to the law in force in British India,—section 3. Thus if the property is so incorrectly described that it cannot be identified (*t*), or when the registration has proceeded on a misdescription which is a fraud on the law of registration (*u*); or when the deed is registered in a circle in which the property is not situate (*v*) or an infinitesimal property not really intended to be transferred is inserted in the deed only for the purpose of creating jurisdiction in the registration district where the properties really intended to be transferred are situate (*w*) or is not presented for registration by the proper person (*x*) the mortgage is invalid.

Registration, if invalid.—A mortgage deed invalid for want of registration cannot operate as a charge (*y*), but it would be adimissible in evidence for a collateral purpose to prove the nature and character of the possession under the Privy Council ruling in *Varatha Pillai* v. *Jeevarathammal* (*z*). Following this ruling the Madras High Court allowed a plaintiff to sue on title for possession after he had executed a usufructuary mortgage which was invalid for want of registration (*a*), and to use the unregistered deed to defeat defendant's claim to title by adverse possession (*b*).

(*p*) *Habibullah* v. *Nakched* (1883) 5 All. 447 F.B.; *Nana* v. *Anant* (1878) 2 Bom. 353; *Ram Doolary* v. *Thacoor* (1878) 4 Cal. 61; *Panchi Dasi* v. *Ahmedulla* (1883) 12 Cal. L.R. 444; *Jodh Ram* v. *Lajja Ram* (1913) 11 All. L.J. 729, 21 I.C. 78; *Sadagopa* v. *Dorasami* (1882) 5 Mad. 214; *Kunhi* v. *Ahmed* (1900) 23 Mad. 105.

Narasayya v. *Guruvappa* (1878) 1 Mad. 378; *Ram Doolary* v. *Thacoor Rai* (1879) 4 Cal. 61.

(*r*) See cases collected in the notes to s. 50 in Mulla's Registration Act.

(*s*) *Rodha Mal* v. *Ramji Das* (1933) 146 I.C. 40, ('33) A. L. 609 following *Khiali Ram* v. *Himmata* (1908) 30 All. 228.

(*t*) *Baij Nath* v. *Sheo Sahoy* (1891) 18 Cal. 556 F.B.; *Narasamma* v. *Subbarayudu* (1896) 18 Mad. 364; *Nahar Lal* v. *Baij Nath* (1928) 32 Cal. W.N. 241, 113 I.C. 855, ('28) A.C. 265.

(*u*) *Harendra Lal* v. *Hari Dasi* (1914) 41 Cal. 972, 41 I.A. 110, 23 I.C. 637, ('14) A.PC. 67; *Biswanath* v. *Chandra* (1921) 48 Cal. 509, 48 I.A. 127, 60 I.C. 833, ('21) A.PC. 8; *Bisal Singh* v. *Roshan Lal* (1924) 22 All. L.J. 241, 78 I.C. 265, ('24) A.A. 373; *Akshayalingam* v. *Ramayya* (1929) 120 I.C. 876, ('29) A.M. 426; *Kedar* v. *Bidhu* (1924) 38 Cal. L.J. 355, 70 I.C. 588, ('24) A.C. 348.

(*v*) *Joginee Mohan* v. *Bhoot Nath* (1904) 29 Cal. 654.

(*w*) *Inuganti Venkatarama Rao* v. *Sobhanadri Appa Rao* (1936) 63 I.A. 169.

(*x*) *Dottie Karan* v. *Lachmi Prasad* (1931) 10 Pat. 481, 58 I.A. 58, 131 I.C. 321, ('31) A.PC. 52.

(*y*) *Maung Tun Ya* v. *Maung Aung Dun* (1924) 2 Rang. 318, 84 I.C. 1028, ('25) A.R. 1; *P.R.P.R. Somasundram Chettiar* v. *Y. P. N. Nachiappa Chettiar* (1924) 2 Rang. 429, 84 I.C. 302, ('25) A.R. 55. See note "Registration" under s. 100.

(*z*) (1919) 43 Mad. 244, 46 I.A. 285, 53 I.C. 901.

(*a*) *Ma Mo E* v. *Ma Kun Hlaing* (1941) A.R. 234.

(*b*) *Appanna* v. *Venkatasami* (1924) 47 Mad. 223, 79 I.C. 510, ('24) A.M. 262.

In an Allahabad case (c) a defendant who had been 12 years in possession under a usufructuary mortgage which was invalid for want of registration was held to have acquired a legally operative mortgage by adverse possession. Under sec. 53A and the proviso to sec. 49 of the Registration Act, a mortgage invalid for want of registration is available to usufructuary mortgagee to protect his possession.

Again an unregistered mortgage deed though invalid as a mortgage may be used to prove the debt. It has been held that if the personal covenant to pay is separable from the creation of the security it may be used to support a personal claim for the debt (d); but not if the transaction is indivisible and if the loan and the mortgage cannot be separated (e). Two Madras cases to the contrary are, it is submitted, unsound. In one (f) the mortgage bond was not admitted even as evidence of an express contract to pay contained in the deed and in the other (g) it was not admitted even as evidence of a stipulation to pay compound interest.

Effect of registration.—A mortgage does not become complete and enforcible until it is registered. Therefore if a mortgage is impeached as a fraudulent preference, the time of three months under sec. 54 of the Provincial Insolvency Act runs from the date of registration (h). But registration does not suspend the operation of the mortgage and under sec. 47 of the Registration Act, as soon as it is registered it takes effect from the date of execution. Therefore if the property is attached after the date of execution of a mortgage, but before the date of registration, the mortgage will not be invalid as against claims enforcible under the attachment (i). This is because an attachment does not affect a subsequent alienation.

When the mortgage and the terms of the mortgage are admitted in the pleadings it has been held that a suit for redemption will lie even though the deed is not registered (j). On the other hand, if a person suing to enforce a claim arising out of a mortgage admits that the deed of mortgage has been altered by a subsequent verbal arrangement, he can neither prove the verbal arrangement, nor succeed on the footing that the transaction is governed by the mortgage (k).

Extent.—This section does not apply to territories excluded from the operation of the Registration Act—see sec. 1. It has been extended to cantonments by sec. 287 of the Cantonments Act 2 of 1924.

(c) *Maha Mangal Rai* v. *Kishun Kandu* (1927) 100 I.C. 346, ('27) A.A. 311.

(d) *Lachmipat* v. *Mirza* (18[illegible]) 4 Beng. L.R. 18 F.B.; *Tukaram* v. *Khandoji* (1869) 6 Bom. H.C. 134 O.C.J.; *Sangappa* v. *Basappa* (1870) 7 Bom. H.C. 1 A.C.; *Siri Seshathri* v. *Sankara* (1873) 7 Mad. H.C. 296; *Guduri* v. *Rapaka* (1874) 7 Mad. H.C. 348; *Sheo Dial* v. *Prag Dat* (1881) 3 All. 229 F.B.; *Krishto Lall* v. *Bonomalee* (1880) 5 Cal. 611; *Gour Charn* v. *Jinnut Ali* (1882) 11 Cal. L.R. 166; *Ulfatunnissa* v. *Hosain Khan* (1883) 9 Cal. 520 F.B.; *Jagappa* v. *Latchappa* (1882) 5 Mad. 119; *Gomaji* v. *Subbarayappa* (1892) 15 Mad. 253; *Vani* v. *Bani* (1896) 20 Bom. 553; *Sriramulu* v. *Chinna* (1902) 25 Mad. 396; *Nemdhari* v. *Bisseswari* (1897) 2 Cal. W.N. 591; *Sada Kavaur* v. *Tadepally* (1907) 30 Mad. 284; *Khudda Mal* v. *Kunji* (1881) P.R. 80; *Premsing* v. *Mula Lal* (1883) P.R. 10; *Jogines Mohun* v. *Bhoot Nath* (1902) 29 Cal. 654; *Rama Rao* v. *Vedayya* (1923) 46 Mad. 455, 73 I.C. 188, ('23) A.M. 447; *Basant Mal* v. *Jawahir Singh* (1925) 7 Lah. L.J. 3, 87 I.C. 609, ('25) A.L. 356; *Jagannadham Pillai* v. *The Official Assignee* (1931) 60 Mad. L.J. 309, 129 I.C. 814, ('31) A.M. 124; *Krishnaswami* v. *Kamalaama* (1941) A.PC. 90, 68 I.A. 136; *Chhotibai Daulatram* v. *Mansukhlal* (1941) A.B.1.

(e) *Mattongeney* v. *Ramnarain* (1879) 4 Cal. 83; *Jaisukh* v. *Sayad Mahomed* (1880) P.R. 39.

(f) *Achoo* v. *Dhany Ram* (1869) 4 Mad. H.C. 378.

(g) *Swami Chetty* v. *Ethirajulu* (1917) 40 Mad. 547, 34 I.C. 853.

(h) *Muthiah Chettiar* v. *Official Receiver, Tinnevelley* (1933) 64 Mad. L.J. 382, 141 I.C. 101, ('33) A.M. 185 followed in *Iswarayya* v. *Subbamma* (1934) 67 Mad. L.J. 360, 151 I.C. 1054, ('34) A.M. 637 (a sale).

(i) *Nabadweepchandra Das* v. *Lokenath Roy* (1932) 59 Cal. 1176, 36 Cal. W. N. 733, 143 I.C. 452, ('33) A.C. 212.

(j) *Govindan Nayar* v. *Ammed* (1927) 96 I.C. 195, ('27) A.M. 92.

(k) *Kamta Singh* v. *Chaturbhuj Singh* (1934) 61 I.A. 185, 13 Pat. [illegible], 66 Mad. L.J. 562, (1934) All. L.J. [illegible], 36 Bom. L.R. 547, 38 Cal. W.N. 875, 59 Cal. L.J. 272, 148 I.C. 496, ('34) A.PC. [illegible].

Moveables.—The section has no application to a mortgage of moveable property. A mortgage of moveable property does not require registration or attestation (*l*).

References to mortgagors and mortgagees to include persons deriving title from them.

59A. *Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.*

This section is new. It was inserted by the Amending Act 20 of 1929 to make clear that the words "mortgagor" and "mortgagee" include all persons deriving title under them as in the English Statutes (*m*). These words were so used even before the amendment (*n*). The Privy Council in *Muhammad Sidiq Khan* v. *Muhammad Nasir-ullah Khan* (*o*) treated the words as including the heirs of the mortgagor and of the mortgagee. The word "mortgagor," however, does not include a transferee of the mortgagor in sec. 68 (a), as the transferee of the mortgagor is not bound by the mortgagor's personal covenant (*p*). This is shown by the words "mortgagor himself" used in that section. But in clause (c) of that section, a subsequent purchaser would be included (*q*).

Rights and Liabilities of Mortgagor.

Right of mortgagor to redeem.

60. At any time after the principal money has become *due*, [*pp. 407-409*], the mortgagor has a right, on payment [*p. 409*] or tender, at a proper time and place, [*p. 412*] of the mortgage-money, [*p. 412*] to require the mortgagee (a) to deliver *to the mortgagor the mortgage deed and all documents relating to the mortgage property which are in the possession or power of the mortgagee* [*pp. 412-413*], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession [*p. 412*] thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished [*p. 413*]:

Provided that the right conferred by this section has not been extinguished by the act of the parties [*p. 413*] or by *decree* of a Court [*pp. 416-418*].

(*l*) *Jati Kar* v. *Mukund Deb* (1912) 39 Cal. 227, 230, 11 I.C. 884; *Vasudevan* v. *Kutti Amma* (1941) A.M. 806 (2), (1941) 2 M.L.J. 293, 54 M.L.W. 238, (1941) M.W.N. 75, 197 I.C. 259.

(*m*) Conveyancing and Law of Property Act, 1881, sec. 2 (vi); Law of Property Act, 1925, sec. 205 (1) (XVI); *Teevan* v. *Smith* (1882) 20 Ch.D. 724.

(*n*) *Subba Rao* v. *Pakkiammal Nadathi* (1924) 46 Mad. L. J. 74, 80 I.C. 964, ('24) A.M. 453.

(*o*) (1899) 21 All. 23, 26 I.A. 45.

(*p*) *Jamna Das* v. *Ram Autar Pande* (1912) 34 All. 63, 39 I.A. 7, 13 I.C. 304.

(*q*) *Haridas* v. *Jagannath* (1939) Nag. 88, 186 I.C. 579, (1939) A.N. 256.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption [*pp. 418-419*].

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money [*p. 420*].

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor [*pp. 420-428*].

Amendments.—The section has been amended by Act 20 of 1929. The word "*due*" in the section has been substituted for the word "payable" in order to make it clear that a mortgagor cannot redeem within the term of the mortgage.

The words "to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee have been substituted for the words "to deliver the mortgage deed, if any, to the mortgagor." The requisition for the delivery of the mortgage deed was inadequate, for the mortgagee when redeemed is under an obligation to deliver up not only the mortgage deed but all documents relating to the mortgaged property.

In the second paragraph the word "decree" has been substituted for the word "order." This is because the amendments made in Order 34 of the Code of Civil Procedure, 1908, show that the right of redemption is extinguished by a decree.

In the last paragraph the word "only" has been inserted to overrule cases which have erroneously held that a surrender by a mortgagee of a part of his security destroys the integrity of the mortgage, and justifies partial redemption: See note *infra* "Partial redemption."

Amendments whether retrospective.—This section is not specified in sec. 63 of the Amending Act 20 of 1929 as a section in which the amendments shall not have retrospective effect. But the Calcutta High Court has in effect held that the amended section is not retrospective (*r*).

Right of redemption.—The mortgagor's right of redemption after the date fixed for payment, is called in English law the equity of redemption. The term indicates that the right was a creation of the Courts of Equity which, while giving relief against forfeiture, allowed the right to continue even after default on due date. It also indicates that the mortgagor had an estate in land (*s*) and the phrase is therefore generally used in India instead of right of redemption. The mortgagor in Indian law is the owner who has parted

(*r*) *Pranballav Shaha* v. *Bhagaban Chandra Seal* (1934) 61 Cal. 894, 38 Cal. W. N. 838, 59 Cal. L. J. 473, 152 I. C. 429, ('34) A.C. 775.

(*s*) *Casborne* v. *Scarfe* (1738) 1 Atk. 603; *Parashram* v. *Govind* (1886) 11 Bom. 286.

with some rights of ownership and the right of redemption is a right which he exercises in virtue of his residuary ownership to resume what he has parted with. The section affirms a right of redemption in all mortgages and thus carries out the recommendation of the Privy Council in *Thumbuswamy*'s case (*t*) that the Legislature should intervene to recognize a right of redemption in mortgages by conditional sale. In India this right of redemption is, however, a statutory and, therefore, a legal right as stated by the judicial committee.

The section is not prefaced by any such words as "in the absence of a contract to the contrary." The right of redemption is therefore a statutory right which cannot be fettered by any condition which impedes or prevents redemption (*u*). Any such condition is void as a clog on redemption. A mortgagee's suit for sale was compromised on terms that the mortgagor should pay within a specified time and that in default the mortgagee should take possession as usufructuary mortgagee; and that thereafter the mortgagor should have a right to redeem at any time by taking out execution. The Madras High Court held that this term of the consent decree was invalid as it had the effect of reducing the time for redemption from 60 to 3 years (*v*). On appeal to the Privy Council the point did not arise as their Lordships held that on a proper construction of the decree it did not exclude the mortgagor's remedy bysu it (*w*). The section further explains when the right of redemption arises: how the right of redemption is exercised and what the mortgagor's rights on redemption are.

Right of redemption and right of foreclosure co-extensive.—The mortgagor's right of redemption and the mortgagee's right of foreclosure or sale are co-extensive. When the mortgagor's right to redeem accrues, the mortgagee has a right to enforce his security (*x*). But the rule may be limited by the terms of the mortgage and if the limitation is not oppressive or unreasonable it will be given effect to. Thus when a mortgage for a fixed term provided that the mortgagee might sue for sale before the expiry of the term if his security were jeopardised, it was held that the right of redemption was not accelerated (*y*).

Clog on Redemption.—A mortgage being a security for the debt the right of redemption continues although the mortgagor fails to pay the debt at due date. Any provision inserted to prevent, evade or hamper redemption is void. This is also implied in the maxim "once a mortgage always a mortgage" (*z*). Collins, M.R., in *Jarrah Timber & Wood Paving Corporation* v. *Samuel* (*a*), approved and adopted the following extract from a judgment in an Irish case (*b*):

> "It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage . . . to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be

(*t*) (1875) 1 Mad. 1, 2 I.A. 241.

(*u*) *Mohammad Sher Khan* v. *Seth Swami Dayal* (1922) 44 All. 185, 49 I.A. 60, 65, 66 I.C. 583, ('22) A.PC. 142.

(*v*) *Ambu Nair* v. *Kelu Nair* (1930) 53 Mad. 805, 123 I.C. 584, ('30) A.M. 305.

(*w*) *Ambu Nair* v. *Kelu Nair* (1933) 60 I.A. 266, 56 Mad. 737, 65 Mad. L.J. 108, 35 Bom. L.R. 807, 37 Cal. W.N. 797, 57 Cal. L.J. 454, 143 I.C. 433, ('33) A.PC. 167.

(*x*) *Sakharam* v. *Vithu* (1866) 2 Bom. H.C. 225 A.C.J.; *Vadju* v. *Vadju* (1881) 5 Bom. 22; *Raghubar Dayal* v. *Budhu Lal* (1886) 8 All. 95; *Tirugnana* v. *Nallatambi* (1893) 16 Mad. 486; *Sayad Abdul Hak* v. *Gulam Jilani* (1896) 20 Bom. 677; *Sari* v. *Motiram* (1898) 22 Bom. 375; *Narasimha Rao* v. *Seshayya* (1925) 48 Mad. L.J. 363, 90 I.C. 138, ('25) A.M. 825; *Rahmat Ali* v. *Shadi Ram* (1927) 100 I.C. 625, ('27) A.L. 226; *Shiam Lal* v. *Jagdamba Prasad* (1927) 25 All. L.J. 1061, 106 I.C. 561, ('28) A.A. 131.

(*y*) *Bhawani* v. *Sheodihal* (1905) 26 All. 479.

(*z*) *Newcomb* v. *Bonham* (1681) 1 Vern. 7; *Santley* v. *Wilde* (1899) 2 Ch. 474 C.A.; *Salt* v. *Northampton (Marquess)* (1892) A.C. 1; *Noakes* v. *Rice* (1902) A.C. 24; *Samuel* v. *Jarrah Timber, etc., Corporation* (1904) A.C. 323; *Rajmal* v. *Shivaji* (1903) 27 Bom. 154.

(*a*) (1903) 2 Ch. 1, 7.

(*b*) *Browne* v. *Ryan* (1901) 2 I.R. 653, 667.

rectly charged with whatever causes the prevention. If he be so prevent fact, the equity of redemption is affected by what, whether very aptly t, has been always termed 'a clog.' "

In this case a company borrowed money on the security of their debenture stock wi a condition that the debenture holders should have an option of purchasing the stock 40 per cent. of its price within twelve months. This condition was held to be void as a cl on redemption. This decision was affirmed by the House of Lords (c). Both Lo Halsbury and Lord Macnaghten regretted the application of the rule, the latter sayi that the directors of a trading company in search of financial assistance were in a ve different position from that of an impecunious land owner in the toils of a money lend The rule of equity was based on the assumption, which was perhaps true when the usu laws were in force that the mortgagor and mortgagee did not contract on equ terms (d), but it was so well settled that their Lordships were constrained to follow

The doctrine does not apply if the transaction is not in its essence a mortgage. Th where the transaction gives an option to purchase property, the sole consideration bei the loan of a sum of money secured on the property during the continuance of the optio the transaction is the sale of an option, the consideration being the use of the money fr of interest (e).

The doctrine applies to anomalous mortgages. There were some decisions to tl contrary when the definition of anomalous mortgages was in a later section (f); bu these are overruled by the decision of the Privy Council in *Mohammed Sher Khan* *Seth Swami Dayal* (g). Even before this decision the doctrine was applied to simp mortgages usufructuary which were not then classed as anomalous (h).

The doctrine of a clog on redemption has been applied as a rule of justice, equity an good conscience in a province where the Act is not in force (i). In the Act it is implie by the omission of words "in the absence of a contract to the contrary." The right redemption is therefore a statutory right which as Lord Macnaghten said in *Noakes* *Co.* v. *Rice* (j) is "of the very nature and essence of a mortgage and inherent to the thin itself." The right of redemption cannot be controlled by any agreement made as pa of the transaction of mortgage. But after the mortgage, the mortgagor may deal as h pleases with his property, and so the maxim "once a mortgage always a mortgage" ha no reference to agreements subsequent to the mortgage. Thus in *Reeve* v. *Lisle* (k the defendant mortgaged a ship and other property to the plaintiffs on the 23rd of Apri 1896, for a term of two years. He could not pay at the expiry of the term and anothe agreement was come to in July 1898 giving the plaintiff an option for five years to g into partnership with the defendant and if he did, he was to release the mortgage deb and the property was to belong to the partnership in equal shares. The plainti exercised the option in 1900 and the defendant resisted it on the ground that it was clog. It was held that the agreement was independent of the mortgage and not a clog

(c) *Samuel* v. *Jarrah Timber and Wood Paving Corporation, supra.*

(d) See *Webb* v. *Rorke* (1806) 2 Sch. & Lef. 661 where Lord Redesdale compared the mortgagee to the beggar in Gil Blas who, with gun at his shoulder, extorted money without uttering a word.

(e) *London & Globe Furnace Corporation Ltd.* v. *Montgomery* (1902) 18 T.L.R. 661.

(f) *Ma Min Byu* v. *Maung Chit* (1923) 1 Rang. 419, 76 I.C. 665, ('24) A.R. 58; *Hakeem Patie Muhammad* v. *Shaik Dawood* (1915) 39 Mad. 1010, 30 I.C. 569.

(g) (1922) 44 All. 185, 49 I.A. 60, 66 I.C. 583, ('22) A. PC. 17; *Chellaputti* v. *Vengappa* (1925) 82 I.C. 909, ('25) A.M. 366.

(h) *Kandula Venkiah* v. *Pallaya* (1920) 43 Mad. 589, 57 I.C. 724 F.B.; *Srinivasa* v. *Radhakrishnam* (1915) 38 Mad. 667, 22 I.C. 54 *Pandiyan* v. *Vellayappa* (1917) 33 Mad L.J. 316, 42 I.C. 438.

(i) *Mehrban Khan* v. *Makhna* (1930) 11 Lah 251, 57 I.A. 168, 123 I.C. 554, ('30) A.PC 142.

(j) (1902) A.C. 24, 30 Cf. *Ramji* v. *Pandharinat* (1919) 43 Bom. 334, 355, 89 I.C. 894 F.B ("In equity as long as the relationship o mortgagor and mortgagee continues th right to redeem exists. That right i recognized by sec. 60"); *Ramchandra* v *Hanmanta* (1920) 44 Bom. 939, 58 I.C. 4 (so long as there is a mortgage there i a right of redemption); *Chedi Lal* v *Babu Nandan* (1944) A.A. 394.

(k) (1902) 1 Ch. 53 on app. (1902) A.C. 461

Vaughan Williams, L.J., said—"the mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent to and independent of the original bargain." The agreement though made at the same time may not be part of the mortgage transaction. Thus in *De Beers Consolidated Mines* v. *British South African Co.* (*l*) the mortgagee advanced a loan under an agreement by which they agreed to accept in satisfaction of the loan future debentures of the mortgagor company in case the company should in the future issue debentures. There was also a stipulation that in consideration of the loan the debtor company granted the creditor company an exclusive right to work in perpetuity all the diamond bearing land in their territories. The company did issue mortgage debentures which the creditor company accepted. These were afterwards redeemed and the debtor company then claimed that the right to work the diamond bearing land ceased as it was a clog on the right to redeem. But the Court decided that the grant of the land formed no part of the mortgage transaction, for when it was made the debtor company was under no obligation to issue mortgage debentures. What is, or, what is not, a clog on the equity of redemption is a question of fact in each case. These are the general principles and the following are instances of their application.

Condition of sale in default.—A condition converting a mortgage into a sale is invalid as a clog on the equity of redemption. In *Vernon* v. *Bethell* (*m*) Lord Henley said—"This Court, as a Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance [made] absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them." A condition that if we do not pay your amount by the due date, we agree to this document being treated as a sale deed" was held to be a clog on the equity of redemption and the document was held to be a mortgage (*n*). An agreement that in default of payment on the date fixed the mortgagor shall sell the property to the mortgagee at a price to be fixed by an umpire is invalid as a clog on the equity of redemption (*o*). So also is a condition in a usufructuary mortgage for a fixed term that in default it should work itself out into a sale (*p*), or that part of the land mortgaged should not be returned on redemption (*q*) or that the mortgagor shall not be entitled to get possession of the property mortgaged under a previous usufructuary mortgage unless he paid the money due under the subsequent mortgage (*r*). Such a condition is in fact a condition preventing redemption. An English illustration is the case of *Salt* v. *Northampton* (*Marquess*) (*s*). The mortgagor secured an advance from the trustees of an insurance society on the mortgage of a

(*l*) (1912) A.C. 52.

(*m*) (1762) 1 Eden 113 quoted by Lord Macnaghten in *Samuel* v. *Jarrah Timber & Wood Paving Corporation* (1904) A.C. 323 and also in *Faujdar Khan* v. *Abdul Samad* (1924) 5 Lah. L.J. 394, 76 I.C. 445, ('24) A.L. 129.

(*n*) *Jadam Jampura Bai* v. *Jinki Siddapa*; see *Supra*.

(*o*) *Kanaran* v. *Kuttooly* (1898) 21 Mad. 110; *Jadam Jampura Bai* v. *Jinki Siddapa* (1944) A.M. 227.

(*p*) *Mehrban Khan* v. *Makhna* (1930) 11 Lah. 251, 57 I.A. 168, 123 I.C. 554, ('30) A.P.C. 142; *Srinivasa* v. *Radhakrishnam* (1915) 38 Mad. 667, 22 I.C. 54; *Pandiyan* v. *Vellayappa* (1917) 33 Mad. L.J. 316, 42 I.C. 438; *Kandula Venkiah* v. *Pallaya* (1920) 43 Mad. 589, 57 I.C. 724 F.B.; *Vaddiparthi Narayanamurthy* v. *Appalanarasimhulu* (1921) 41 Mad. L.J. 563, 68 I.C. 717, ('21) A.M. 517; *Chellakutti* v. *Vengappa* (1925) 82 I.C. 909, ('25) A.M. 366; *Athan Kutti* v. *Subhadra* (1917) 32 Mad. L.J. 317, 37 I.C. 756; *Ram Ganesh* v. *Rup Narain* (1925) 90 I.C. 944, ('25) A.A. 34; *Ram Bali* v. *Ram Asre* (1925) 86 I.C. 666, ('25) A.O. 398.

(*q*) *Saponswar* v. *Brindiban* (1934) 148 I.C. 489, ('34) A.P. 397.

(*r*) *Mt. Rangili* v. *Pearey Lal* (1940) A.A. 191.

(*s*) (1892) A.C. 1.

S. 60 reversionary interest to which the mortgagor was entitled contingently on his surviving his father. The trustees also effected an insurance on the life of the mortgagor against that of his father for an amount equal to the loan, plus premia, plus interest and it was agreed that this policy should be assigned to the mortgagor and be his property if he paid the debt in his father's lifetime, and that it should belong to the mortgagee if the mortgagor died before his father. The mortgagor paid nothing and died before his father. The policy was treated as part of the security and the agreement that it should be the property of the mortgagee was set aside as a clog on redemption.

Subsequent sale valid.—A condition of sale is a clog, if it is part and parcel of the mortgage transaction. But subsequent to the mortgage the mortgagee may stipulate for the purchase of the property from the mortgagor (*t*). In *Shankar Din* v. *Gokal Prasad* (*u*) the Privy Council said that there was nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right of redemption. A separate transaction dehors the mortgage is not a clog and may have the effect of extinguishing the equity of redemption (*v*).

Illustrations.

(1) *A* mortgaged his land to *B* with possession for 5 years the rents and profits to be set off against interest. The mortgage further provided that if the mortgage was not redeemed within a period of 20 years from due date, the mortgagee should treat the land as sold to him absolutely. This provision was invalid as a clog on the equity of redemption and the mortgage was redeemable even after the period of 20 years: *Vaddiparthi Narayanamurthy* v. *Appalanarasimhulu* (1921) 41 Mad. L. J. 563, 68 I.C. 717, ('21) A.M. 517.

(2) *A* mortgaged his land to *B* with possession and the mortgage provided that in default of redemption after 20 years *B* should be owner of half the land. This provision was a clog on the equity of redemption. But four years after the expiry of the period of 20 years while *B* was still in possession, *A* executed a deed by which half the land was conveyed to *B*, and *B* released the other half from the mortgage. This was an arrangement for the discharge of the mortgage and was valid: *Shankar* v. *Yeshwant* (1920) 22 Bom. L.R. 965, 58 I.C. 384.

In a case where the mortgage provided that in default of payment the mortgagee should become absolute owner and the mortgagor in ignorance of his rights surrendered the land to the mortgagee the Court could give no relief. This was really a surrender subsequent to the mortgage which the Court could not set aside as there was no fraud (*w*). But a mere admission that the mortgagee has become owner will not destroy the equity of redemption (*x*). Nor is the mortgage extinguished by an understanding that the mortgage has been converted into a sale if such understanding and conduct is solely due to the *gahan lahan* clause and not any transaction independent of the mortgage (*y*).

Condition postponing redemption in case of default.—Such a condition is a clog on the equity of redemption and is invalid. In *Mohammed Sher Khan* v. *Seth Swami Dayal* (*z*) the mortgage was for a term of five years with a condition that if the money

(*t*) *Kanhayalal* v. *Narhar* (1903) 27 Bom. 297; *Shankar* v. *Yeshwant* (1920) 22 Bom. L.R. 965, 58 I.C. 384.

(*u*) (1912) 34 All. 620, 16 I.C. 78 P.C.; *Usman Khan* v. *Dasanna* (1914) 37 Mad. 545, 16 I.C. 694.

(*v*) *Ramalinga Mudaliar* v. *Arunachala* (1926) 93 I.C. 338, ('26) A.M. 386.

(*w*) *Vishnu Sakharam* v. *Kashinath* (1887) 11 Bom. 174.

(*x*) *Ram Singh* v. *Baij Nath* (1919) 17 All. L.J. 117, 49 I.C. 353.

(*y*) *Abdul Rahim* v. *Madhavrao* (1890) 14 Bom. 78; *Kanhayalal* v. *Narhar* (1903) 27 Bom. 297; cf. *Ramchet Bachashet* v. *Pandharinath* (1871) 8 Bom. H.C. 236 A.C.J.

(*z*) (1922) 44 All. 185, 49 I.A. 60, 66 I.C. 353, ('22) A.PC. 17.

was not paid the mortgagee might enter into possession for a period of twelve years during which the mortgagor could not redeem. The Privy Council held that the condition hindered an existing right to redeem and was therefore invalid. Again a condition that in default the mortgage should be renewed for a period of 40 years is invalid (*a*). The Allahabad High Court has said that no hard and fast rule can be laid down as to what is an improper restraint on alienation and upheld a condition that in default of redemption on due date the mortgage should not be redeemable for a further period of twenty years (*b*). It is submitted that this decision is inconsistent with *Mohammed Sher Khan*'s case (*c*). In a Bombay case (*d*) the mortgage was for a term of 21 years in order that the mortgagee should plant an orchard, but there was a condition that in default of redemption at the expiry of 21 years the mortgagee should be allowed to retain possession as long as the trees bore fruit. The condition was not enforced as the mortgagor was an agriculturist within the Dekkan Agriculturists' Relief Act. S. [illegible]

Penalty in case of default.—A stipulation for a penalty in case of default is relieved against. Thus a stipulation that in case of default one murra of rice was to be paid for every rupee of the debt was set aside as unreasonable (*e*). But if there is no question of penalty, stipulations for enhanced interest or for compound interest from date of default are valid (*f*); but if the original rate of interest is high, a stipulation for compound interest in default may be a penalty (*g*). A stipulation for enhanced interest from the date of the bond would always be a penalty (*h*). See Pollock and Mulla's Contract Act 6th Ed., pp. 436-454. If there is no undue influence or unfair dealing a high rate of interest is not a clog (*i*). The Court cannot, except under the provisions of the Usurious Loans Act 10 of 1918, give relief against excessive interest (*j*). But 24 per cent. with six monthly rests in a deed of further charge has been relieved against (*k*). A usufructuary mortgagee may of course stipulate for interest as well as profits (*l*).

Restraint of alienation.—A condition restraining alienation by the mortgagor is a clog on the equity of redemption, for it will not recognise the transferee as having acquired the right of redemption (*m*). So also is a stipulation that the mortgagor shall redeem without having recourse to a loan from anybody (*n*). But a stipulation that the mortgagor might redeem before due date, if he could do so without alienating other property was upheld as a special concession personal to the mortgagor and not available to his assignee (*o*).

(*a*) *Sarbdawan* v. *Bijai Singh* (1914) 36 All. 551, 24 I.C. 705.

(*b*) *Narsingh Prasad* v. *Rupan Singh* (1929) 27 All. L.J. 606, 116 I.C. 876, ('29) A.A. 388. See also *Rambaran Singh* v. *Ramker Singh* (1911) 10 I.C. 243.

(*c*) (1922) 44 All. 185, 49 I.A. 60, 66 I.C. 853, ('22) A.PC. 17.

(*d*) *Genu* v. *Narayan* (1921) 45 Bom. 117, 59 I.C. 258, ('21) A.B. 51.

(*e*) *Mayilaraya* v. *Subbaraya* (1862) 1 Mad. H.C. 81 A.C.J.

(*f*) *Surya Narain* v. *Jogendra Narain* (1892) 20 Cal. 360; *Gunga Pershad* v. *Land Mortgage Bank* (1894) 21 Cal. 366, 21 I.A. 1.

(*g*) *Rama Krishnayya* v. *Venkata Somayajulu* (1934) 148 I.C. 467, ('34) A.M. 31.

(*h*) *Sundar Koer* v. *Sham Krishen* (1906) 34 Cal. 150, 34 I.A. 9, 17.

(*i*) *Sarfraz Singh* v. *Udwat Singh* (1929) 4 Luck. 147, 118 I.C. 46, ('29) A.O. 80; *Sahib Baksh* v. *Mohammad Ali* (1920) 56 I.C. 115.

(*j*) *Ram Krishna* v. *Heramba* (1929) 56 Cal. 960, 122 I.C. 212, ('30) A.C. 207; *Shubratan* v. *Dhanpat Godaraiyu* (1932) 54 All. 1041, 1932 All. L.J. 1021, 143 I.C. 409, ('33) A.A. 70; see also *Nathu Ram* v. *Shagi Ram* (1919) 49 I.C. 946.

(*k*) *Gajraj Singh* v. *Maharaj Munnu Lal* (1929) 4 Luck. 415, 126 I.C. 673, ('30) A.O. 173.

(*l*) *Sarfraz Singh* v. *Udwat Singh*, *supra*; *Gokul Prasad* v. *Gauri Prasad* (1927) 100 I.C. 180, ('27) A.O. 595.

(*m*) *Ram Saran* v. *Amrita Kuar* (1880) 3 All. 369 F.B.

(*n*) *Ram Saran* v. *Amrita Kuar*, *supra*; *Trimbak Jivaji* v. *Sakharam* (1892) 16 Bom. 599; *Visvanathan* v. *Ethirajulu* (1923) 45 Mad. L.J. 389, 76 I.C. 467, ('24) A.M. 57; *Ram Ganesh* v. *Rup Narain* (1925) 80 I.C. 944, ('25) A.A. 34; *Kudsi Lal* v. *Mst. Aisha Jahan* (1927) 2 Luck. 564, 108 I.C. 262, ('27) A.O. 199; *Kirpal Singh* v. *Sheoambar* (1930) 28 All. L.J. 610, [illegible] I.C. [illegible], ('30) A.A. 283.

(*o*) *Shiam Lal* v. *Jagdamba Prasad* (1927) 25 All. L.J. 1051, 106 I.C. 561, ('28) A.A. 121.

S. 60

Long term.—A long term for redemption is not necessarily a clog on the equity of redemption. Indeed a long term may suit both parties, relieving the mortgagor of the necessity of finding another creditor, and being a long term investment for the mortgagee. In England there is no reported case in which a restriction for more than seven years has been upheld (*p*), and a restriction for twenty years has been held, in conjunction with other circumstances, to be a clog on redemption (*q*). But in India terms of much greater duration have been allowed (*r*) though 200 years have been held to be a clog (*s*). But if there are circumstances which indicate that the length of term is unreasonable or oppressive, redemption, has been allowed before the expiry of the term (*t*).

Illustration.

A mortgaged his property to *B* by an usufructuary mortgage for a term of 101 years. The mortgage provided that *A* should be liable for interest at 8½ per cent. and that *B* should take the rents and profits; that if the rents and profits exceeded the interest, *B* should take the surplus but that if the rents and profits were less than the interest, *A* was liable for the deficit: and that at the expiry of the term *A* should be entitled to redeem on payment of three times the principal money. These provisions rendered redemption onerous and difficult without any corresponding benefit to the mortgagor. *A* was entitled to an account and redemption before the expiry of the term: *Abdul Hakim* v. *Sajjad Husain* (1923) 26 O.C. 209, 74 I.C. 304, ('23) A.O. 209.

On the other hand the Allahabad High Court has held that a long period even though coupled with onerous and oppressive terms affords no ground for interference unless there has been coercion, fraud or undue influence (*u*). In another case the same High Court held that a condition in a mortgage that if the mortgagee constructed a new building by demolishing an old one which was a kutcha structure, the mortgagor would pay the cost of its construction at the time of redemption was not a clog (*v*).

If there is a long term without a mutual provision for the continuance of the loan, as when the right of redemption is postponed and the mortgagee is given the right to call in his money at any time, the stipulation for postponement becomes unilateral, void of consideration and invalid. This is because the right of redemption and the right for

(*p*) Halsbury Laws of England, Vol. 21, para. 222, note (1).

(*q*) *Davis* v. *Symons* (1934) 1 Ch. 442.

(*r*) *Lila Morji* v. *Vasudeo* (1875) 11 Bom. H.C. 283 A.C.J. (15 years); *Govindrao* v. *Annaji* (1891) P.J. 241 (27 years); *Muhammad Ibrahim* v. *Muhammad Aziz* (1910) M.W.N. 792, 8 I.C. 1068 (90 years); *Dalthamman* v. *Amardeo* (1914) 12 All. L. J. 492, 23 I.C. 926 (30 years); *Agu Muhammadally* v. *Venkatappayya* (1918) 35 Mad. L.J. 287, 48 I.C. 379 (37 years) with an option of redemption after 10 years; *Sarban Singh* v. *Bhagwan* (1926) 8 Lah. L.J. 235, 96 I.C. 467, ('26) A.L. 457 (20 years); *Bansilal* v. *Sawanu* (1933) 145 I.C. 1016, ('33) A.L. 373 (50 years); *Sayad Abdul Hak* v. *Gulam Jilani* (1896) 20 Bom. 677 (50 years); *Narain* v. *Jagan* (1925) 80 I.C. 728, ('25) A.A. 42 (60 years); *Mela Ram* v. *Prithvi Chand* (1929) 116 I.C. 609, ('29) A.L. 523 (60 years); *Lal Singh* v. *Kartar Singh* (1930) 130 I.C. 57, ('30) A.L. 1060 (40 years); *Sarfraz Singh* v. *Udwat Singh*, *supra* (35 years); *Abdulla* v. *Saadulla* (1912) 15 I.C. 917 (150 years); *Jagannadhan* v. *Narsimhan* (1944) A.M. 501.

(*s*) *Fateh Mahomed* v. *Ram Dayal* (1927) 2 Luck. 583, 102 I.C. 160, ('27) A.O. 224.

(*t*) *Abdul Hakim* v. *Sajjad Husain* (1923) 74 I.C. 304, ('23) A.O. 209; *Cowdry* v. *Day* (1859) 1 Giff. 316 (term of 20 years and mortgagee solicitor of mortgagor); *Raza Mohammad* v. *Ram Lal* (1925) 88 I.C. 201 ('25) A.O. 406; *Bachu Upadya* v. *Perbhu* (1926) 93 I.C. 329, ('26) A.O. 356; *Balbhaddar* v. *Danpat Dayal* (1924) 80 I.C. 213, ('24) A. O. 193 (property worth Rs. 9,000 to be redeemed after 50 years for 2½ lacs) followed in *Baldeo* v. *Losat* (1929) 4 Lah. 203, 114 I.C. 811, ('29) A.O. 54; *Har Dayal Singh* v. *Raja Ram Singh* (1933) 9 Luck. 151, 145 I.C. 669, ('33) A.O. 460 and in *Faujadar Khan* v. *Abdul Samad* (1924) 5 Lah. L. J. 394, 76 I.C. 445, ('24) A.L. 129 (usufructuary mortgage of a minor's property for 51 years, the mortgagee to take the rents and profits as well as interest and to spend as much money as he liked on improvements); *Durga Singh* v. *Nawab Mirza Muhammad Raza* (1914) 17 O.C. 313, 25 I.C. 912; *Darghahi Lal* v. *Rafiqunnissa* (1927) 102 I.C. 62, ('27) A.O. 237; *Sohan Lal* v. *Kunwar* (1921) 61 I.C. 962; *Mahdo Singh* v. *Lachhmin* (1925) 87 I.C. 909, ('25) A.O. 720; *Mathura Prasad* v. *Harakh Narain* (1919) 22 O.C. 191, 53 I.C. 770; *Ram Das* v. *Swami Dayal* (1920) 23 O.C. 108, 57 I.C. 553.

(*u*) *Shubratan* v. *Dhanpat Godaraiya* (1932) 54 All. 1041, 1932 All. L.J. 1021, 148 I.C. 409, ('33) A.A. 70.

(*v*) *Chhedi Lal* v. *Babu Nandan* (1944) A.A. 204.

foreclosure are coextensive (*w*). So an arbitrary stipulation that the mortgagor shall redeem only when the mortgagee demands his money is void (*x*): and a covenant by the mortgagor for the perpetual renewal of the mortgage is inoperative (*y*).

In *Hira Kuar* v. *Gambhir Singh* (*z*) a mortgage for a term of 40 years stipulated that in default of payment of interest for any one year, the mortgagee would be entitled to sue at once for the mortgage money and it was held that this provision gave the mortgagor a right to redeem before the expiry of the fixed period. But a right to sue for the mortgage money in case the security is endangered is not oppressive so as to accelerate the right of redemption (*a*). It has been said that a long term in a usufructuary mortgage is less likely to operate as a clog on redemption, as redemption is effected on payment of a fixed sum and there is no danger of arrears of interest exceeding the value of the property (*b*). A stipulation postponing redemption for a period of 40 years with a condition that in default of redemption on a particular day the mortgage would be renewed for another period of 40 years was held to be a clog on redemption (*c*). So also a term of 95 years with a condition that interest should be paid only with the principal (*d*). A condition that a usufructuary mortgage should be redeemed on a particular day 60 years later and on no other day is void as a clog on redemption (*e*). A covenant in a mortgage for possession for 51 years, together with a high rate of interest and also a covenant that the expenses of repairs to be added to the mortgage-money were not held to be a clog on redemption (*f*).

Collateral benefit to the mortgagee.—The rule in English law with reference to covenants securing a collateral benefit to the mortgagee used to be very much stricter than it is now. The Master of the Rolls in *Jennings* v. *Ward* (*g*) said—"A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement," and Lord Eldon in *Chambers* v. *Goldwin* (*h*) said that a mortgagee cannot stipulate to be a receiver of rents or profits with a commission and that the Court protected the mortgagor not only against usury but anything tending to usury and oppression. At the time these cases were decided the usury laws were in force and it was perhaps necessary to defeat every device for evading them. But the usury laws were repealed in 1854 (*i*) and after that there could be no valid reason why a mortgagee instead of stipulating for a high rate of interest should not stipulate for lower interest and some collateral benefit such as a commission. But the same course of decisions continued and in *Broad* v. *Selfe* (*j*) a covenant to employ the mortgagee as auctioneer was held to be a clog on redemption. However, in *Mainland* v. *Upjohn* (*k*) a mortgagee had been allowed a commission for making the loan, this being only a way of securing a return for the use of money, and in *Biggs* v. *Hoddinott* (*l*) a restriction on

(*w*) *Sukharam* v. *Vithu* (1866) 2 Bom. H.C. 225, A.C.J.; *Vadju* v. *Vadju* (1881) 5 Bom. 22; *Raghubar Dayal* v. *Budhu Lal* (1886) 8 All. 95; *Tirugnana* v. *Nallatambi* (1893) 16 Mad. 486; *Sayad Abdul Haq* v. *Gulam Jilani* (1896) 20 Bom. 677; *Sari* v. *Motiram* (1898) 22 Bom. 375; *Rahmat Ali* v. *Shadi Ram* (1927) 100 I.C. 625, ('27) A.L. 226; *Shiam Lal* v. *Jagdamba Prasad* (1927) 25 All. L.J. 1051, 108 I.C. 561, ('28) A.A. 131.

(*x*) *Narayan* v. *Rowji* (1884) P. J. 254; *Sari* v. *Motiram*, *supra*.

(*y*) *Neelakhandhan* v. *Ananthakrishna Ayyar* (1907) 30 Mad. 61.

(*z*) (1921) 19 All. L.J. 460, 62 I.C. 985, ('21) A.A. 143: *Rahmat Ali* v. *Shadi Ram*, *supra*.

(*a*) [illegible] v. *Sheodihal* (1904) 26 All. 479.

(*b*) *Zulficar Ali* v. *Suraj Prasad* (1922) 68 I.C. 998, ('22) A.O. 221; *Narasimha* v. *Seshayya* (1925) 48 Mad. L.J. 363, 90 I.C. 138, ('25) A.M. 825.

(*c*) *Sarbdawan Singh* v. *Bijai Singh* (1914) 36 All. 551, 24 I.C. 705; *Ram Ganesh* v. *Rup Narain* (1925) 80 I.C. 944, ('25) A.A. 34; *Bhullan* v. *Bachcha* (1931) 53 All. 580, 131 I.C. 520, ('31) A.A. 380.

(*d*) *Rajai Singh* v. *Randhir Singh* (1925) 87 I.C. 30, ('25) A.A. 643; *Kunj Behari Lal* v. *Pandit Prag Narain* (1922) 68 I.C. 529, ('22) A.O. 283.

(*e*) *Bhullan* v. *Bachcha*, *supra*.

(*f*) *Sheikh Abdur Rahman* v. *Ram Padarnath* (1945) A.O. 113.

(*g*) (1705) 2 Vern. 520.

(*h*) (1804) 9 Ves. 254.

(*i*) 17 and 18 Vict. c. 90.

(*j*) (1863) 9 Jur. (N.S.) [illegible]

(*k*) (1889) 41 Ch. D. 1[illegible]

(*l*) (1898) 2 Ch. 307.

S. 60 the purchase of beer from any one but the mortgagee during the term of the mortgage of a public house was held to be valid. The disability of solicitor mortgagees charging for costs was removed by the Mortgagees Legal Costs Act, 1895 (*m*). At last the point went to the House of Lords in the case of *Noakes & Co.* v. *Rice* (*n*). A brewer mortgagee of a public house had stipulated that the mortgagor should buy all the beer consumed on the premises from him. It was held that the tie was valid during the continuance of the mortgage but on redemption the mortgagor was entitled to a reconveyance of the property free from the tie. Lord Macnaghten said—"redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security." Thus the agreement conferring a collateral benefit on the mortgagee was not enforceable in so far as it extended beyond the period of redemption. This was followed in *Bradley* v. *Carritt* (*o*) a contract for the employment of the mortgagee as broker for the sale of tea and Lord Macnaghten definitely laid down the rule that the collateral advantage came to an end when the mortgage debt was paid.

The rule therefore seemed to be as laid down in *Noakes* v. *Rice* and *Bradley* v. *Carritt* that the collateral advantage whether it affected the mortgaged property, as in the first case, or the mortgagor personally as in the second case came to an end when the mortgage debt was discharged. But the point came up again before the House of Lords in *Kreglinger* v. *New Patagonia Meat & Cold Storage Company Ltd.* (*p*). This was a mortgage by a meat preserving company to a firm of wool brokers and the mortgagees stipulated for a right of pre-emption of sheep skins sold by the company. It was held that this right of pre-emption was enforceable notwithstanding that the loan was paid off. This case decides that the mortgagee can stipulate for a collateral benefit to endure beyond redemption subject to three conditions: (1) that it is not unfair or unconscionable, (2) that it is not in the nature of a penalty clogging the equity of redemption, and (3) that it is not inconsistent with or repugnant to the contractual or equitable right to redeem. This case restores freedom of contract between the mortgagor and mortgagee; but, as Strahan observes, though it is favourable to financial interest, it leaves the law more uncertain than it was before. Does it apply only to personal undertakings as in *Bradley* v. *Carritt* (*q*) or to undertakings affecting the mortgaged property as in *Noakes* v. *Rice* (*r*)? Does it apply only where by the terms of the mortgage the mortgagor is not entitled to a reconveyance until after the stipulation has been fulfilled? Is the rule that the mortgagor is entitled to recover the property free from all encumbrances created by the mortgage abolished?

Following *Kreglinger's* case a provision that debenture holders should receive a share of the surplus profits in a winding up was held in *Re Cuban Land Co.* (*s*) to be a collateral benefit that was not a penalty clogging the equity of redemption.

In India a collateral advantage that extends beyond the period of redemption is invalid. Sargent, C.J., set aside a permanent lease granted by a mortgagor to a mortgagee on the ground that the parties were not in a position to deal on equual

(*m*) 58 & 59 Vict. c. 25.
(*n*) (1902) A.C. 24.
(*o*) (1903) A.C. 253.
(*p*) (1914) A.C. 25.
(*q*) (1903) A.C. 253.
(*r*) (1902) A.C. 24.
(*s*) (1921) 2 Ch. 147.

terms (*t*). A condition that after redemption the mortgagee should continue in possession as a permanent tenant is invalid as it prevents the mortgagor getting back the property free and unfettered (*u*), while a lease by a mortgagor to a mortgagee to last during the pendency of the mortgage is valid (*v*). But in another case (*w*) the Bombay High Court held that an agreement to pay remuneration to a mortgagee mill manager was not a clog on redemption although the same Court had said seven years previously apparently with reference to the early English cases that it was a well established principle that a mortgagee cannot charge for his personal services (*x*). In *Chalikani Venkatarayanim* v. *Zamindar of Tuni* (*y*) the Privy Council held that an agreement that a mortgagee in possession should charge a fixed sum annually for repairs and contingent charges was not a clog on redemption.

In Oudh a stipulation that the mortgagor should pay on redemption "deorha," *i.e.*, the principal and half as much again, has been held to be valid (*z*).

A condition for pre-emption in favour of the mortgagee is, it is submitted, a clog on redemption, for the mortgagor gets back his property on redemption fettered with this stipulation (*a*). The cases on the subject are not consistent. In a Madras case (*b*) Bashyam Ayyangar, J., suggests that if the price is not fixed and if the right of pre-emption does not continue after redemption there is no clog, as the mortgagor may sell or not as he pleases. The Allahabad and Patna High Courts have said of a covenant for pre-emption at a fixed price that the covenant for pre-emption was enforceable if the bargain was not unconscionable and if the right did not continue after redemption (*c*). The Calcutta High Court has held that a stipulation for pre-emption is valid and not contrary to public policy (*d*).

The Madras High Court has observed that the relaxation of the rule of equity in *Kreglinger*'s case does not affect the construction of a statutory enactment such as this section (*e*). But the tendency to restore freedom of contract between the mortgagor and the mortgagee which that case discloses and which is apparent in the protests of Lords Halsbury and Macnaghten in *Samuel* v. *Jarrah, etc., Corporation* (*f*) may also be observed in the judgment of the Judicial Committee in *Kanhaya Lal* v. *National Bank of India* (*g*). Indian cases were cited to show the necessity to protect mortgagors from a power of sale without the intervention of the Court and their Lordships said it was absurd to apply the reasoning of those cases to a transaction between a limited company and the trustees of debenture holders.

(*t*) *Subrao* v. *Munjapa* (1892) 16 Bom. 705, followed in *Parsharam* v. *Laxmibai* (1929) 53 Bom. 360, 115 I.C. 405, ('29) A.B. 186 on app. (1931) 33 Bom. L. R. 755, 134 I.C. 701, ('31) A.B. 399; *Gobindrao* v. *Anaji* (1891) P. J. 241; *Narsing* v. *Narayan* (1890) P. J. 211.

(*u*) *Mahomed Muse* v. *Jijibhai* (1885) 9 Bom. 524; *Bhimrao* v. *Sakharam* (1922) 46 Bom. 409, 64 I.C. 612, ('22) A.B. 277; *Parmanand Pandit* v. *Mata Din* (1925) 47 All. 582, 87 I.C. 477, ('25) A.A. 427; *Ram Narain Pathak* v. *Surathnath* (1920) 5 Pat. L.J. 423, 57 I.C. 337; *Sheo Singh* v. *Birbahadar Singh* (1910) 6 I.C. 707; *Aukinedu* v. *Subbiah* (1912) 35 Mad. 744, 12 I.C. 382; *Daolat Rai* v. *Sheikh Chand* (1915) 11 Nag. L.R. 180, 31 I.C. 869.

(*v*) *Mahomed* v. *Ezekiel* (1905) 7 Bom. L.R. 772.

(*w*) *Hope Mills Ltd.* v. *Cowasji* (1911) 13 Bom. L.R. 162, 10 I.C. 749.

(*x*) *Mahadeo* v. *Ramchandra* (1904 L. R. 590.

(*y*) (1923) 46 Mad. 108, 50 I.A. 41, 71 I.C. 1035, ('23) A.PC. 26; *Bisheshwar Dayal* v. *Chedi Singh* (1935), 156 I.C. 926, ('35) A.P. 157.

(*z*) *Lala* v. *Hirajan* (1926) 96 I.C. 538, ('26) A.O. 502; *Miran Baksh* v. *Bajrang* (1907) 10 O.C. 214.

(*a*) See *Rangayya Chetti* v. *Raghavacharlu* (1929) 52 Mad. 300, 121 I.C. 753, ('29) A.M. 243.

(*b*) *Ramasami Pattar* v. *Chinnan* (1901) 24 Mad. 449; approved in *Kurri Veerareddi* v. *Kurri Bapireddi* (1906) 29 Mad. 336 [F.B.].

(*c*) *Bimal Jati* v. *Biranja* (1900) 22 All. 238, followed in *Matura Subba* v. *Surendranath* (1929) 8 Pat. 248, 113 I.C. 106, ('28) A.P. 637.

(*d*) *Haris Paik* v. *Jahuruddi* (1897) 2 Cal. W.N. 575.

(*e*) *Ambu Nair* v. *Kelu Nair* (1930) 53 Mad. 805, 123 I.C. 584, ('30) A.M. 305.

(*f*) (1904) A.C. 323.

(*g*) (1923) 4 Lah. 284, 50 I.A. 162, 75 I.C. 7, ('23) A.PC. 114.

S. 60

Subsequent agreement postponing redemption.—A subsequent agreement which has the effect of postponing redemption or which postpones redemption may be either (1) an agreement which creates a personal obligation, or (2) a charge or a mortgage creating a right *in rem*. If the agreement creates only a personal obligation it is a clog on redemption, for the mortgagor is entitled to get back his land on payment of the debt secured upon it. So if the mortgagor borrows a fresh sum, and executes a money bond agreeing not to redeem the mortgage until the bond is paid off, the agreement is invalid (*h*). This rule, however, was not observed in some cases that are now obsolete (*i*). So also a condition in a mortgage bond that the mortgage shall not be redeemed until a previous personal loan is paid off is a clog on redemption; but the Bombay High Court has said that this was not so in cases before the Act (*j*). On the other hand if the mortgaged property is made security for the repayment of the further advances, the agreement not to redeem the first mortgage until the second debt is paid off is valid, for the agreement operates as a deed of further charge and the mortgagor can redeem only on payment of all the moneys secured (*k*). In a case where some of the mortgagors have executed deeds creating a further charge in favour of the mortgagee, the mortgagee cannot in a suit for the redemption of the mortgage compel the payment of the sum due in respect of the further charge. He can enforce that right in a separate suit (*l*).

No hard and fast rule can be laid down as to whether the agreement operates as a further charge or not and each case must be decided on the construction of the particular document (*m*).

Illustrations

(1) *A* borrows money from *B* and executes a usufructuary mortgage for the amount redeemable in any month of Jeth. *A* then borrows a further sum from *B* and executes a simple money bond in which the covenants not to redeem the mortgage until the money due on the latter bond is paid. This covenant is invalid as a clog on the equity of redemption: *Sheo Shankar* v. *Parma Mahton* (1904) 26 All. 559.

(2) *A* borrows Rs. 500 from *B* and executes a usufructuary mortgage for Rs. 300, the rents and profits to be taken in lieu of interest. *A* covenants in the deed that the payment of the balance of Rs. 200 with interest at 2 per cent. per mensem would be compulsory at the time of redemption. The covenant is not a clog on redemption, but creates a further charge for Rs. 200: *Jeut Koeri* v. *Mathura Koeri* (1926) 24 All. L.J. 125, 90 I.C. 787, ('26) A.A. 171.

(*h*) *Rama* v. *Martand* (1885) 9 Bom. 236 note; *Chottalal* v. *Gobindram* (1893) 18 Bom. 591; *Rajmal* v. *Shivaji* (1903) 27 Bom. 154; *Rugad Singh* v. *Sat Narain* (1905) 27 All. 178; *Sheo Shankar* v. *Parma Mahton* (1903) 26 All. 559; *Durga Pershad* v. *Dukhi Roy* (1905) 9 Cal. W.N. 789.

(*i*) *Hari Mahadaji* v. *Balambhat* (1884) 9 Bom. 233; *Yashvant* v. *Vithoba* (1888) 12 Bom. 231; *Allu Khan* v. *Roshan Khan* (1881) 4 All. 85; *Sundar Malhar* v. *Bapuji* (1894) 18 Bom. 755; *Krishnaji* v. *Maheshvar* (1896) 20 Bom. 346.

(*j*) *Hiralal* v. *Narsilal* (1909) 11 Bom. L.R. 318, 2 I.C. 469.

(*k*) *Durga Pershad* v. *Dukhi Roy* (1904) 9 Cal. W.N. 789; *Muhammed Abdul* v. *Jairajmal* (1906) 3 All. L.J. 768; *Ranjit Khan* v. *Ramdhan* (1909) 31 All. 482, 2 I.C. 859; *Bikhan Singh* v. *Shankar* (1909) 6 All. L.J. 255, 1 I.C. 345; *Ulfat Rai* v. *Kanhaiya Lal* (1922) 20 All. L.J. 86, 65 I.C. 819 ('22) A.A. 41; *Jiwan* v. *Tahal Singh* (1930) 12 Lah. L.J. 144; *Har Prasad* v. *Ramchandar* (1922) 44 All. 37, 63 I.C. 750 ('22) A.A. 174 [F.B.] following *Mst. Rais-un-nissa* v. *Zorawar* (1926) 1 Luck. 92, 92 I.C. 675, ('26) A.O. 228; *Jeut Koeri* v. *Mathura* (1926) 24 All. L.J. 125, 90 I.C. 787, ('26) A.A. 171; *Ashraf Ali* v. *Chandrapal Singh* (1925) 89 I.C. 563, ('25) A.O. 506; *Brij Lal* v. *Bhawani Singh* (1910) 32 All. 651, 7 I.C. 115; *Shib Narain* v. *Gajadhar* (1926) 48 All. 292, 92 I.C. 772, ('26) A.A. 506; *Sita Ram* v. *Sheo Darshan* (1926) 96 I.C. 197; *Lal Bahadur Singh* v. *Rameshwar Prasad* (1927) 105 I.C. 581, ('27) A.O. 510; *Ram Kishore* v. *Ram Nandan* (1927) 25 All. L.J. 1086, 108 I.C. 149, ('28) A.A. 99; *Sheo Kumar Upadhya* v. *Jittu Singh* (1909) 9 I.C. 52; *Hargobind* v. *Tula Ram* (1910) 10 I.C. 222; *Chauharja Baksh* v. *Ram Harakh* (1916) 32 I.C. 740; *Radha Krishna* v. *Sheo Dial* (1905) 8 O.C. 182; *Naunidh* v. *Mahadeo Singh* (1922) 25 O.C. 134, 65 I.C. 401; *Gaya Din* v. *Gajadhar* (1915) 24 I.C. 611; *Ramcharan* v. *Jagan Behari Lal* (1915) 24 I.C. 787; *Gaya Prasad* v. *Rachpal* (1923) 70 I.C. 66, ('23), A.O. 24; *Mt. Jugeshri Kuer* v. *Aftab Chand* (1929) 8 Pat. 68, 112 I.C. 655, ('28) A.P. 582.

(*l*) *Kenak Singh* v. *Gujraj Singh* (1936) 160 I.C. 890, (1936) A.O. 202.

(*m*) *Har Prasad* v. *Ramchander* (1922) 44 All. 37, 63 I.C. 750, ('22) A.A. 174.

(3) *A* borrows Rs. 500 from *B* and executes a usufructuary mortgage in his favour. *A* then borrows a further sum of Rs. 50 from *B* and executes a *mashrat-ul-rahn* (or additional mortgage), containing the following covenant: "the stipulation is that when I shall redeem the land mortgaged I shall also pay the said amount, with interest at the stipulated rate, and then the mortgaged property shall be redeemed. Without payment of the said sum the property shall not be redeemed." It was held that the covenant was not a clog on redemption, but created a further charge: *Har Prasad* v. *Ramchander* (1922) 44 All. 37, 40, 63 I.C. 750, ('22) A. A. 174.

(4) *A* borrowed Rs. 1,500 from *B* and executed a mortgage for Rs. 1,500. The mortgage bond recited that Rs. 5,000 was due on a previous *Khata*, and *A* promised to pay this sum and covenanted not to redeem the mortgage till both sums of Rs. 1,500 and Rs. 5,000 were paid. The deed was stamped for Rs. 6,500. It was held that Rs. 5,000 were also secured by way of mortgage, and that there was no question of a clog on redemption: *Hari* v. *Vishnu* (1904) 28 Bom. 349.

If a person executes two successive mortgages of his property in favour of another to secure separate debts, a stipulation in the second mortgage that the mortgagor shall not be entitled to redeem the first mortgage, unless he also paid the debt secured by the second mortgage is perfectly valid (*n*). The mortgagee is entitled in such a case to resist redemption of the first mortgage, unless the second debt is discharged even if his right to enforce the second mortgage is barred by limitation (*o*). The rule, however, does not apply when the mortgagees are different. Thus if *A* mortgages to a firm and then for a further advance makes a second mortgage to a partner in that firm stipulating that he will not redeem the partnership mortgage before paying the personal debt that stipulation will not prevent him from redeeming the partnership mortgage first (*p*). Again if the previous advance whether secured or unsecured is secured on the mortgage given at the time of the second advance the case is different because both the transactions become merged in one mortgage (*q*). But one mortgagor cannot by executing a tacking mortgage affect the right of his co-mortgagors to redeem. Thus in a case where *K* and *L* in 1876 executed a mortgage to *T* and then *K* alone in 1891 executed a second mortgage to *T* which contained a condition that he would not redeem it without at the same time redeeming the mortgage of 1876, *L* was allowed to redeem the first mortgage without redeeming the second (*r*).

When the right of redemption arises.—The right of redemption arises when the principal money secured by the mortgage has become due and may be exercised at any time thereafter, subject of course to the law of limitation. In English law the mortgagor cannot redeem before the time fixed for payment (*s*). Nevertheless there were a considerable number of Indian cases in which it was held that the time fixed in the deed was fixed for the convenience of the mortgagor and that he could redeem before that time unless there was an express stipulation to the contrary (*t*). These cases are bad law, for

(*n*) *Punnu Ram* v. *Ghulam Hussain* (1926) 7 Lah. 297, 96 I.C. 630, ('26) A. L. 494; *Mohammad Khan* v. *Chandi Shah* (1933) 147 I. C. 198, ('33) A. L. 864; *Ganpat Raoji* v. *Abdulji Chandji* (1936) 169 I.C. 23 (1937) A.N. 54; *Jai Narain* v. *Gokul Singh* (1937) 168 I.C. 40, (1937) A.O. 321.

(*o*) *Nathwa* v. *Kanhiya* (1921) 3 Lah. L. J. 432, 65 I. C. 642, ('21) A. L. 170; *Neba Ram* v. *Muhammad Hussain* (1926) 89 I. C. 871, ('26) A. L. 90; *Ram Kishore* v. *Ram Nandan* (1927) 25 All. L. J. 1086, 106 I. C. 149, ('28) A. A. 99; *Sultan Muhammed* v. *Ladha* (1926) 96 I. C. 844, ('26) A. L. 633; *Jokhu Bhunja* v. *Sitla Bakhsh* (1930) 52 All. 539, 122 I.C. 411, ('30) A.A. 416. The contrary decisions in *Kesar Kunwar* v. *Kashi Ram* (1915) 37 All. 634, 30 I. C. 777 and *Ramakrishna* v. *Nekker* (1917) 33 Mad. L. J. 581, 43 I. C. 286, are incorrect.

(*p*) *Chhotalal Govindram* v. *Mathur* (1898) 18 Bom. 591.

(*q*) *Hari* v. *Vishnu* (1904) 28 Bom. 349.

(*r*) *Tarkeshwar* v. *Kalka Pathak* (1927) 98 I.C. 499, ('27) A. A. 144. following *Muhammad Husain* v. *Sheodarshan Das* (1907) 4 All. L. J. 176.

(*s*) *Brown* v. *Cole* (1845) 14 Sim. 427.

(*t*) *Dorappa* v. *Kundukuri* (1867) 3 Mad. H. C. 363 A. C. J.; *Mashook* v. *Marem* (1875) 8 Mad. H.C. 31 A.C.J.; *Sri Raja Satrucherla* v. *Sri Raja Vairicherla* (1880) 2 Mad. 314; *Rose Ammal* v. *Rajarathnam* (1900) 23 Mad. 33; *Bhagwat Das* v. *Parshad Singh* (1888) 10 All. 602.

S. 60

the view taken in other cases (*u*) that the mortgagor cannot redeem before the time fixed for payment is confirmed by the decision of the Judicial Committee in *Bakhtawar Begam* v. *Husaini Khanam* (*v*). Their Lordships said that ordinarily, in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period; but that there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property, such a provision being usually to the advantage of the mortgagor (*w*). In a recent case the House of Lords have held that a covenant to repay the money with interest by 80 half yearly instalments was not a clog on redemption and the mortgagor could not claim to redeem before the expiry of that period (*x*). The time for payment is sometimes expressed to be within a certain number of years. There is a conflict of decisions as to whether this imports a right to redeem earlier (*y*). It is submitted that this is purely a matter of construction of the deed. In the case of *Hewanchal* v. *Jawahir* (*z*) the mortgage was for eight years with a condition that the mortgagor might redeem on payment of the whole amount due at the second, fourth and eighth years. If the mortgage fixes no time for payment the mortgagor may redeem at any time (*a*). A mortgagor is not entitled to redeem before the expiry of the stipulated period merely on the ground that the mortgagee in possession has done something which he was not authorised to do (*b*). In an usufructuary mortgage there can be a term fixed for the mortgagee's enjoyment during which redemption cannot take place (*c*).

In some agricultural tenancies time is of the essence of the contract, for redemption at any other time would prejudice agricultural operations. So when a mortgage was redeemable in Jeth of any year it cannot be redeemed in any other month (*d*). When the mortgage money was deposited in the month of Jeth, that is at harvest time, but too late for notice to be served on the mortgagee in that month, the Allahabad High Court treated it as available for redemption from the month of Jeth of the next year (*e*).

But the mortgagor may on equitable grounds be allowed to redeem before the expiry of the term on account of a default of the mortgagee. Thus in *Chhotku Rai* v. *Baldeo* (*f*) the mortgage was for Rs. 599-15 and the mortgagee was to discharge prior encumbrances out of the mortgage money. The mortgagee only advanced Rs. 50-15 and did not discharge the encumbrances. The assignee of the mortgagor was allowed to redeem before

(*u*) *Sakkaram* v. *Vithu* (1866) 2 Bom. H. C. 225 A. C. J.; *Raghubar Dayal* v. *Budhu Lal* (1886) 8 All. 95; *Vadju* v. *Vadju* (1881) 5 Bom. 22; *Sayad Abdul Hak* v. *Gulam* (1896) 20 Bom. 677; *Tirugnana* v. *Nallatambi* (1892) 16 Mad. 486; *Husaini Khanum* v. *Husain Khan* (1907) 29 All. 471.

(*v*) (1914) 36 All. 195, 41 I. A. 84, 23 I.C. 855 followed in *Bir Mohamad* v. *Nagoor* (1914) 27 Mad. L. J. 483, 25 I. C. 576 which treats *Rose Ammal* v. *Rajarathnam* (1900) 23 Mad. 33 as overruled; but apparently overlooked by the Chief Court of Lucknow in *Hardeo Bakhsh* v. *Deputy Commissioner* (1926) 1 Luck. 367, 98 I. C. 542, ('26) A. O. 281.

(*w*) See for instance *Kudai Lal* v. *Mst. Aisha Jehan* (1927) 2 Luck. 564, 102 I. C. 268, ('27) A. O. 199.

(*x*) *Knightsbridge Estates Trust Ltd.* v. *Byrne* (1940) A. C. 613.

(*y*) Yes, in *Purna Chandra* v. *Peary Mohan* (1912) 39 Cal. 828, 15 I. C. 287, following *Rose Ammal* v. *Rajarathnam*, *supra*; *Chinna Sami* v. *Krishna* (1906) 16 Mad. L. J. 146; *Radha Krishna* v. *Madhava* (1907) 17 Mad. L. J. 83; *Chandu* v. *Koaja* 1915) 29 Mad. L. J. 86, 30 I. C. 370; No, in *Vadju* v. *Vadju*, *supra*; *Raghubar* v. *Budhu Lal*, *supra*; *Shiam Lal* v. *Jagdamba Prasad* (1927) 25 All. L. J. 1051, 108 I. C. 660, ('28) A. A. 131; *Akbar Husain* v. *Shah Ahsanul* (1932) 134 I. C. 549, ('32) A. A. 155.

(*z*) (1889) 16 Cal. 307 PC.

(*a*) *Chengiah* v. *Pichayya* (1907) 17 Mad. L. J. 177.

(*b*) *Har Baksh Singh* v. *Mahabir Singh* (1936) 159 I.C. 1052, (1936) A.O. 130.

(*c*) *Kishan Singh* v. *Nathu Ram* (1939) A.L. 235, 41 P.L.R. 270.

(*d*) *Bansi* v. *Girdhar Lal* (1894) A. W. N. 143.

(*e*) *Saiyid Ahmad* v. *Dharmun* (1921) 43 All. 424, 60 I.C. 760, ('21) A. A. 71; *Kirpal Singh* v. *Sheoambar* (1930) 28 All. L. J. 610, 126 I. C. 366, ('30) A. A. 288; *Narsingh* v. *Achhaibar* (1914) 36 All. 86, 22 I. C. 539; *Muhammad Ali* v. *Baldeo* (1916) 38 All. 148, 34 I.C. 183.

(*f*) (1912) 34 All. 659, 17 I.C. 340; *Sanwaley Prasad* v. *Sheo Sarup* (1927) 2 Luck. 279, 98 I.C. 770, ('27) A.O. 12; *Narasimha Rao* v. *Seshayya* (1925) 48 Mad. L.J. 363, 90 I.C 138, ('25) A.M. 825; *Durga Charan* v. *Poresh* (1925) 76 I.C. 336, ('25) A.C. 105; but see *Manicka Nadar* v. *Aramugha Sundara* (1945) A.M. 340.

the expiry of the term. On the other hand, in order to avoid multiplicity of actions the mortgagor may in some cases be refused redemption unless he at the same time pays an unsecured debt. If the mortgaged property is in the hands of an heir or devisee of the mortgagor as assets for the payment of an unsecured debt, the mortgagee may if the assets are sufficient for the payment of all creditors tack the unsecured debt to his mortgage debt (*g*)—but not if the estate is insolvent (*h*). Such tacking was permitted in a Bombay case (*i*) where the mortgagor had in his lifetime assigned his whole estate to the plaintiff with an obligation to pay his debts, and the plaintiff was not allowed to redeem the mortgage without paying an unsecured debt also.

Exercise of right of redemption.—The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place of the mortgage money.

Payment.—Payment may be made not only to the mortgagee but to an authorised agent of the mortgagee, *e.g.*, the mortgagee's solicitor (*j*), but a payment to an agent who disclaims authority is made at the payer's risk (*k*). When there are several mortgagees there is a conflict of decisions as to whether payment to one is valid. In *Wallace* v. *Kelsall* (*l*) payment to one of several joint creditors was held to operate as a discharge; but in *Steeds* v. *Steeds* (*m*) Wills, J., observed that though this may be the rule in law yet in equity the general rule with regard to money lent by two persons to a third is that they will *prima facie* be regarded as tenants in common both of the debt and of the security held for it and cited a passage from the judgment of Lord Alvanley, M. R., in *Morley* v. *Bird* (*n*) that " though they take a joint security, each means to lend his own money and to take back his own." Again the authority of *Wallace* v. *Kelsall* (*o*) has been shaken by the decision in *Powell* v. *Brodhurst* (*p*) that payment to one of two joint mortgagees in the other's lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest, even though the payee ultimately becomes the survivor of the joint account. The Madras High Court following *Wallace* v. *Kelsall* (*q*) has held that payment to one of several mortgagees is a valid discharge (*r*). This was doubted in several Madras cases (*s*) and was not followed in Bombay and Calcutta (*t*). In *Annapurnamma* v. *Akkayya* (*u*) a full Bench of the Madras High Court held that one of several payees of a negotiable instrument can give a valid discharge of the entire debt but White, C. J., in a dissenting judgment was of opinion that the equitable presumption of a tenancy in common should prevail. This opinion has since been followed (*v*), and it is unquestionably correct, for the security being in favour of several mortgagees cannot be retransferred by any one of them and therefore the mortgage cannot be discharged except by payment to all. In an Allahabad case (*w*) a full discharge given by one of two joint mortgagees was held to operate in respect of his share only.

(*g*) *Rolfe* v. *Chester* (1855) 20 Beav. 610.
(*h*) *Talbot* v. *Frere* (1878) 9 Ch. D. 568.
(*i*) *Ragho Govind* v. *Balvant* (1883) 7 Bom. 101.
(*j*) *Bouston* v. *Williams* (1870) 5 Ch. App. 655.
(*k*) *Bai Ruttonbai* v. *Fraser Ice Factory* (1909) 32 Bom. 521.
(*l*) (1840) 7 M. & W. 264.
(*m*) (1889) 22 Q.B.D. 537.
(*n*) (1798) 3 Ves. 631.
(*o*) *Supra*.
(*p*) (1901) 2 Ch. 160.
(*q*) *Supra*.
(*r*) *Barber Maran* v. *Ramana* (1897) 20 Mad. 461.
(*s*) *Ahinsa Bibi* v. *Abdul Kader* (1902) 25 Mad. 26, 38; *Ramasami* v. *Muniyandi* (1910) 20 Mad. L. J. 709, 5 I.C. 343; *Sheik Ibrahim* v. *Rama Aiyar* (1911) 35 Mad. 685, 687, 10 I.C. 874.
(*t*) *Sitaram* v. *Shridhar* (1903) 27 Bom. 292, 294; *Jagat Tarini* v. *Naba Gopal* (1907) 34 Cal. 305, 321; *Hossainara* v. *Rahimannessa* (1911) 38 Cal. 342, 349, 8 I.C. 837; *Harihar Pershad* v. *Bholi Pershad* (1907) 6 Cal. L.J. 383, 394.
(*u*) (1913) 36 Mad. 544, 19 I.C. 12.
(*v*) *Mathra Das* v. *Nizam Din* (1917) P.R. 68, 41 I.C. 921; *Shaikh Hakim* v. *Adwaita Chandra* (1917) 22 Cal. W.N. 1021, 49 I.C. 63; *Umes Chandra* v. *Dinabandhu* (1916) 21 Cal. L.J. 570, 29 I.C. 956; *Ray Satindra* v. *Ray Jatindra* (1927) 31 C.W.N. 874, 101 I.C. 530, ('27) A.C. 425; *Syed Abbas Ali* v. *Misri Lall* (1920) 5 Pat. L.J. 376, 56 I.C. 403; *Banamali Satpathi* v. *Taina Ramhari* (1920) 5 Pat. L.J. 151, 55 I.C. 841—Contra *Purbhu Ram* v. *Jhalu Kuer* (1917) 2 Pat. L.J. 520, 42 I.C. 406 overruled.
(*w*) *Janhari Singh* v. *Ganga* (1919) 41 All. 631, 51 I.C. 107.

S. 60 The Judicial Committee in *Shrinivasdas Bavri* v. *Meherbai* (x) held that one of two mortgagees was not bound by a recital of a release given by the other and this decision in effect overrules *Barber Maran* v. *Ramana* (y). But even after this decision, the Madras High Court has held that a purchase by one of several co-mortgagees of the equity of redemption has the effect of extinguishing the mortgage (z). The Bombay High Court has held that in the case of payment to the heirs of a mortgagee, payment must be made to all unless they have constituted one of their number Karta or manager (a). Or, according to the Patna High Court (b), the manager's agent. It was also held in the Patna case that even where the mortgage deed contained a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage debt would be payments endorsed on the mortgage deed itself, it was open to the mortgagor to rely on evidence other than the endorsements on the mortgage bond such as a receipt signed by the mortgagee or his agent.

Payment must be made in the current coin of the realm or currency notes unless the mortgagee accepts some other form of payment (c). If the debt is contracted in any particular currency, it must be repaid in that currency or its equivalent (d).

A mortgagor is not bound to pay the executors of a mortgagee, until they obtain probate (e).

Tender must be unconditional.—See sec. 38 of the Indian Contract Act. In a case where the purchaser of the equity of redemption made a tender conditional on the delivery of the title deeds to him, the tender was held to be conditional and void (f). It is submitted, however, that a tender coupled with a demand for something which the creditor is bound in law to perform on being paid, is not conditional (g). The law as enacted in section 38 of the Indian Contract Act is less rigid than the English law (h). A tender under protest is a valid tender, for the protest is not a condition, but merely notice that the tender is not an admission, and the creditor has only to say " I take the money ; protest as much as you please " (i). Tender must be in current coin or currency notes. The old rule that the money must be shown to the creditor to tempt him (j) is now obsolete and if the debtor is ready to produce the money and offers to pay it, and the creditor dispenses with production at the time that is sufficient. In a case before the Privy Council (k) their Lordships quoted with approval the following passage from the judgment of Vice-Chancellor Wigram in *Hunter* v. *Daniel* (l) :—

> " The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

In the case before the Privy Council a purchaser of the equity of redemption wrote a letter asking to be informed of the amount of the balance due and promising to send the money on receipt of a reply. The mortgagee replied that there was no need for him to pay as there was a covenant against alienation in the mortgage deed, but at the conclusion

(x) (1917) 41 Bom. 300, 44 I.A. 36, 39 I.C. 627.
(y) (1897) 20 Mad. 461.
(z) *Follesatha* v. *Md. Rashiuddin* (1934) 153 I.C. 462, ('34) A.M. 656.
(a) *Ahinsa Bibi* v. *Abdul Kadar* (1902) 25 Mad. 26 ; *Sitaram* v. *Shridhar* (1903) 27 Bom. 292.
(b) *Ram Kirpal* v. *Baleshwar* (1940) 192 I.C. 861, (1941) A.P. 246. See also *Gopaljee Jha* v. *Upendranarain Jha* (1942) 202 I.C. 495, (1942) A.P. 408.
(c) *Ragho* v. *Hari* (1900) 24 Bom. 619 ; *Jugat Tarini* v. *Naba Gopal* (1907) 34 Cal. 305 ; *Bolye Chund* v. *Moulard* (1877) 4 Cal. 572.
(d) *Trimbak Jivaji* v. *Sakharam* (1892) 16 Bom. 599.
(e) *Pandurang* v. *Dadabhoy* (1902) 26 Bom. 643.
(f) *Varadarajulu* v. *Dhanalakshmi* (1914) 16 Mad. L.T. 365, 26 I.C. 184.
(g) Cf. *Rourke* v. *Robinson* (1911) 1 Ch. 480.
(h) *Kanyhalal* v. *Khuttermoney* (1880) 5 Cal. L.R. 105.
(i) *Scott* v. *Uxbridge, etc.* (1866) L.R.I.C.P. 596.
(j) *Ex parte Danks* (1852) 2 DeG. M. & G. 936.
(k) *Chalikani Venkatarayanim* v. *Zamindar of Tuni* (1923) 46 Mad. 108, 115, 50 I.A. 41, 46, 71 I.C. 1085, ('23) A.PC. 26.
(l) (1845) 4 Hare 420, 423.

of the letter stated what was the balance due on the mortgage. The covenant against alienation was of course invalid and as the mortgagee stated what was the amount due and no attempt was made by the mortgagor to pay it, their Lordships said they were "unable to construe the [mortgagee's] letter as equivalent to any such clear release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt (*m*)." In another case, when the mortgagor went with the money to the mortgagee and did not pay it as the mortgagee demanded extra interest, that was good tender (*n*). But a mere expression of willingness to pay is insufficient (*o*), for the money must be available for immediate delivery (*p*); and even an offer by letter to pay is not sufficient (*q*). S. 60

Tender of less than the proper amount is invalid according to the rule in *Dixon* v. *Clarke* (*r*); but in *Haji Abdul* v. *Haji Noor Mahomed* (*s*) Telang, J., said this rule was limited to cases where the party making the tender admits that more is due than is tendered but it is difficult to understand why the mortgagee should suffer for the mortgagor's mistake (*t*). But the creditor may accept the amount tendered in part payment, if the debtor does not make it a condition that the tender is to be in discharge of the whole (*u*).

In the absence of a stipulation to that effect the mortgagee is entitled to decline to receive payment by instalments (*v*).

A valid tender, with continued readiness to pay, stops the running of interest(*w*). But not so an invalid tender (*x*).

A tender improperly rejected is not equivalent to payment (*y*).

Phear, J., said in an old case (*z*) that tender by one of several mortgagors is not valid. But that is incorrect, for any of several mortgagors can redeem and it is sufficient here as in England that tender should be made by a person having a *prima facie* right to redeem. The costs of a suit for redemption are payable by the mortgagor; but if a mortgagee improperly refuses to accept a tender, he may be refused his costs or ordered to pay costs (*a*).

Instead of making tender to the mortgagee personally, the mortgagor may make a deposit in Court under sec. 83—but such deposit does not of course put an end to the relationship of the mortgagor and mortgagee (*b*).

In the case of an usufructuary mortgage when the debt has been satisfied out of the usufruct there is no question of tender (*c*).

(*m*) *Chalikani Venkatarayanim* v. *Zamindar of Tuni* (1923) 46 Mad. 108, 115, 50 I.A. 41, 46, 71 I.C. 1035, ('23) A.PC. 26.

(*n*) *Pestonjee* v. *Hormasji* (1903) 5 Bom. L.R. 387.

(*o*) *Haji Abdul* v. *Haji Noor Mahomed* (1892) 16 Bom. 141, 150.

(*p*) *Pandurang* v. *Dadabhoy* (1902) 26 Bom. 643.

(*q*) *Kamaya* v. *Devapa* (1898) 22 Bom. 440; *Chetan Das* v. *Gobind* (1914) 36 All. 139, 22 I.C. 659; *Muhammad Mushtaq* v. *Banke Lal* (1920) 42 All. 420, 55 I.C. 991.

(*r*) (1848) 5 C.B. 365; *Chunder Caunt* v. *Jodoonath* (1878) 3 Cal. 468.

(*s*) (1892) 16 Bom. 141; cf. *Narasingh* v. *Achaibar Singh* (1914) 36 All. 36, 22 I.C. 539; *Digambar Das* v. *Harendra Narayan* (1909) 14 Cal. W.N. 617, 5 I.C. 165.

(*t*) See *Subbai Goundan* v. *Palani* (1916) 30 Mad. L.J. 607, 34 I.C. 825.

(*u*) *Digambar Das* v. *Harendra Narayan*, *supra*.

(*v*) *Behari Lal* v. *Ram Ghulam* (1902) 24 All. 461.

(*w*) *Satyabadi Behara* v. *Hirabati* (1907) 34 Cal. 223; *Jagat Tarini* v. *Nabo Gopal* (1897) 34 Cal. 305; *Velayuda Naick* v. *Hyder Hussan* (1910) 33 Mad. 100, 3 I.C. 729.

(*x*) *Narain Das* v. *Abinash Chandar* (1922) 27 C.W.N. 290, 69 I.C. 27, ('22) A.PC. 347.

(*y*) *Govind* v. *Dillar Jang* (1899) 1 Bom. L.R. 381; *Satyabadi Behara* v. *Hirabatti*, *supra*; *Rukhminibai* v. *Venkatesh* (1907) 31 Bom. 527.

(*z*) *Ram Buksh* v. *Mohant Ram Lall* (1874) 21 W.R. 428.

(*a*) *Pearce* v. *Morris* (1869) 5 Ch. App. 227.

(*b*) *Balasidhantam* v. *Perumal* (1914) 27 Mad. L.J. 475, 27 I.C. 162; *Ahmadullah* v. *Abdul Rahim* (1923) 45 All. 592, 74 I.C. 763, ('24) A.A. 26.

(*c*) *Het Singh* v. *Bihari Lal* (1921) 43 All. 95, 59 I.C. 92, ('21) A.A. 358.

S. 60 In a suit for redemption it is not necessary to prove previous tender (*d*). The Allahabad High Court once held that it was (*e*)—but the Madras High Court disagreed (*f*) and later Allahabad cases follow Madras (*g*).

At a proper time.—These words refer to the time of the day, after the right to redeem has accrued. This would be as under sec. 47 of the Indian Contract Act—any time during the usual business hours.

At the proper place.—This would be determined according to the general rule enacted in secs. 48 and 49 of the Indian Contract Act. The money may also be deposited in Court under sec. 83.

Mortgage money.—A mortgagee is entitled to treat interest due under the mortgage as a charge on the estate (*h*). Mortgage money therefore includes both principal and interest (*i*). This accords with the definition in sec. 58 (a). See note under the same heading to sec. 58. Mortgage money also includes costs properly incurred by the mortgagee (*j*). See sec. 72.

Mortgagor's rights on redemption.—The mortgagor's rights on redemption are (1) delivery of the mortgage deed and documents of title relating to the mortgaged property, (2) possession, and (3) reconveyance or acknowledgment.

Delivery of the mortgage deed.—The mortgagor has a right on redemption to the return of the mortgage deed and documents of title relating to the mortgaged property. The provision as to documents relating to the property which are in the possession or power of the mortgagee have been inserted in conformity with Order 34, rules 3 to 8, of the Code of Civil Procedure to show that the mortgagor is also entitled to the return of all title deeds handed over to the mortgagee at the time of the mortgage. If the mortgage deed comprises other property the mortgagor is not entitled to the return of the deed, but the mortgagee must covenant to produce it when required (*k*). If the deeds are lost the mortgagor is entitled to an indemnity (*l*), and may also be entitled to compensation (*m*). In England it has been recently held that where the owner of a legal estate in fee simple in land executes a mortgage and hands over the mortgage and other title deeds to the mortgagee but fails to pay any interest on the mortgage or give any acknowledgment of the mortgage debt for more than 12 years the mortgagee loses all title to the land and the mortgagor can recover possession of the mortgage and other deeds (*n*). This is because under section 8 of the Real Property Limitation Act, 1874 the money charged upon land is, according to the margin note and on a construction of the section by the Court, to be deemed to be satisfied at the end of 12 years if no interest be paid or acknowledgment be given during that period. It is submitted that the position is not the same in India for section 28 of the Limitation Act does not apply to such a case and under the present section of the Transfer of Property Act the mortgagor becomes entitled to the deeds only on redemption.

(*d*) *Dinanath Rai* v. *Rama Rai* (1927) 6 Pat. 102, 97 I.C. 348, ('26) A.P. 512.

(*e*) *Muhammad Ali* v. *Baldeo Pande* (1916) 38 All. 148, 34 I.C. 183.

(*f*) *Batchanna* v. *Varahalu* (1901) 24 Mad. 408.

(*g*) *Het Singh* v. *Bihari Lal* (1921) 43 All. 95, 59 I.C. 92, ('21) A.A. 358; *Raghunandan* v. *Raghunandan* (1921) 43 All. 638, 61 I.C. 812, ('21) A.A. 353 F.B.; *Saiyid Ahmad* v. *Dharmun* (1921) 43 All. 424, 60 I.C. 760, ('21) A.A. 71—followed in *Dinanath Rai* v. *Rama Rai, supra.*

(*h*) *Ganga Ram* v. *Natha Singh* (1924) 5 Lah. 425, 80 I.C. 820, ('24) A.PC. 183; *Manghi* v. *Dial Chand* (1926) 7 Lah. 559, 96 I.C. 477, ('26) A.L. 624; *Abbas Khan* v. *Ram Das* (1928) 9 Lah. 140, 112 I.C. 153, ('28) A.L. 342.

(*i*) *Hewanchal Singh* v. *Jawahir Singh* (1889) 16 Cal. 307 P.C.

(*j*) *Nadershaw* v. *Shirinbai* (1923) 25 Bom. L.R. 839, 87 I.C. 129, ('24) A.B. 264; *Varadarajulu* v. *Dhanalakshmi* (1914) 16 Mad. L.T. 365, 26 I.C. 184.

(*k*) *Yates* v. *Plumbee* (1854) 2 S. & G. 174.

(*l*) *Midleton (Lord)* v. *Eliot* (1847) 15 Sim. 531.

(*m*) *Hornby* v. *Matcham* (1848) 16 Sim. 325.

(*n*) *Lewis* v. *Plunket* (1937) 1 Ch. 306.

Restoration of possession.—If the mortgagee is in possession he must on redemption restore possession to the mortgagor—not only of the lands originally mortgaged, but all the lands that have come into his possession *as mortgagee* (o). He must restore the lands in the same condition as when they were mortgaged. A lease granted by the mortgagee comes to an end when the land is redeemed (p). The mortgagee cannot be heard to say that he does not know what has happened to the mortgaged property (q). If the lands have been lost through the negligence of the mortgagee, he is liable to account for them to the mortgagor (r).

Reconveyance.—The right of the mortgagor to a reconveyance is not limited to the case of an English mortgage—but (except in the case of an English mortgage) it is seldom insisted on in India. If the mortgage money is paid and the mortgage redeemed it is not necessary that the redemption should be proved by a registered instrument (s). The mortgagor must pay for the cost of the reconveyance which has been described as a useful protection, being evidence of the removal of the cloud on title created by the mortgage (t). As an alternative, the mortgagor may require a registered acknowledgment that the mortgage is not outstanding. Special provision is made in this section for the registration of this acknowledgment in the case of registered mortgages, for sec. 17 (1) (b) of the Registration Act would not apply, if the mortgage was for less than Rs. 100.

By act of parties.—The right of redemption may be extinguished by act of parties or by operation of law. "Act of parties" refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction, otherwise it would be invalid as a clog on redemption. In a mortgage by conditional sale the right of redemption is not extinguished at the expiry of the period. See note "Mortgages by conditional sale" under sec. 58. The insertion of a clause in the mortgage deed that in default of payment the mortgage should operate as a sale is therefore not an "act of parties" extinguishing the right of redemption (u). If the mortgage stipulates that in default of payment, the mortgagee shall have a right to foreclose, the equity of redemption is not determined unless the mortgagee obtains a decree for foreclosure. Otherwise mere mutation to the name of the mortgagee in the revenue registers is not sufficient to extinguish the equity of redemption (v). Subsequent to the mortgage the mortgagee may purchase the equity of redemption from the mortgagor and this is an extinction by act of parties. Instances of such purchases have already been cited (w). The equity of redemption is not however extinguished by a mere contract for sale to the mortgagee (x). So also where a mortgagee having a power to sell the mortgaged property as provided in the mortgage deed enters into a contract to sell the property in the purported exercise of that power, the mortgagor has still the right to redeem the property (y).

In one case where a charge holder agreed to postpone his right over the property in favour of an equitable mortgagee, it was held that such agreement did not extinguish his right to redeem the equitable mortgage (z).

Mortgagee purchasing at a Court sale.—The effect of the mortgagee purchasing the equity of redemption at a Court sale is complicated by the peculiar position of the

(o) *Dildar* v. *Shukrullah* (1924) 46 All. 152, 78 I.C. 1023, ('24) A.A. 444.

(p) *Ramchand* v. *Raj Hans* (1906) 3 All. L.J. 517; *Subrao* v. *Munjapa* (1892) 16 Bom. 705.

(q) *Ramchandra* v. *Mukund* (1901) 3 Bom L. R. 152.

(r) *Anandrao Purshottam* v. *Bhikaji* (1922) 46 Bom. 218, 64 I.C. 485, ('22) A.B. 156.

(s) *Kunj Behari* v. *Bisheshwar* (1924) 148 I.C. 68, ('34) A.O. 98.

(t) *Dinanath* v. *Lachmi Narain* (1902) 25 All. 446.

(u) *Perayya* v. *Venkata* (1888) 11 Mad. 409.

(v) *Harihar Baksh* v. *Luchman Singh* (1934) A.O. 246.

(w) See note "Conditions of sale in default," *supra*.

(x) *Silla* v. *Dhum Singh* (1925) 28 O.C. 100, 82 I.C. 406, ('25) A.O. 114; *Ellapa* v. *Sivasubramanian* (1937) A.M. 293.

(y) *Abraham Ezra* v. *Abdul Latif* (1944) A.B. 156.

(z) *In re Vanraj Vallabhdas* (1945) A.B. 161.

S. 60 mortgagee. The Calcutta High Court in an old case (*a*) described the mortgagee as a trustee. This, it is submitted, is incorrect and it is clear that a mortgagee is not a trustee, for he has rights of his own which he can exercise adversely to the mortgagor. Nevertheless the mortgagee is under many obligations similar to those of a trustee, and which are discussed in the notes under secs. 64, 76 (a), 76 (g) and 69. If the mortgagee in possession makes default in payment of assessment and then himself purchases the property at the revenue sale, he is still liable to be redeemed (*b*). The Courts have never allowed the mortgagee to escape from these obligations by bringing the equity of redemption to sale in execution of a decree on the personal covenant (*c*). The evil consequences of such sales were described in the judgment of Macpherson, J., in *Kamini Debi* v. *Ramlochan Sircar* (*d*). The Legislature in the repealed sec. 99 of this Act went to the length of prohibiting a mortgagee from bringing to sale the equity of redemption in execution of a money decree for a claim whether arising under the mortgage or not; and this rule was applied by Farran, C.J., in *Martand* v. *Dhondo* (*e*) before the Transfer of Property Act was applied to Bombay. But this case is no longer an authority (*f*) and sec. 99 was repealed by the Code of Civil Procedure, 1908, and Order 34, rule 14, limits the restriction to what it was before the enactment of sec. 99. In *Kamini Debi*'s case (*g*) where the mortgagee had improperly sold the equity of redemption in execution of a money decree for the mortgage debt Macpherson, J., said:—

> "Without saying that an equity of redemption can never be seized and sold, I have no doubt that a mortgagee cannot properly in execution of a simple decree for a sum of money, the repayment of which is secured by a mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged, and that a mortgagee who attaches and sells his mortgagor's equity of redemption, and purchases it (directly or indirectly) himself, is a trustee for the mortgagor, and cannot acquire an irredeemable title against him."

The Judicial Committee in *Mahabir Pershad Singh* v. *Macnaghten* (*h*) approved this passage, but explained that it referred to a case of a mortgagee decree-holder who has purchased without the leave of the Court, and then added that "leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser."

Mahabir Pershad's case was that of a mortgagee purchasing with leave of the Court at a sale in execution of his own mortgage decree and the Judicial Committee that held he had acquired an irredeemable title. In *Kamini Debi*'s case (*i*) Macpherson, J., said: "One view of the matter is that, when the mortgagee purchases, the mortgage debt is satisfied. But I think that the more correct view is that the mortgagee purchasing is a trustee for the mortgagor who still has the right to redeem." The first view seems to have been adopted by the Allahabad High Court which at one time held that the mortgagee's purchase of even a portion of the property had the effect of extinguishing the whole mortgage (*j*)—and, that too, irrespective of the question whether leave to bid had or had not been obtained. But

(*a*) *Jogendronath* v. *Raj Narain* (1868) 9 W.R. 488.

(*b*) *Kalappa* v. *Shivaya* (1896) 20 Bom. 492; *Babaji* v. *Magniram* (1897) 21 Bom. 396; *Jaikaran Singh* v. *Sheo Kumar Singh* (1928) 50 All. 86, 103 I.C. 37, ('27) A.A. 747; *Ramkishore* v. *Jagarnath* (1934) 151 I.C. 255, ('34) A.P. 307.

(*c*) *Khiarajmal* v. *Daim* (1905) 32 Cal. 296, 32 I.A. 23; *Kamini Debi* v. *Ramlochan Sircar* (1870) 5 Beng. L. R. 450, 458; *Bhuggobutty Dossee* v. *Samachurn Bose* (1876) 1 Cal. 337.

(*d*) (1870) 5 Beng. L. R. 450.

(*e*) (1898) 22 Bom. 624.

(*f*) *Siddeshwar* v. *Ganpatrao* (1926) 50 Bom. 331, 96 I.C. 861, ('26) A.B. 368.

(*g*) (1870) 5 Beng. L. R. 450, 458.

(*h*) (1889) 16 Cal. 682, 692, 16 I.A. 107, 114.

(*i*) (1870) 5 Beng. L. R. 450, 459-460.

(*j*) *Ahmad Wali* v. *Bakar Husain* (1883) A.W.N. 61; *Ballam Das* v. *Amar Raj* (1890) 12 All. 537.

these decisions were soon overruled (*k*). The second is the correct view but it should be limited to cases where the mortgagee is the decree-holder and buys without leave of the Court. This limitation was overlooked in *Hart* v. *Tara Prasanna* (*l*) where it was held that a mortgagee claiming rateable distribution for the balance due after the mortgaged property had been sold in execution of his mortgage decree and purchased by himself, presumably with leave of the Court, was obliged to shew that he had purchased at a fair price. Banerji, J., fell into the same error in two Allahabad cases (*m*) for he held that the equity of redemption was not extinguished by the mortgagee's purchase at a Court sale unless the mortgagee had paid a fair price for it. He resiled however from this view in *Bisheshur Dayal* v. *Ram Sarup* (*n*). Again the Madras High Court held that a mortgagee cannot get an irredeemable title when he purchases at a sale in execution of the money decree of a third party and that the principle applies a *fortiori* to cases where no leave to bid is necessary (*o*). It is difficult to understand this, for if the mortgagee may bring the property to sale in a decree on a claim not connected with the mortgage and so deprive the mortgagor of the equity of redemption, surely he can purchase when a third person does so. Again the relation between a mortgagee and mortgagor is not so far analogous to that of a trustee and a *cestui que trust* as to preclude the purchase of an equity of redemption by a mortgagee (*p*). The case however has been practically overruled by later decisions (*q*). The law therefore is :— S. 60

(1) If the mortgagee, after obtaining leave to bid, purchases at a sale in execution of his decree, he gets an irredeemable title, and the equity of redemption is extinguished (*r*).

(2) If the mortgagee purchases without leave to bid at a sale in execution of his decree on the mortgage, he holds as trustee for the mortgagor, and the equity of redemption is not extinguished (*s*).

(3) If the mortgagee purchases at a sale in contravention of sec. 99 of the Transfer of Property Act, or of Order 34, rule 14, of the Code of Civil Procedure he holds as trustee, and the equity of redemption is not extinguished (*t*).

(4) If the mortgagee purchases at a sale in execution of a decree, whether mortgage decree or money decree, obtained by a third person, he gets an irredeemable title and the equity of redemption is extinguished (*u*).

In cases (2) & (3) the mortgagor must take objection in execution proceedings before the sale is confirmed, otherwise the equity of redemption is extinguished on confirmation of the sale (*v*). So in a Madras case (*w*) where the mortgagee had

(*k*) *Nand Kishore* v. *Raja Hariraj* (1898) 20 All. 23 [F.B.].

(*l*) (1885) 11 Cal. 718.

(*m*) *Chunna Lal* v. *Anandi Lal* (1897) 19 All. 196; *Nand Kishore* v. *Raja Hariraj*, *supra*.

(*n*) (1900) 22 All. 284, 291 [F.B.].

(*o*) *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank* (1900) 23 Mad. 377.

(*p*) *Mir Eusuff Ali* v. *Panchanan* (1910) 15 Cal. W. N. 800, 6 I.C. 842.

(*q*) *Sesha Ayyar* v. *Krishna* (1901) 24 Mad. 96; *Ikkotha* v. *Chakkiamma* (1904) 27 Mad. 428.

(*r*) *Mahabir Pershad* v. *Macnaghten* (1889) 16 Cal. 682 P.C.

(*s*) *Kamini Debi* v. *Ramlochand Sircar* (1870) 5 Beng. L. R. 450.

(*t*) *Khiarajmal* v. *Daim* (1900) 32 Cal. 296, 32 I.A. 23; *Ashutosh Sikdar* v. *Behari Lal* (1908) 35 Cal. 61, 79; *Uttam Chandra Daw* v. *Rajkrishna Dalal* (1920) 47 Cal. 377, 407, 55 I.C. 157. See also notes on Order 34, rule 14, in Mulla's Civil Procedure Code.

(*u*) *Bisheshur Dial* v. *Ram Sarup* (1900) 22 All. 284 F.B.; *Sesha Ayyar* v. *Krishna* (1901) 24 Mad. 96; *Ikkotha* v. *Chakkiamma* (1904) 27 Mad. 428; *Ponnambala Pillai* v. *Annamalai Chettiar* (1921) 43 Mad. 292. 62 I.C. 752, ('21) A.M. 475 F.B., overruling *Sami Rowuppa* v. *Kuppusami Iyengar* (1911) 2 Mad. W.N. 342, 12 I.C. 130; *Siddeshwar* v. *Ganpatrao* (1926) 50 Bom. 331, 96 I.C. 361, ('26) A.B. 303.

(*v*) *Dharanikota* v. *Budhararu* (1907) 30 Mad. 362; *Lal Bahadur* v. *Abharan Singh* (1915) 37 All. 165, 27 I.C. 795 F.B., dissenting from *Sardar Singh* v. *Ratan Lal* (1914) 36 All. 516, 24 I.C. 612; *Pandit Sheo Narain* v. *Ram Jutan* (1917) 2 Pat. L. J. 587, 41 I.C. 533, disapproving *Pancham Lal* v. *Kishun Pershad* (1910) 14 Cal. W. N. 579, 6 I.C. 47; *Raja Jagadish Chandra* v. *Bhubaneswar* (1923) 27 Cal. W. N. 38, 76 I.C. 241, ('23) A.C. 121; cf. *Muhammad Abdul* v. *Bilsukh Rai* (1905) 27 All. 517.

(*w*) *Muthuraman Chetty* v. *Ettappasami* (1899) 22 Mad. 372.

S. 60 purchased the mortgaged property in execution of a money decree for an instalment of the mortgage debt, a member of the undivided family of the mortgagor born after the decree but before the attachment and sale and not added as a party, was entitled to redeem his own share as not being bound by the sale, but was not allowed to redeem the share of the members of the joint family who were parties to the decree and order for sale. But in respect of all purchases by the mortgagee of the equity of redemption whether by private treaty or through the Court the condition referred to by Lord Justice Knight Bruce in *Shaw* v. *Bunny* (*x*) must be observed and the sale may be set aside if the mortgagee "had availed himself of his position as a mortgagee to procure some facility or advantage leading to the purchase or connected with it."

By operation of law.—The section does not refer to the extinction of the equity of redemption by operation of law. This may occur by merger when the mortgagee acquires the equity of redemption by inheritance (*y*). One co-mortgagor may by adverse possession acquire the equity of redemption of another co-mortgagor (*z*) but the possession of a mortgagee can never be adverse to the mortgagor during the continuance of the mortgage. This could only occur if the mortgagee's possession were indicative of such an acquiescence on the part of the mortgagor as to amount to a release of the equity of redemption (*a*). A forfeiture and sale under the Bombay Land Revenue Code for non-payment of assessment has the effect of extinguishing the equity of redemption (*b*).

By decree of a Court.—These are final decrees for foreclosure in mortgagees' suits under the Code of Civil Procedure, Order 34, rule 3, (2), and final decrees for foreclosure in redemption suits under O. 34, rule 8 (3) of the same Code.

In foreclosure suits the final decree extinguishes the equity of redemption. Until the final decree for foreclosure is made, the mortgagor can redeem even after the time fixed in the preliminary decree (*c*). But in a case where the mortgagee under an arrangement with the mortgagor took possession before the order absolute for foreclosure and the mortgagor raised no objection for many years he was held to have lost his right of redemption by acquiescence (*d*). In decrees for sale the repealed secs. 89 and 93 of the Act provided that on the making of the order for sale the right of redemption was extinguished. The decisions of the Privy Council in *Het Ram* v. *Shadi Lal* (*e*) and *Matru Mal* v. *Durga Kunwar* (*f*) were based on the law as enacted in these sections. But all the Courts held that a mortgagor could stop a sale under sec. 291 of the Code of Civil Procedure, 1882 (*g*), and all the Courts (*h*) except Calcutta (*i*) held that a mortgagor could have a sale set aside under sec. 310A of the same Code. This seemed to imply that the right of redemption continued even after order absolute for sale, and the Calcutta High Court was constrained to construe sec. 89 as referring to the extinction of the right of redemption on the actual

(*x*) (1864) 2 De G. J. & Sm. 468, 471.

(*y*) *Hamida Bibi* v. *Ahmad Husain* (1909) 31 All. 335, 1 I.C. 779.

(*z*) *Khiarajmal* v. *Daim* (1905) 32 Cal. 296, 32 I. A. 23.

(*a*) *Khiarajmal* v. *Daim*, *supra*.

(*b*) *Abdul Rehman* v. *Vinayak* (1927) 29 Bom. L.R. 1056, 104 I.C. 653, ('27) A.B. 540.

(*c*) *Poreshnath* v. *Ramjodu* (1889) 16 Cal. 246; *Somesh* v. *Ram Krishna* (1900) 27 Cal. 705; *Salig Ram* v. *Muradan* (1903) 25 All. 281; *Mallikarjunadu* v. *Lingamurti* (1902) 25 Mad. 244, 289 F.B.; *Nandram* v. *Babaji* (1898) 22 Bom. 771; *Ishwar* v. *Gopal* (1904) 28 Bom. 102; *Murugesa* v. *Ramasami* (1916) 39 Mad. 332, 31 I.C. 200; *Pardas Singh* v. *Dwarka Singh* (1910) 7 All. L.J. 958, 7 I.C. 50; *Mohan Lal* v. *Ram Charan* (1931) 29 All. L.J. 165, 130 I.C. 196, ('31) A.A. 223.

(*d*) *Vasantrao* v. *Nanabhai* (1926) 28 Bom. L. R. 347, 94 I.C. 96, ('26) A.B. 278 on app. *Keshavrao* v. *Nanabhai* (1929) 31 Bom. L.R. 696, 114 I.C. 574, ('29) A.PC. 61.

(*e*) (1918) 45 I.A. 130, 40 All. 407, 45 I.C. 798.

(*f*) (1920) 47 I.A. 71, 42 All. 364, 58 I.C. 969.

(*g*) *Raja Ram* v. *Chunni Lal* (1897) 19 All. 205; *Harjas Rai* v. *Rameshar* (1898) 20 All. 354; *Bibijan* v. *Sachi* (1904) 31 Cal. 863; *Misri Lal* v. *Mithu Lal* (1906) 28 All. 28; *Adipuranam* v. *Gopalasami* (1908) 31 Mad. 354.

(*h*) *Raja Ram* v. *Chunni Lal*, *supra*: *Than Chand* v. *Jagannath* (1909) 31 All. 346, 2 I.C. 400; *Tirumal Rao* v. *Syed Dastaghiri* (1899) 22 Mad. 286; *Krishnaji* v. *Mahadev* (1901) 25 Bom. 104; *Mallikarjunadu* v. *Lingamurti*, *supra*.

(*i*) *Kedar Nath* v. *Kali Churn* (1898) 25 Cal. 703.

sale and distribution of the sale proceeds (*j*). This was doing violence to the section; but the section was bad law, for a decree for sale is but a judgment on the debt and though the debt merges in the judgment the collateral security of the mortgage does not merge (*k*). The provision for the extinction of the right of redemption was therefore omitted in rules 5 and 8 of Order 34. The Privy Council in *Sukhi* v. *Ghulam Safdar* (*l*) said that the effect of this omission was that the law remained the same as it was before the passing of the Transfer of Property Act. And before the Act a decree for sale had not the effect of extinguishing the right of redemption (*m*). The Allahabad High Court held that the effect of the repeal of sec. 89 was that the right of redemption was not extinguished by the decree for sale but by the sale (*n*). The Legislature has however made the law quite clear, for the rules 5 and 8 as amended by Act 21 of 1929 expressly state that the mortgagor's right of redemption subsists till the confirmation of the sale held in execution of the decree for sale on a mortgage or, in a suit for redemption, until the final decree (*o*). A Bench of the Calcutta High Court seemed to accept this (*p*); but another Bench took the opposite view on the ground that the amending Act 21 of 1929 was not retrospective (*q*). After the section of the Transfer of Property Act was transferred to the Code of Civil Procedure, 1908, the High Court of Calcutta has held that a mortgagor can have a sale set aside under O. 21, r. 89, corresponding to sec. 310A of the Code of Civil Procedure 1882 (*r*).

If the mortgagor obtains a decree for redemption and the decree does not provide that in default of payment by the mortgagor he shall be debarred of all right to redeem, the right to redeem is not extinguished and the mortgagor can file another suit for redemption. This has now been settled by the Privy Council in *Bhaiya Raghunath Singh* v. *Mt. Hansraj Kunwar* (*s*). In that case the decree was that in default of payment the suit for redemption should be dismissed. Their Lordships said :—"The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in the manner enacted for that purpose, and strictly complied with. In the present case the only basis for the claim that the right to redeem has been extinguished is sec. 60; but in their Lordships' view the old decree cannot properly be construed as doing that which it does not purport to do, *viz.*, as extinguishing the right to redeem." Before this pronouncement of the Privy Council the decisions of the Courts had been conflicting. The Courts of Allahabad, Bombay and Lahore held that a second suit was maintainable (*t*), while the Courts of Calcutta and Madras held that the second suit was not maintainable (*u*). In a later full Bench decision (*v*) of the Madras High Court, however, it has been held that *Vedapuratti* v. *Vallabha*, *supra* must be taken as overruled by the abovementioned Privy Council decision. The difference was rather as to the application of the rule of *res judicata*

(*j*) *Bibi Jan* v. *Sachi* (1904) 31 Cal. 863.

(*k*) *Drake* v. *Mitchell* (1803) 3 East. 251.

(*l*) (1921) 48 I.A. 465, 43 All. 469, 65 I.C. 151, ('22) A.PC. 11.

(*m*) *Badruddin* v. *Sitaram* (1930) 32 Bom. L.R. 933, 126 I.C. 882, ('30) A.B. 401.

(*n*) *Shah Mehdi Hasan* v *Syed Ismail* (1920) 42 All. 517, 56 I.C. 172. See *Faiyaz* v. *Prag Narain* (1907) 34 I.A. 102, 29 All. 172.

(*o*) *Joti Lal* v. *Sheodhyan* (1936) 15 Pat. 607, 163 I.C. 908 (1936) A.P. 420.

(*p*) *Kalipada Mukerji* v. *Basanta Kumar* (1931) 59 Cal. 117, 35 Cal. W.N. 877, 138 I.C. 177, ('32) A.C. 126.

(*q*) *Asia Khatun* v. *Nur Jahan Khatun* (1932) 59 Cal. 1464, 36 Cal. W. N. 955, 142 I.C. 125, ('33) A.C. 89.

(*r*) *Virjiban Dass* v. *Biseswar Lal* (1921) 48 Cal. 69, 60 I.C. 406, ('21) A.C. 169.

(*s*) (1934) 61 I.A. 362, 56 All. 561, 1934 All. L.J. 900, 39 Cal. W.N. 9, 60 Cal. L. J. 337, 36 Bom. L.R. 1189, 151 I.C. 37 (34) A.PC. 205.

(*t*) *Sita Ram* v. *Madho Lal* (1902) 24 All. 44 F.B.; *Hari Ram* v. *Indraj* (1922) 44 All. 730, 69 I.C. 167, ('22) A.A. 377; *Muhamdi Begam* v. *Tufail Hasan* (1926) 48 All. 17, 92 I.C. 260, ('26) A.A. [illegible]; *Mohan Lal* v. *Ram Charan* (1931) All. L.J. 255, 130 I.C. 196, ('31) A.A. 223; *Ramji* v. *Pandharinath* (1919) 43 Bom. 334, 49 I.C. 894 F.B.; *Ramchandra* v. *Balbhim* (1923) 25 Bom. L.R. 211, 72 I.C. 315, ('23) A. B. 287; *Hanmant Anant* v. *Shidu* (1923) 47 Bom. 602, 75 I.C. 566, ('23) A.B. 300; *Arura* v. *Bur Singh* (1924) 5 Lah. 371, 84 I.C. 67, ('25) A.L. 31; *Nakta Ram* v. *Chiranji Lal* (1910) 32 All. 215, 5 I.C. 269; *Govind* v. *Narayan* (1931) 33 Bom. L.R. 844, 134 I.C. 609, (31) A.B. 480.

(*u*) *Sira* v. *Nundo* (1891) 19 Cal. 139; *Vedapuratti* v. *Vallabha* (1902) 25 Mad. 300.

(*v*) *Viroopakshan* v. *Pulipre Tarwad* (1937) A.M. 214.

S. 60 than as to the existence of the right to redeem. But the Privy Council in the above case pointed out that in the first suit the issue was whether the plaintiff was *then* entitled to redeem and in the second suit the issue is whether he is *now* entitled to redeem. It is correctly pointed out by the Bombay High Court, following the above decision of the Privy Council, that in each case it would be a question of fact whether the earlier decree involves a decision that the mortgagor's right to redeem was extinguished. In that case it was held that the decree provided that if there was any default in the payment of instalments, the right to redeem would be extinguished (*w*). It is perhaps unnecessary to add that if the first suit is pending the second suit will not lie (*x*).

The withdrawal of a redemption suit does not extinguish the equity of redemption so as to bar a fresh suit to redeem (*y*). A contrary view appears to have been taken in *Mattapalli Raju* v. *Challa Venkata* (*z*) in which the Madras High Court has held that sec. 60 cannot have the effect of overriding statutory provisions which may bar or limit the exercise of the right of redemption in certain circumstances. Order 23, rule 1 Civil Procedure Code contains such a provision. Accordingly when once a suit to redeem a mortgage has been withdrawn or abandoned without the permission referred to in Order 23, rule 1 (2) and consequently dismissed, a fresh suit for redemption is not maintainable. In view of the fact, pointed out by the Privy Council that the issue in the first suit was whether the plaintiff was *then* entitled to redeem and that the issue in the second suit is whether he is *now* so entitled, it would seem that the two causes of action were different. If on this principle the plea of *res judicata* was excluded, it is difficult to see why the same principle, should not exclude the operation of Order 23, rule 1. In a case where the first redemption suit was dismissed as the result of a compromise without regard to the fact that the plaintiff was a minor a fresh suit was maintainable (*a*). So also when the first redemption suit was dismissed for default (*b*) and when the mortgagee's decree for sale in the first suit was not executed (*c*).

Suit for redemption.—A suit for redemption is a suit to enforce the right to redeem. Such a suit may be filed not only by the mortgagor but by any person mentioned in sec. 91. The forms of decree enforcing redemption are enacted in order 34, rules 7 and 8 of the Code of Civil Procedure, 1908, formerly secs. 92 and 93 of this Act. All persons interested in the right of redemption or in the security must be joined as parties—Order 34, rule 1. The suit can only be instituted after the right has accrued, that is after the principal money has become due. It is not necessary to tender the mortgage money before filing the suit—see note "Tender", *supra*. The mortgagee is entitled to hold against every one who has not a paramount title (*d*). The plaintiff must therefore prove his title to redeem (*e*). In *Sevvaji Raghunadha* v. *Chinna Nayana* (*f*) the Judicial Committee said: "A plaintiff who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason of the weakness of his opponent's." *Prima facie* evidence will however shift the burden of proof. In *Raja Kishen Dutt* v. *Narendar* (*g*) where the mortgage deed was lost and the plaintiff claimed to redeem, the Privy Council said: "It appears to their Lordships that in such a case

(*w*) *Maruti* v. *Manohar* (1945) A.B. 307 following *Kushaba* v. *Budhaji* (1922) A.B. 127, 46 Bom. 348.

(*x*) *Abdul Karim* v. *Durga Prasad* (1927) 101 I.C. 324, ('27) A.A. 305.

(*y*) *Ramchandra* v. *Hanmanta* (1920) 44 Bom. 939, 58 I.C. 45.

(*z*) (1945) A.M. 225.

(*a*) *Basangouda* v. *Rudrappa* (1926) 28 Bom. L.R. 1507, 99 I.C. 814, ('27) A.B. 87.

(*b*) *Shridhar* v. *Ganu* (1928) 52 Bom. 111, 108 I.C. 22, ('28) A.B. 67; *Kashiram* v. *Maheshwar* (1928) 30 Bom. L.R. 1089, 113 I.C. 384, ('29) A.B. 116.

(*c*) *Badruddin* v. *Sitaram* (1930) 32 Bom. L.R. 933, 126 I.C. 882, ('30) A.B. 401; *Rama* v. *Bhagchand* (1915) 39 Bom. 41, 27 I.C. 249.

(*d*) *Pearce* v. *Morris* (1869) 5 Ch. App. 227.

(*e*) *Gursaram* v. *Shib Singh* (1943) A.A. 393, (1943) A.L.J. 548.

(*f*) (1864) 10 M.I.A. 151, 160.

(*g*) (1875) 3 I.A. 85, 88.

as the present it lies upon the plaintiff to substantiate his case by some evidence, by some *prima facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *prima facie* in this case in their Lordships' view is upon the plaintiff still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *prima facie* at all events, more in his power to give accurate evidence of its contents than in that of the plaintiff." In an old Bombay case (*h*) it was said that it was not the practice in India for a counterpart of the deed to be taken by the mortgagor and therefore very slight proof that a mortgage had originally been made would serve to shift the entire burden of proof on the defendants. But the *prima facie* evidence must be forthcoming (*i*). If the plaintiff fails to prove the specific mortgage on which he sues he may succeed on defendant's admission in the suit that he is holding the land under a mortgage (*j*); or if the defendant produces another deed of mortgage (*k*). But the defendant's admission made in another proceeding is not sufficient (*l*).

Right to redeem acquired by adverse possession.—In *Purshottam* v. *Sagaji* (*m*) a right to redeem was acquired by adverse possession by a mortgagor who had no title when the deed was executed.

Illustration.

In 1873 the widow of the deceased owner granted a mortgage to *G*, the husband of her daughter *R*. On the widow's death the plaintiffs claimed the property as reversionary heirs and disputed the mortgage. The dispute was settled by *G* accepting a mortgage from the plaintiffs for a reduced amount, on the 22nd June 1882. The plaintiffs had then no title, for *R* was the true heir and had acquiesced in ignorance of her rights. *R* on discovering that she was the heir, sold the property and her vendee paid off the mortgage of 1873. The plaintiffs then sued to redeem the mortgage of 1882. Held that the plaintiffs had a right to redeem. As between the plaintiffs and *G* the mortgage of 1873 had been treated as having come to an end. *G* held the property as mortgagee of the plaintiffs, and though *G*'s possession was not in its inception by virtue of a right derived from the plaintiffs, yet, as from the 22nd June 1882, it was under colour of a right derived from the plaintiffs and so adverse to *R*, and that to her knowledge: *Purshottam* v. *Sagaji* (1904) 28 Bom. 87.

Limitation.—Limitation for a suit for redemption is under Article 148 sixty years from the time when the right to redeem accrues. Within that period the mortgagor is entitled to redeem if the mortgagee has not foreclosed (*n*). The period of sixty years is to be computed from the date when the mortgagor is entitled to redeem (*o*).

A minor mortgagor's suit to redeem will not be barred under sec. 7 of the Limitation Act because a co-mortgagor could have redeemed during his minority (*p*). As the mortgage security is indivisible, limitation for a suit for redemption will not be

(*h*) *Balaji Narji* v. *Babu Devli* (1868) 5 Bom. H. C. 159 A.C.J.

(*i*) *Balaji Narji* v. *Babu Devli*, *supra*; *Parmanand Misr.* v. *Sahib Ali* (1889) 11 All. 438; *Ramchandra* v. *Mukund* (1901) 3 Bom. L.R. 152; *Prem Singh* v. *Mahamad Khurshid* (1927) 108 I.C. 215, ('27) A.L. 574.

(*j*) *Lakshman* v. *Hari Dinkar* (1880) 4 Bom. 584; *Unnian* v. *Rama* (1885) 8 Mad. 415; *Chimnaji* v. *Sakharam* (1893) 17 Bom. 365; *Bala* v. *Shiva* (1903) 27 Bom. 271; *Kadakam Valli* v. *Mokkath* (1907) 30 Mad. 388; *Kailash Rai* v. *Mst. Jaga Kuer* (1931) 10 Pat. 417, 133 I.C. 678, ('31) A.P. 295.

(*k*) *Kunhi Kutti* v. *Kutti Maracrar* (1870) 4 Mad. H.C. 359.

(*l*) *Govindrav Deshmukh* v. *Ragho* (1884) 8 Bom. 543; *Krishna Pillai* v. *Rangasami* (1895) 18 Mad. 462.

(*m*) (1904) 28 Bom. 87.

(*n*) *Pal Singh* v. *Bhola Singh* (1934) 149 I.C. 696, ('34) A.L. 242.

(*o*) *Bageshari Tewari* v. *Nandoo Singh* (1937) A.A. 82.

(*p*) *Bai Keval* v. *Madhu Kala* (1922) 46 Bom. 585, 64 I.C. 972, ('22) A.B. 319.

S. 60

saved by an acknowledgment made by one of the heirs of the mortgagee (q). But in a case from Bombay (r) the heirs of the mortgagee had effected a partition, and the suit for redemption was filed after the period of limitation had expired. One of the heirs had acknowledged the existence of the mortgage, and that acknowledgment was held to save limitation as to his share, though redemption of that share was allowed on payment of the whole amount due on the mortgage.

Notice.—The mortgagee may stipulate for notice before redemption after due date. This is in order to enable him to find another investment. In England the mortgagee is entitled to six months' notice of the mortgagor's intention to redeem, or to six months' interest in lieu of notice (s). In India it is generally three months, especially in presidency-towns. The omission to give notice would not be a bar to a suit for redemption, but probably, the mortgagee would be entitled to six months' interest in lieu of notice (t).

Redemption suit by benamidar.—The Judicial Committee have held that an action can be maintained by a benamidar in respect of property although the beneficial owner is in no way a party to it (u). A benamidar may sue to redeem a mortgage granted by him as benamidar of the real owner, and so may the heirs of the benamidar mortgagor or their assigns (v).

Partial redemption.—The last proviso of this section recognises the principle of the indivisibility of the mortgage security. In England tenants in common and joint tenants can redeem the whole property but not their shares separately, for the mortgagee cannot be required to permit redemption of part of the property mortgaged (w). This was the law in India before the Act (x) and is also law under the Act (y). A part-owner or purchaser of part of the equity of redemption is entitled to redeeem the whole mortgage (z), but is not entitled to redeem his share only (a). The reason for this rule is that the disintegration of the mortgage security would result in great injustice to the mortgagee. The Judicial Committee in *Nilakant* v. *Suresh Chunder* (b) said—

> "It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created."

There may be a special condition in the mortgage deed recognizing the mortgagors' shares as subject to separate redemption (c), or there may be partial redemption as a

(q) *Bhogilal* v. *Amritlal* (1892) 17 Bom. 173.

(r) *Motilal Jadav* v. *Samal Bechar* (1930) 54 Bom. 625, 128 I.C. 417, ('30) A.B. 466 F.B.

(s) *Smith* v. *Smith* (1891) 3 Ch. 550.

(t) *Smith* v. *Smith* (1891) 3 Ch. 550, 553; *Johnson* v. *Evans* (1889) 6 L.J. 18 C.A.; *Nadershaw* v. *Shirinbai* (1923) 25 Bom. L.R. 839, 846, 87 I.C. 120, ('24) A.B. 264.

(u) *Gur Narayan* v. *Sheo Lal Singh* (1919) 46 I.A. 1, 46 Cal. 556, 49 I.C. 1.

(v) *Mahomed Sheriff* v. *Sayyad Kasim* (1933) 145 I. C. 230, ('33) A. M. 635.

(w) *Hall* v. *Heward* (1886) 32 Ch. D. 430 C.A.

(x) *Moulvie Razeeuddeen* v. *Jhubboo* (1864) W. R. 75; *Timmappa* v. *Lakshmamma* (1882) 5 Mad. 385.

(y) *Mirza Yadalli Beg* v. *Tukaram* (1921) 48 Cal. 22, 47 I.A. 207, 57 I.C. 535, ('21) A.PC. 125; *Chaudhri Ahmad* v. *Seth Raghubar Dayal* (1906) 28 All. 1, 32 I.A. 229.

(z) *Shankar* v. *Bhikaji* (1929) 53 Bom. 353, 116 I.C. 225, ('29) A.B. 139; *Rugad Singh* v. *Sat Narain* (1905) 27 All. 178; *Fakir Chand* v. *Babu Lal* (1917) 39 All. 719, 44 I.C. 77, 42 I.C. 879; *Baikantha Nath* v. *Mohesh Chandra* (1917) 22 Cal. W.N. 128; *Protap Chandra* v. *Peary Mohan* (1918) 22 Cal. W. N. 800, 48 I.C. 669; *Sri Kanta Prasad* v. *Jag Sah* (1924) 3 Pat. 818, 84 I.C. 293, ('25) A.P. 57.

(a) *Mirza Yadalli Beg* v. *Tukaram* (1921) 48 Cal. 22, 47 I.A. 207, 57 I.C. 535, ('21) A. PC. 125; *Kuppusami Chetti* v. *Papathi Ammal* (1897) 21 Mad. 369; *Aughore Kumar Gangooli* v. *Mahomed Mussa* (1907) 2 I.C. 662.

(b) (1886) 12 Cal. 414, 12 I.A. 171, 181.

(c) *Ram Kristo* v. *Musst. Ameeroonissa* (1867) 7 W. R. 314, see s. 119, Law of Property Act, 1925, replacing s. 28, Conveyancing and Law of Property Act, 1881.

matter of subsequent bargain or arrangement between all the parties interested (*d*). Otherwise neither the mortgagor nor the mortgagee can get relief except in consonance with the principle of indivisibility—for the character of indivisibility exists both with reference to the mortgagor and to the mortgagee (*e*). Therefore the mortgagor of a share is entitled to redeem the whole mortgage although the mortgagee is prepared to allow redemption of the share only (*f*). A lessee of a share of the property mortgaged can redeem the whole property (*g*). **S. 60**

Before the amendment.—Before the amendment of the section by the insertion of the word "only" the following exceptions seem to have been admitted to the principle that the mortgage security is indivisible:

(1) *Where the mortgagee allows redemption of a share.*—If the mortgagors divided their shares, and the mortgagee recognised the division by allowing one of the sharers to redeem, there was said to be a severance of the security which justified partial redemption of each of the other shares (*h*). Thus in *Subramanyan* v. *Mandayan* (*i*) there was a mortgage of seven parcels of land for Rs. 300, and the mortgagee allowed the mortgagor to redeem one parcel for Rs. 30. The mortgagee was then compelled to allow a purchaser of two other parcels to redeem them for a proportionate part of the debt. This was extended to a case where the mortgagee recognised a partition among the mortgagors by taking a second mortgage of some of the shares (*j*). But the Allahabad High Court did not recognise this exception, and held that when the mortgagee allowed one share to be redeemed, the mortgage of that share was extinguished, and there still remained an *indivisible* mortgage of the *residue* (*k*). Thus if three brothers *A*, *B* and *C* mortgaged their joint property, and then effected a partition, and the mortgagee allowed *A* to redeem his share for ⅓ of the mortgage debt, then ⅓ of the mortgage was extinguished and there remained an *indivisible* mortgage of the shares of *B* and *C* for ⅔ of the debt. *B* and *C* therefore did not, according to the Allahabad view, acquire the right each to redeem his share for ⅓ of the debt.

(2) *Release of a share by the mortgagee.*—If the mortgagee released part of the property mortgaged, there was said to be a severance of the security, and the shares in the rest of the property were allowed to redeem each for the proportion of his share (*l*). If the mortgagee had notice that the equity of redemption in any part of the property had been transferred, and then released part of the estate mortgaged, it was said that he had no right to prejudice the rights of those who had acquired an interest in the unreleased portion. Accordingly the mortgagee was held liable to contribute under the old section 82 in respect of the share released and could only recover a rateable proportion of the mortgage debt from the rest of the property (*m*). In all these cases the mortgagee had notice

(*d*) *Hathasanan* v. *Parameswaran* (1899) 22 Mad. 209.

(*e*) *Hathasanan* v. *Parmeswaran*, *supra*.

(*f*) *Fakirchand* v. *Babu* (1917) 39 All. 719, 42 I.C. 879.

(*g*) *Annanda Pandurang* v. *Uttamrao* (1933) 144 I. C. 521, ('33) A. N. 44.

(*h*) *Ragho Salvi* v. *Balkrishna* (1884) 9 Bom. 128; *Subramanyan* v. *Mandayan* (1886) 9 Mad. 453; *Lakshuman Giriraya* v. *Madhav* (1891) 15 Bom. 186; *Plott Chandu* v. *Kolathum* (1915) Mad. W. N. 189, 28 I. C. 248.

(*i*) (1886) 9 Mad. 453.

(*j*) *Plott Chandu* v. *Kolathum* (1915) Mad. W. N. 189, 28 I. C. 248.

(*k*) *Lachmi Narain* v. *Muhammad* (1895) 17 All. 63; *Ali Jan* v. *Majid-ud-din* (1923) 45 All. 524, 81 I. C. 275, ('23) A.A. 499; *Mussamat Bati* v. *Tantya Singh* (1926) 89 I.C. 674, ('26) A.A. 130; *Kaldeo Baksh* v. *Jawahir Singh* (1899) 2 O.C. 344.

(*l*) *Marana Ammanna* v. *Pendyala* (1881) 3 Mad. 230; *Hari Kissen* v. *Veliat Hossein* (1903) 30 Cal. 755; *Ponnusami Mudaliar* v. *Srinivasa* (1908) 31 Mad. 333; *Hakim Lal* v. *Ram Lal* (1907) 6 Cal. L.J. 46.

(*m*) *Mir Eusuff Ali* v. *Panchanan* (1910) 15 Cal. W.N. 800, 6 I.C. 842; *Ponnusami Mudaliar* v. *Srinivasa* (1908) 31 Mad. 333; *Imam Ali* v. *Baij Nath* (1906) 33 Cal. 613; *Hakim Lal* v. *Ram Lal*, *supra*; *Surjiram* v. *Barhamdeo* (1905) 1 Cal. L.J. 337; *Surjiram* v. *Barhamadeo* (1905) 2 Cal. L.J. 202; *Budhmal Kevalchand* v. *Rama valad Yesu* (1920) 44 Bom. 223, 55 I.C. 327; *Mayashankar* v. *Burjorji* (1925) 27 Bom. L.R. 1449, 91 I.C. 978, ('26) A.B. 31; *Muktakeshi* v. *Ramani Mohan* (1927) 96 I.C. 504, ('27) A.C. 195; *Kamakhya Narain* v. *Ramzan Ali* (1945) A.P. 106, 23 Pat. 648.

of the transfer. The case of a mortgagee granting a release without notice of a transfer of part of the equity of redemption arose in the undernoted case (*n*), and the Calcutta High Court held that the mortgagee was entitled to recover the whole amount of the debt from the rest of the property.

(3) *Acquisition by the mortgagee of a share in the property.*—If the mortgagee acquired a share in the property mortgaged, the integrity of the mortgage was broken, and a sharer in the residue was entitled to redeem his own share. Thus if four fields are mortgaged for Rs. 400, and the mortgagor sells the fields one to *A* for Rs. 100, another to *B* for Rs. 100, the third to *C* for Rs. 100, and the fourth to the mortgagee for Rs. 100, then the mortgage of the fourth field is extinguished, and there remains a mortgage of three fields for Rs. 300. But as the mortgagee has severed the mortgage by his purchase, *A*, *B* or *C*, may each redeem his one field for Rs. 100. The integrity of the mortgage was broken whether the acquisition of a share by the mortgagee was by purchase, inheritance or otherwise (*o*). The same rule was applied when a mortgagee, in the execution sale on the mortgage decree which he had obtained without joining a purchaser of a part of the property, purchased another part of the property mortgaged. The purchaser was entitled to redeem his part for a proportionate part of the mortgage debt (*p*). But there is no such acquisition when the mortgagee or a transferee of the mortgage decree becomes the heir of a mortgagor who has lost the equity of redenption. This occurred in an Allahabad case (*q*). The mortgagor made two successive mortgages, and each mortgagee obtained a decree for sale without joining the other. The first mortgage decree was transferred to *M*. Under the second mortgage decree the property was sold and purchased by the plaintiff. *M* then became heir to a share in the estate of the mortgagor who had died. The plaintiff claimed to redeem a share only of the first mortgage on the ground that part of the mortgage was extinguished by merger; but the Court held that he must redeem the whole, for the equity of redemption was no longer part of the mortgagor's estate when *M* became his heir.

After the amendment.—It is submitted that by the amendment of the section by the insertion of the word "only," the first two exceptions are abolished and the third alone remains. The effect of the amendment in respect of these exceptions is stated more fully below:—

(1) *Where the mortgagee allows redemption of a share.*—Under the amended section the fact that the mortgagee has allowed a sharer in the equity of redemption to redeem his share will not justify partial redemption as to the rest. The mortgage of that share will be extinguished by the redemption but as to the residue there will be an indivisible

(*n*) *Pranballav Shaha* v. *Bhagaban Chandra Seal* (1934) 61 Cal. 894, 38 Cal. W.N. 833, 59 Cal. L. J. 473, 152 I.C. 429, ('34) A.C. 775 reversing 37 Cal. W.N. 424, 145 I.C. 657, ('33) A.C. 588.

(*o*) *Kuray Mal* v. *Puran Mal* (1880) 2 All. 565; *Kishan Lal* v. *Chunna Lal* (1887) A.W.N. 250; *Kudhai* v. *Sheo Dayal* (1888) 10 All. 570; *Pirjada Ahmadmiya* v. *Sha Kalidas* (1897) 21 Bom. 544; *Kallan Khan* v. *Mardan Khan* (1906) 28 All. 155; *Pawan Kumar* v. *Dulari Kuar* (1920) 1 Pat. L.T. 544, 58 I.C. 316; *Brij Kishore* v. *Madho Singh* (1906) 28 All. 279 (foreclosure); *Hamida Bibi* v. *Ahmad Husain* (1909) 31 All. 335 (mortgagee inheriting a share of a mortgagor); *Zafar Ahsan* v. *Zubaida* (1929) 27 All. L.J. 1114, 123 I.C. 398, ('29) A.A. 604 (mortgagee becoming one of the heirs of the mortgagor); *Inukhan* v. *Naimudin* (1906) 3 Cal. L. J. 377; *Debendra Nath* v. *Mirza Abdul* (1909) 10 Cal. L.J. 150, 1 I.C. 264; *Wajahat Husain* v. *Ratan Lal* (1911) 8 All. L.J. 1092, 12 I.C. 182; *Ponnambala Pillai* v. *Annamalai* (1920) 43 Mad. 872, 55 I.C. 666 F.B.; *Ko Thine* v. *Ismail Cassim* (1923) 68 I.C. 887, ('23) A.R. 61; *Ramaswami Reddi* v. *Veera Kudumban* (1923) 45 Mad. L.J. 719, 76 I.C. 154, ('24) A.M. 364; *Raghunath Prasad* v. *Sadhu Saran* (1925) 75 I. C. 821. ('25) A.P. 31; *Raghunath* v. *Sheo Pratap* (1929) 27 All. L.J. 761, 119 I.C. 525, ('29) A.A. 409; *Sarfuraz* v. *Muhammad Salim* (1934) 150 I.C. 140, ('34) A.O. 348; *Krishna Iyer* v. *Susai Reddiar* (1940) A.M. 496, (1940) 2 M.L.J. 1003, 51 M.L.W. 289, (1940) M.W.N. 200, 190 I.C. 858.

(*p*) *Venkatasami Naicken* v. *Rama Nathan Chettiar* (1910) 8 Mad. L. T. 400, 8 I.C. 158.

(*q*) *Abdool Ghafoor* v. *Qamar Uddin* (1923) 21 All. L.J. 270, 71 I.C. 973, ('23) A.A. 397.

mortgage. This was the view of the Allahabad High Court even before the amendment and cases to that effect have already been cited (*r*).

(2) *Release of a share by the mortgagee.*—Under the amended section the fact that the mortgagee releases part of the property mortgaged does not justify partial redemption as to the rest (*s*). Even before the amendment it was recognised that cases which held that a release by a mortgagee of a share was equivalent to a purchase by the mortgagee of that share were incorrect, for the effect of the release is only to diminish the mortgagee's security and the rest of the property remains subject to the mortgage for the full amount. Thus when three properties X, Y and Z were mortgaged and the mortgagee released X from the mortgage, Y and Z were liable for the whole amount of the mortgage and subsequent transferees of Y and Z could not claim that they were liable only for a share of the mortgage debt (*t*). In some cases before the amendment the purchaser got relief by being allowed partial redemption which was in effect making the mortgagee contribute. This was wrong, for the obligation of contribution under sec. 82 is not personal but attaches to the property. The purchaser gets relief not against the mortgagee but against the share of the property released by the mortgagee. This he must get after he has redeemed the whole mortgage. This view of the law was taken even before the amendment by the Allahabad High Court in *Jugal Kishore Sahu* v. *Kedar Nath* (*u*), and by the Madras High Court in *Perumal* v. *Raman Chettiar* (*v*).

(3) *Acquisition by the mortgagee of a share in the property.*—The law on this case has not been altered. If the mortgagee acquires a share in the property, the integrity of the mortgage is broken, and a sharer in the rest of the property is entitled to redeem his own share. The onus lies on the mortgagee to prove that no part of the mortgage debt was extinguished (*w*). If the integrity of the mortgage is broken by the mortgagee purchasing a share and there are several mortgagors, each mortgagor is entitled to redeem his own share and there is no equity in favour of redeeming more than his share (*x*). Cases on this point cited in footnote (*m*) are still good law, and it matters not whether the acquisition was by purchase, inheritance or otherwise. The share of the mortgagor means the interest of the mortgagor after the creation of the mortgage (*y*). The third para of sec. 60 does not apply to a maintenance decree which creates a charge (*z*).

Illustrations to case (3) *above.*

(1) *A* mortgages property to his wife *B* in satisfaction of a debt for dower. After the deaths of *A* and *B* their daughter *C* sues to enforce the mortgage. *C* as one of the heirs of *A* is entitled to 1/11th share of *A*'s estate. The integrity of the mortgage is broken, and the other heirs are entitled to redeem 10/11ths of the property mortgaged for their share of the debt: *Zafar Ahsan* v. *Zubaida* (1929) 27 All. L. J. 1114, 121 I.C. 398, ('29) A. A. 604; *Munga Lal* v. *Sagar Mal* (1936) 15 Pat. 481, 166 I. C. 29, (1936) A.P. 629.

(*r*) *Lachmi Narain* v. *Muhammad* (1895) 17 All. 63; *Ali Jan* v. *Majid-ud-din* (1923) 45 All. 524, 81 I. C. 275, ('23) A.A. 499; *Mussamat Beti* v. *Tanlya Singh* (1926) 89 I.C. 574, ('26) A.A. 136; *Baldeo Baksh* v. *Jawahir Singh* (1899) 2 O.C. 344.

(*s*) *Jugat Singh* v. *Behari Lal* (1942) A.A. 104.

(*t*) *Radha* v. *Manak* (1905) 7 Bom. L.R. 191; *Balkishan* v. *Mst. Bundia* (1931) 29 All. L.J. 1093, 136 I.C. 567, ('32) A.A. 246; *Shah Ram Chand* v. *Pandit Parbu Dayal* (1942) A.PC. 50 (1942) 69 I.A. 93.

(*u*) (1912) 34 All. 606, 16 I.C. 400; *Sheo Prasad* v. *Behari Lal* (1903) 25 All. 79; *Sheo Tahal* v. *Sheodan Rai* (1906) 28 All. 174 F.B.; *Sanwal* v. *Ganeshi Lal* (1913) 35 All. 441, 20 I. C. 41 (suit against one co-mortgagor time barred); *Ali Jan Khan* v. *Majid-ud-din* (1923) 45 All. 524, 81 I. C. 275, ('23) A. A. 499; *Lachmi Narain* v. *Muhammad* (1895) 17 All. 63.

(*v*) (1917) 40 Mad. 968, 42 I.C. 352; cf. *Sant Lal* v. *Nanku Lal* (1923) 75 I.C. 96, ('24) A.P. 174.

(*w*) *Himmat Sahai* v. *Md. Moin* (1941) A.A. 300.

(*x*) *Durga Prasad* v. *Chunni* (1940) A.A. 523.

(*y*) *Krishna Iyer* v. *Susai Reddiar* (1940) A.M. 498, (1940) 2 M.L.J. 1008, 51 M.L.W. 239, (1940) M.W.N. 200, 190 I.C. 856.

(*z*) *Debendra Nath* v. *Trinayani* (1945) A.P. 273.

S. 60

(2) *A* mortgages property to *B*. *A* then sells ⅓ of the property to *C*, ⅓ to *D*, and ⅓ to the mortgagee *B*. The integrity of the mortgage is broken, and *C* may redeem his ⅓ share for ⅓ of the debt.

The above submissions that by the amendment of the section by insertion of the word "only" after word "except" the first two exceptions are abolished and the third alone remains is now fully supported by a recent decision of the Privy Council (*a*) where it has been held that the right of redemption of mortgaged property in India is, in the absence of a wider right being given by agreement express or implied, conferred and defined by the Transfer of Property Act, and a mortgagor must redeem on the terms of the Act. The last clause of sec. 60 of the Act, apart from the exception which it recognises was intended to preclude mortgagors or persons deriving title from them from claiming, independently of agreement to have an equity to redeem their own share on payment of a proportionate part of the mortgage money. Under sec. 60 of the Act the integrity of a mortgage is not broken except where the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the property mortgaged. This categorical statement of the law sets at rest the divergent views previously expressed by Courts in India.

Lis pendens.—If the mortgagee purchases a share of the equity of redemption after a redemption suit is filed, he is subject to the doctrine of *lis pendens* and is liable to be redeemed as to the whole (*b*).

Purchase by one of several mortgagees.—A co-mortgagor cannot claim to redeem his share because of the purchase of another share by one of several mortgagees (*c*), for there is no merger unless the rights are co-extensive, and it would be a hardship, on the other mortgagees that one of them should have the power to alter the indivisible character of the security. In order that the integrity of the mortgage may be broken it is necessary that the mortgagee should have purchased a share in the mortgaged property (*d*).

Gift by mortgagee to two or more persons.—The mere fact that the mortgagee has divided his interest by gift or assignment to several persons will not justify partial redemption of each share (*e*). In *Sunitabala Debi* v. *Dhara Sundari* (*f*), where there was a mortgage to several mortgagees as tenants in common, their Lordships of the Privy Council said that no redemption could be effected of part of the property by paying to one of the mortgagees his separate debt.

Adjustment of a part of the debt with some of the mortgagors under C. P. Indebtedness of Relief Act—where a mortgagee accepts a settlement with some of the persons interested in the mortgaged property and agrees to recover from them a proportionate part of the debt payable by them out of the property owned by them and has submitted to the scheme of payment enforced on him by the operation of the provision of the Relief of Indebtedness Act, the Court will not allow him to recover the entire debt again from the other mortgagors. Sec. 60 is inapplicable to such a case (*g*).

Suit for partial redemption.—A suit for partial redemption will now only lie when the mortgagee has acquired a share in the equity of redemption. When that occurs the mortgage is *pro tanto* extinguished. The *ordinary right* of any sharer in the rest of the property is to redeem the whole of the rest for the balance of the debt. This is the

(*a*) *Himmat Sahai* v. *Md. Moin* (1941) A.A. 200.

(*b*) *Naro Hari* v. *Vithalbhai* (1886) 10 Bom. 648, 655.

(*c*) *Maktab Rai* v. *Sant Lal* (1883) 5 All. 276; *Velayudan Chetty* v. *Alangaram* (1912) 23 Mad. L. J. 475, 15 I. C. 605; *Subha Rao* v. *Sarvarayudu* (1924) 47 Mad. 7, 10, 72 I. C. 292, ('23) A. M. 583; *Jagmohan* v. *Harbans Singh* (1925) 85 I.C. 621, ('25) A.O. 609.

(*d*) *Bashir Uddin* v. *Waheed Udin* (1939) A.A. 600.

(*e*) *Purshottam* v. *Isub Mahamad* (1927) 29 Bom. L. R. 1052, 104 I. C. 648, ('27) A. B. 518.

(*f*) (1920) 47 Cal. 175, 179, 46 I.A. 272, 58 I.C. 131, ('19) A. PC. 24.

(*g*) *Bapurao* v. *Bulakidas* (1944) A. N. 225.

general rule laid down by the Privy Council in *Norender Narain* v. *Dwarka Lal Mundur* (h) and enacted in sec. 91 of the Act. Thus supposing four fields of equal value are mortgaged for Rs. 400 and the mortgagor then sells one to *A*, one to *B*, one to *C* and one to the mortgagee, the mortgage of the field sold to the mortgagee is extinguished and there remains a mortgage of the three fields of *A*, *B* and *C* for Rs. 300. Either *A*, *B* or *C* is entitled to redeem the three fields for Rs. 300 and to allow the other two who are necessary parties to the suit to take their fields on their contributing Rs. 100 each. But *the right of partial redemption* would give either *A*, *B* or *C* a right to sue for the redemption of his own field for Rs. 100 (i). But if *A* sues to redeem his field he must make *B* and *C* parties, for they must be bound by the account which will have to be taken as to the respective values of the shares. A suit for partial redemption is therefore a combination of a suit for redemption and a suit for contribution, the right of partial redemption being a privilege given to avoid multiplicity of suits (j). Thus if *A* mortgages property to *B*, and then *A* sells 1/16th to *C*, ⅛ to *D*, 3/16 to *E* and ½ to the mortgagee *B*; the mortgage of ½ is extinguished and there remains a mortgage of ⅜ consisting of 1/16 of *C* plus ⅛ of *D* plus 3/16 of *E*. Then if *C* sues to redeem ⅜ this is generally called a suit for partial redemption because it seeks to redeem a part of the original mortgage. But strictly speaking this is not partial redemption, for the only mortgage subsisting after *B*'s purchase is a mortgage of ⅜. *C* by seeking to redeem this mortgage is exercising his right as co-mortgagor to redeem the whole mortgage existing at the time of his redemption. But if *C* sues only to redeem his own share of 1/16 he is exercising his right of partial redemption of "his own share only" to quote the words of the section. In this suit *D* and *E* would be made parties and their rights safeguarded. S. 60

After the acquisition of a share of the property by the mortgagee the normal right of a sharer in the residue is to redeem the whole residue—and his right under the exception, in this section is to redeem his own share only in that residue.

Unfortunately this proposition has been obscured in what is generally considered to be the leading case on the subject of partial partition. This is the case of *Nawab Azimut Ali* v. *Jowahir Singh* (k). An estate consisting of 16 villages had been mortgaged to the predecessors in title of the Nawab. The villages were then sold in execution of a money decree against the mortgagors. One village Husseinpur was purchased by the plaintiff, one village by *A*, one by *B*, a quarter of another village by *C*, and 12¾ villages by the mortgagee. The plaintiff sued to redeem his village of Husseinpur on payment of a rateable proportion of the debt but did not make *A*, *B* and *C* parties to the suit. The mortgagee objected that they should have been made parties and that plaintiff should have offered to redeem their villages also. The Sadar Court gave effect to the mortgagee's contention and dismissed the suit. The plaintiff then filed a fresh suit claiming to redeem all the 3¼ villages excepting those purchased by the mortgagee. The mortgagee objected that the plaintiff was only entitled to redeem his own village. The Sadar Court made a decree for redemption in terms of the plaint. On appeal, however, the Judicial Committee varied the decree and allowed the plaintiff to redeem only his own village of Husseinpur on payment of a rateable proportion of the debt. The following passage gives the *ratio decidendi* :—

> "The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sadar Court. It merely ruled that the plaintiffs were bound to offer to redeem the villages in question, it did not rule that they were entitled to do so, or to acquire the interest of the mortgagee in them against his will. It is unnecessary to determine in this suit, whether in the peculiar

(h) (1877) 3 Cal. 397, 5 I.A. 18.
(i) *Phula Singh* v. *Harnaman* (1941) A.L. 421, 43 P.L.R. 705, 197 I.C. 626.
(j) *Subba Rao* v. *Sarvarayudu* (1924) 47 Mad. 719, 72 I.C. 292, ('23) A.M. 538.
(k) (1870) 13 M. I. A. 404, 407, 415.

S. 60

circumstances of this case the former proposition is correct. Their Lordships are of opinion, that the latter cannot be supported. They think that the appellant, if desirous of retaining possession of those villages as mortgagee, is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Husseinpur, upon payment of so much of the sum deposited in Court as represents the portion of the mortgage debt chargeable on that village."

The right of partial redemption was therefore given effect to and in an earlier passage in the judgment their Lordships said :—

"The appellant does not, as their Lordships understand, contest the proposition that plaintiffs, as purchasers of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of some proportion of the mortgage debt."

It is also clear that the Privy Council did not approve of the Sadar Court's finding that plaintiff should have offered to redeem the villages of *A*, *B* and *C* as well as his own. Ghose (*l*) seems to think that the plaintiff was bound to offer to redeem these, as the mortgagee's purchase had not destroyed the indivisible character of the mortgage as to the residue. But this view seems inconsistent with the decree allowing redemption of one village only. All that was necessary was that *A*, *B* and *C* should have been parties to the suit in which the account of the respective values of the villages would have to be taken. But the Privy Council do apparently hold that a sharer in the residue left after a mortgagee's purchase of part of the property cannot redeem the whole of that residue without the consent of the mortgagee. It is impossible to justify this limitation of the ordinary right of the mortgagor of a share to redeem the whole. The mortgagee's only interest is to get his money and so long as he is paid it cannot matter to him which mortgagor pays him. Sargent, C. J., was evidently dissatisfied with the case, for he tried to explain it as limited to mortgagors who were owners of distinct villages and not sharers in the same property (*m*). It is submitted that on this point *Azimut Ali's* case has been practically overruled by the more recent decision of the Privy Council in *Mirza Yadalli Beg* v. *Tukaram* (*n*). That was not a case of a mortgagee purchasing a share in the equity of redemption, but it was very similar, for the mortgagee had foreclosed nine villages without making the purchaser in the equity of redemption of one village a party. This purchaser sued to redeem the whole mortgage. On behalf of the mortgagee *Azimut Ali's* case was cited in support of the proposition that he was only entitled to redeem his own village. The Privy Council overruled this contention and held that he was entitled to redeem the nine villages. Lord Haldane said :—

"The Judge in the original Court thought that the decisions of the Courts in India had established that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safeguarding of the rights to redeem, which those owners may possess, their Lordships are of opinion that this is not so in India any more than in England. The decisions referred to when scrutinized turn out to be based not on any general principle different from that adverted to, but on the special circumstances of the transactions to which they related."

In the case of an imperfect foreclosure, the mortgagee has not acquitted a complete title to any part of the equity of redemption and so the whole mortgage is open to redemption. But the judgment in *Mirza Yadalli Beg* v. *Tukaram* (*o*) shows clearly that the mortgagor of a share can redeem the shares of other co-mortgagors in the residue left

(*l*) Law of Mortgages, Vol. I, p. 270.

(*m*) *Sakharam Narayan* v. *Gopal Lakshuman* (1882) P.J. 51, 10 Bom. 656 Note.

(*n*) (1921) 48 Cal. 22, 47 I.A. 207, 212, 57 I.C. 535, ('21) A.PC. 125; *Pariakaruppa* v. *Satyanarayanmoorthi* (1937) A.M. 136.

(*o*) (1921) 48 Cal. 22, 47 I.A. 207, 57 I.C. 535, ('21) A.PC. 125.

after the mortgagee's purchase in spite of the opposition of the mortgagee. The real question is not whether the mortgagee objects or not—but whether the other co-sharers are willing to contribute their shares of the mortgage debt and redeem. If they are not, the plaintiff can redeem their share as well as his own. If they wish to redeem they should be allowed to do so. This was the form of decree made in a case (*p*) decided by the Patna High Court. The Patna High Court construed *Azimut Ali*'s case as follows :—"That case does not lay down that, where a mortgage has been split up a mortgagor cannot redeem more than his share in equity of redemption. What it does lay down is that the mortgagee in such case cannot prevent a mortgagor from redeeming his share only, instead of the entire mortgage." That is good law but it is doubtful if that is a correct version of the decision in *Azimut Ali*'s case. Piggot, J., said quite correctly of the owner of a share in the residue that "he is entitled on the strength of his position as part owner of the mortgaged property to redeem just as much of it as does not belong to the mortgagees themselves, and he is entitled to do so on payment of a proportionate share of the mortgage debt" (*q*). Some other cases allow redemption of the whole of the residue (*r*); but as a rule *Azimut Ali*'s case has been followed and the right of the owner of a share in the residue left after the mortgagee's acquisition has been limited to the redemption of his own share only (*s*) and the result has sometimes been almost absurd. Thus in an Allahabad case (*t*) one Dallibullah owned a 2 ans. 8 pie share of the equity of redemption, the other 13 ans. 4 pie share having been purchased by the mortgagee. If Dallibullah had sued in his lifetime he could have redeemed that 2 ans. 8 pie share but he died and after his death one of his heirs sued to redeem it. He made the other heirs parties and none of them objected, yet on the mortgagee's opposition the heir was allowed to redeem only his fraction of the 2 ans. 8 pie share. The Allahabad High Court in a recent case (*u*) has sought to justify this course of decisions on the ground that "the integrity of a mortgage is necessary for the benefit of a mortgagee alone and where that has been broken and a redemption has to be allowed, there is no equity in favour of one of the mortgagors to possess the remaining property, although the same is more than his own legitimate share." This, it is submitted, is wrong, for the character of indivisibility exists both with reference to the mortgagor as well as to the mortgagee (*v*). The right of the mortgagor of a share to redeem the whole is recognised in secs. 91 and 95 of the Act and it is difficult to see why the acquisition by the mortgagee of a part of the property should affect that right as to the rest. Where the mortgagee brings a suit omitting a necessary party and obtains a decree and purchases the mortgaged property in execution S. 60

(*p*) *Promotho Nath* v. *Ram Kishun* (1927) 97 I.C. 886, ('27) A.P. 25, followed in *Mst. Azizunnissa* v. *Komal Singh* (1930) 9 Pat. 930, 130 I.C. 33, ('30) A.P. 579.

(*q*) *Shiam Saran* v. *Banarasi Das* (1922) 20 All. L.J. 258, 260, 66 I.C. 866, ('22) A.A. 192.

(*r*) *Siddeshwar Martand* v. *Ganpatrao Bhaurao* (1926) 50 Bom. 331, 96 I.C. 361, ('26) A.B. 303; *Baikantha Nath Dey* v. *Mohesh Chandra* (1918) 22 Cal. W.N. 128, 44 I.C. 77; *Protap Chandra Dhar* v. *Peary Mohan* (1918) 22 Cal. W. N. 300, 48 I.C. 669, dissenting from *Girish Chunder* v. *Juramoni De* (1905) 5 Cal. W. N. 83.

(*s*) *Kuray Mal* v. *Puran Mal* (1880) 2 All. 565; *Girish Chunder* v. *Juramoni* (1900) 5 Cal. W.N. 83; *Kallan Khan* v. *Mardan Khan* (1905) 28 All. 155; *Inukhan* v. *Naimudin* (1906) 3 Cal. L.J. 377; *Surjiram* v. *Barhamdeo* (1905) 2 Cal. L.J. 203; *Munshi* v. *Daulat* (1907) 29 All. 262; *Rathna Mudali* v. *Perumal* (1915) 38 Mad. 310, 17 I.C. 887; *Zaib-un-nissa Bibi* v. *Maharaja Parbhu Narain Singh* (1917) 39 All. 618, 40 I.C. 345; *Mewa Ram* v. *Ganga Ram* (1919) 17 All. L.J. 910, 52 I.C. 229; *Amba Prasad* v. [illegible] (1922) 44 All. 708, 68 I.C. 261, ('22) A.A. 405; *Raghunath Prasad* v. *Sadhu Saran* (1924) 75 I.C. 821, ('25) A.P. 31; *Ahmad Husain* v. *Muhammad Qasim* (1926) 48 All. 171, 178, 90 I.C. 80, ('26) A.A. 46; *Kishan Lal* v. *Chunna Lal* (1887) All. W.N. 250; *Sajjan Singh* v. *Attar Singh* (1926) 96 I.C. 362, ('26) A.L. 601; *Mahammad Ismail* v. *Sharfutullah* (1930) 57 Cal. 872, 129 I.C. 310, ('30) A.C. 810; *H. V. Low & Co. Ltd.* v. *Pulin Beharilal Sinha* (1933) 59 Cal. 1372, 143 I.C. 193, ('33) A.C. 154; *Jagannath Kunwar* v. *Jaipal* (1933) 55 All. 359, 1933 All. L.J. 151, 142 I.C. 410, ('33) A.A. 257; *Mustafa Khan* v. *Shadi Lall* (1907) 10 O.C. 31; *Jai Gobind* v. *Abhairaj* (1923) 26 O.C. 306, 77 I.C. 125, ('24) A.O. 40; *Mahomed Sabi* v. *Ahmed Shah* (1920) 58 I.C. 988; *Ramadhin* v. *Jokhan* (1918) 47 I.C. 115; *Abdul* v. *Raghunandan* (1945) A.A. 388.

(*t*) *Zaibunnissa Bibi* v. *Maharaja Parbhu Narain Singh*, *supra*.

(*u*) *Ahmad Husain* v. *Muhammad Qasim* (1926) 48 All. 171, 178, 90 I.C. 80, ('26) A.A. 46.

(*v*) *Huthasanan* v. *Parameswaran* (1899) 22 Mad. 209.

Ss. 60, 60A

thereof, the mortgage decree and the execution sale are of no effect as against the person who was not impleaded in the mortgage suit, and he is entitled to treat the mortgage as subsisting and can ask for its redemption in its entirety. The position is quite different where the equity of redemption of some of the mortgagors has been effectively sold and purchased by the mortgagee himself at a private sale or in execution of a money decree. In such a case the effect of the mortgagee's purchase would be to wipe out the mortgage in respect of that share. The mortgage could not be said to be subsisting so far as that share was concerned (*w*).

The part purchased by the mortgagee cannot of course be redeemed. This is either because the mortgage as to that part has been extinguished by merger or because the mortgagee if redeemed would immediately reclaim it. If the mortgagee has purchased a life-interest in a part he cannot be redeemed while that interest lasts. Thus in a Madras case (*x*) two Hindu widows had mortgaged their late husband's property which was purchased by the mortgagee in execution of a money decree against one of them, the other widow was allowed to redeem her own half share at once and the other half on the death of the co-widow.

In the case of a mortgagee purchasing the share of an undivided Hindu coparcener the Madras High Court requires the other coparcener to ascertain his share by partition and then sue to redeem it (*y*); but in Bombay he must redeem the whole property and then ascertain his share by partition (*z*). The Bombay ruling is based on Sargent, C.J.'s construction of *Azimut Ali*'s case as limited to the part redemption of separate parcels of property. There seems however no reason why a prayer for redemption and for partition should not be combined in one suit.

60A. (1) *Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.*

Obligation to transfer to third party instead of re-transference to mortgagor.

(2) *The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.*

(3) *The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.*

(*w*) *Mir Wajid Ali* v. *Alidad Khan* (184) I.C. 124, (1940) A.P. 45.

(*x*) *Ariyaputri* v. *Alamelu* (1887) 11 Mad. 304.

(*y*) *Mamu* v. *Kuttu* (1882) 6 Mad. 61; *Thillai* v. *Ramanatha* (1896) 20 Mad. 295. But *Mamu* v. *Kuttu* was dissented from in *Subba Rao* v. *Sarvarayudu* (1924) 47 Mad. 7, 72 I.C. 292, ('23) A.M. 583 where it is cited as *Mamu* v. *Kuttu*.

(*z*) *Mora Joshi* v. *Ramchandra* (1890) 15 Bom. 24; *Bhikaji Daji* v. *Lakshman* (1888) P.J. 291; *Naro Hari* v. *Vithalbhat* (1886) 10 Bom. 648; *Alikhan Daudkhan* v. *Mahamadkhan* (1881) P.J. 319, 10 Bom 658 Note—cf. *Bahramkhan* v. *Saidal Khan* (1904) P.R. 2.

This section is new and has been inserted by the amending Act 20 of 1929. The right of the redeeming mortgagor under sec. 60 is to require the mortgagee to re-transfer either to the mortgagor himself or to a third person. Under this section he may require the mortgagee to assign the mortgage to a third person. A puisne mortgagee, as assignee of part of the equity of redemption, may redeem a prior mortgagee and exercise this right.

A mortgagee who is or has been in possession.—The reason why a mortgagee being or having been in possession, is excepted is that a mortgagee who has taken possession remains accountable in respect of profits and other matters even after the transfer (*a*).

The section is modelled on sec. 95 of the Law of Property Act, 1925, which re-enacts with slight variations sec. 15 of the Conveyancing and Law of Property Act, 1881, as extended by sec. 12 of the Act of 1882 under which it has been held that a mortgagee cannot safely transfer to the nominee of the mortgagor without the consent of the owners of subsequent incumbrances of which he has notice (*b*).

Right to inspection and production of documents.

60B. *A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.*

This section is new and was inserted by the amending Act 20 of 1929. It recognises the right of the mortgagor to inspection and copies of deeds of title relating to the mortgaged property which are in the custody of the mortgagee. Cases which denied this right of inspection are no longer good law (*c*).

The section is modelled on sec. 96 of the Law of Property Act, 1925, which re-enacts sec. 16 of the Conveyancing and Law of Property Act, 1881 (*d*).

Right to redeem separately or simultaneously.

61. *A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.*

Amendment.—This section was substituted by the amending Act 20 of 1929 for the original section which was as follows:—

> "A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem."

(*a*) Coote's Law of Mortgages, 9th Ed., p. 1425; *Hall* v. *Heward* (1886) 32 Ch. D. 430, 435; *In re Pryterch, Pryterch* v. *Williams* (1889) 42 Ch. D. 590.

(*b*) *Re Magneta Time Co.* (1915) 84 L.J. Ch. 814.

(*c*) *Beattie* v. *Jaha* (1869) 9 Bom. H.C. 152 O.C.; *Mehta* v. *Gagumbhai* (1922) 24 Bom. L.R. 847, 75 I.C. 193, ('22) A.B. 432.

(*d*) See *Burn* v. *London, etc., Coal Co.* (1890) W.N. 209.

S. 61

The old section had also an illustration appended to it which was as follows :—"*A* the owner of farms Z and Y, mortgages Z to *B* for Rs. 1,000. *A* afterwards mortgages Y to *B* for Rs. 1,000, making no stipulation as to any additional charge on Z. *A* may institute a suit for the redemption of the mortgage on Z alone." That illustration is now omitted.

The section has been completely remodelled and made more exhaustive. It applies not only to two mortgages by the same mortgagor to the same mortgagee, but to any number of such mortgages. The old section referred to a separate mortgage of other property (*e*). The new section embraces not only different mortgages of different properties, but also successive mortgages of the same property.

Consolidation.—Under English law the right to redeem after due date was an equitable relief. Accordingly, under the maxim that he who seeks equity must do equity, the mortgagor seeking to redeem one of several mortgages was put on terms that he should redeem all. It was a condition imposed by equity on the right to redeem given by equity. It did not arise so long as there was a legal right to redeem. But when that was lost the mortgagee was entitled to consolidate the mortgages, *i.e.*, to treat them as one and to decline to be redeemed as to any unless he was redeemed as to all (*f*). Thus in the illustration to the old section if *A* had not redeemed Y, at due date, *B* was entitled to refuse redemption of Z, unless it was also redeemed. This equity was abolished in England as from the 1st January, 1882, by sec. 17 of the Conveyancing and Law of Property Act, 1881, now re-enacted in sec. 93 of the Law of Property Act, 1925, except where a contrary intention appears in the mortgage deeds or one of them. It is, however, usual in England to exclude the section by express words in the mortgage. The equity in India was abolished by sec. 61 which also saves contracts to the contrary (*g*). Before the Act it had been applied in Bombay (*h*), but rejected in Calcutta (*i*). In a latter case the Bombay High Court held that it was inapplicable in the mofussil (*j*).

As the word mortgagor includes persons deriving title under a mortgagor, sec. 61 applies whether the party seeking redemption is the mortgagor or his assignee or heir or survivor (*k*). The rule in English law is that the equity of consolidation does not apply where the equity of redemption of one property was assigned before the mortgage of the other—or in other words there is no right of consolidation unless the right arose before the severances of the equities of redemption (*l*). As the equity of consolidation does not apply in India it is not necessary to pursue this topic further.

Contract to the contrary.—The parties themselves may exclude the operation of the section and the contract of mortgage may allow the mortgagee to consolidate (*m*). But a provision to that effect must be explicit (*n*). If there is a stipulation for simultaneous redemption in the subsequent mortgage of the same property, this is equivalent to a contract for consolidation and the mortgages cannot be redeemed separately. As explained in the notes on sec. 60, such a stipulation is not a clog on redemption. See note 'Subsequent agreement postponing redemption' at p. 375. In an Allahabad case (*o*)

(*e*) *Bhartu* v. *Dalip* (1906) 3 All. L.J. 672; cf. *In re Salmon, Ex parte Trustee* (1908) 1 K.B. 147.

(*f*) *Jennings* v. *Jordan* (1881) 6 App. Cas. 698, 700.

(*g*) *Tajjo Bibi* v. *Bhagwan Prasad* (1894) 16 All. 295: *Parmeshwar* v. *Raj Kishore* (1924) 3 Pat. 829, 80 I.C. 34, ('25) A.P. 59.

(*h*) *Vithal* v. *Daud* (1869) 6 Bom. H.C.R. 90 A.C.J.

(*i*) *Odoy Churn* v. *Bhujohury* (1869) 11 W.R. 310.

(*j*) *Narayan* v. *Pandurang* (1883) 7 Bom. 526.

(*k*) *Jaipal Singh* v. *Lachman Singh* (1934) 9 Luck. 657, 149 I.C. 948, ('34) A.O. 246.

(*l*) *Jennings* v. *Jordan*, *supra*.

(*m*) *Parmeshwar* v. *Raj Kishore* (1924) 3 Pat. 829, 80 I.C. 34, ('25) A.P. 59.

(*n*) *Bhartu* v. *Dalip*, *supra*; *Jiwan Das* v. *Tharaj* (1920) 1 Lah. 105, 55 I.C. 509; *Nathwa* v. *Kanhiya* (1921) 3 Lah. L.J. 432, 65 I.C. 642, ('21) A.L. 170; *Punnu Ram* v. *Ghulam Hussain* (1926) 7 Lah. 297, 96 I.C. 680, ('26) A.L. 494; *Kanhaya Lal* v. *Tulsi Pershad* (1931) 129 I.C. 550, ('31) A.A. 197.

(*o*) *Ganga Rai* v. *Kitharath Rai* (1911) 33 All. 393, 9 I.C. 319; cf. *Gava Din* v. *Has Karan* (1913) 16 O.C. 207, 22 I.C. 132.

the first mortgage was by two mortgagors, and the second by one of them only who covenanted to pay before redeeming the first mortgage. This was held not to be a contract of consolidation but to be only a provision fixing time for payment.

S. 61.

The effect of a covenant for consolidation was much debated in a recent Full Bench decision of the Allahabad High Court (*p*). The mortgagor had made a usufructuary mortgage of his occupancy holding and then took further advances and executed two bonds of further charge and in those bonds covenanted not to redeem the usufructuary mortgage until these subsequent advances had been paid off. Now a transfer of an occupancy holding is forbidden by the Agra Tenancy Act 12 of 1881, but the Allahabad High Court had held that an usufructuary mortgage in so far as it is a transfer of "a right to occupy" or of a right to possession is valid. Under this ruling the bonds were invalid as mortgages or deeds of further charge and the usufructuary mortgage was valid only as the transfer of a right of possession (*q*). In view of this ruling each of the Judges took a different view of the effect of the covenant—one Judge held that as a personal covenant it was valid—another Judge held that it was invalid as it hindered redemption of the usufructuary mortgage; and the third Judge that it was invalid as it had the effect of making the usufructuary mortgage operate as a mortgage of something more than a right of possession.

Two or more mortgages.—These words mark the distinction between the old section and the new. The old section referred to the case of two mortgages of different properties. Thus if *A* mortgaged property X to *B*, and *A* mortgaged property Y to *B*, then the old section enacted that *A* might redeem X and Y separately unless restrained by contract to the contrary. The new section refers to two or more mortgages of the same or of different properties. For instance it would include a case of four mortgages thus: (1) *A* mortgages X to *B*, (2) *A* mortgages X to *B* by a puisne mortgage, (3) *A* mortgages Y to *B*, (4) *A* mortgages Z to *B*. The new section enacts that unless restrained by contract to the contrary, *A* may redeem each of these four mortgages separately.

The old section.—Although the old section referred to mortgages of *different properties*, the Allahabad High Court held that as each mortgage was a separate cause of action (*r*), the mortgagor might redeem two mortgages separately even when the mortgages were of the *same property* (*s*). But in many cases (*t*) it was held that as the section referred to mortgages of *different properties*, it implied that when the mortgages were of the *same property* the mortgagor was bound to redeem all or none. Again, as the right of redemption and the right of foreclosure are co-extensive, it was held that if the mortgages were of the same property, the mortgagee could not enforce one without enforcing the others (*u*).

(*p*) *Lallu Singh* v. *Ram Nandan* (1930) 52 All. 281, 124 I.C. 733, ('30) A.A. 136 F.B.

(*q*) *Khiali Ram* v. *Nathu Lal* (1893) 15 All. 219 F.B.

(*r*) *Sunder Singh* v. *Bholu* (1898) 20 All. 322.

(*s*) *Tajjo Bibi* v. *Bhagwan* (1894) 16 All. 295; *Khuda Bakhsh* v. *Alim-un-nissa* (1906) 27 All. 313.

(*t*) *Panaganti Ramarayaningar* v. *Maharaja of Venkatagiri* (1927) 50 Mad. 180, 54 I.A. 68, 100 I.C. 87, ('27) A.PC. 32; *Ram Ratan Lala* v. *Babu Aditya* (1928) 3 Luck. 459, 112 I.C. 481, ('28) A.O. 273 on app. *Aditya Prasad* v. *Ram Ratan Lal* (1930) 57 I.A. 173, 5 Luck. 191, ('30) A.PC. 176, approving ……… v. *Anant* (1906) 32 Bom. 396; *Balasubramania* v. *Sivaguru* (1911) 21 Mad. L.J. 562, 11 I.C. 629; *Rameshar Singh* v. *Husain* (1930) 28 All. L.J. 972; *Kanhaya Lal* v. *Tulsi Pershad* (1931) 129 I.C. 550, ('31) A.A. 197; *Dorasami* v. *Venkataseshayyar* (1902) 25 Mad. 106; *Ranjit Khan* v. *Ramdhan* (1909) 31 All. 482, 2 I.C. 859; *Keshavram* v. *Ranchhod* (1906) 30 Bom. 156; *Jaipal Singh* v. *Lachman Singh* (1934) 9 Luck. 657, 149 I.C. 543, ('34) A.O. 246.

(*u*) *Dorasami* v. *Venkataseshayyar*, *supra*; *Ranjit Khan* v. *Ramdhan* (1909) 31 All. 482, 2 I.C. 859; *Balasubramania* v. *Sivaguru* (1911) 21 Mad. L.J. 562, 11 I.C. 629. But see *Radha Krishna* v. *Muthusawmy* (1908) 31 Mad. 530 and *Subramania* ……… (1915) 38 Mad. 927, 30 I.C. 317 F.B.

Ss. 61, 62

The new section.—Under the new section it is clear that even if the mortgages are of the same property, the mortgagor may redeem each separately unless restrained by a contract to the contrary. The effect of the amendment is to abolish the consolidation of mortgages whether in respect of the same properties or different properties (*v*).

It might be supposed that conversely a mortgagee who holds two or more mortgages of the same property from the same mortgagor might enforce each separately, and that the old rule requiring the mortgagee to consolidate was abolished. But this is not so; and section 67A of the Act as amended puts the rights of the mortgagee on a totally different footing, and if he has successive mortgages of the same property or different mortgages of different properties from the same mortgagor he must enforce all or none. This is because a sale of property subject to other mortgages is not likely to realise a fair price and would be a hardship on the mortgagor. On the other hand, if the mortgagor redeems one of several mortgages he benefits the mortgagee by enhancing the value of his security. This equitable consideration overrides not only the rule of procedure which allows a separate suit on each cause of action, but also the principle that rights of redemption and foreclosure are co-extensive.

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property *together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee*,—

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(b) where the mortgagee is authorized to pay himself from such rents and profits or *any part thereof, a part only of the mortgage-money*—when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee *the mortgage-money or the balance thereof* or deposits it in Court as hereinafter provided.

Amendments.—This section has been amended by Act 20 of 1929. The following were the amendments :—

In the first paragraph the words "together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee" have been inserted. This corresponds to the similar amendments in sec. 60.

In clause (b) the words "or any part thereof a part only of the mortgage money" have been substituted for the words "the interest of the principal money"; and the words "the mortgage money or the balance thereof" have been substituted for the words "the principal money." These amendments make the section correspond with the definition of usufructuary mortgage in sec. 58 (d). The old section did not so correspond.

(*v*) *Jai Narain* v. *Gokul Singh* (1937) 168 I.C. 40, (1937) A.O. 321.

Right of Usufructuary Mortgagee to Recover Possession :—The section does not use the word redemption and it applies only to usufructuary mortgages pure and simple (*w*); but the remedy of the mortgagor in clause (b) would be enforced by suit for redemption or by the summary process of deposit and notice under sec. 83. On the other hand under clause (a) there is no tender or payment and the suit would not be one for redemption. Such a suit would be described in England as a suit in ejectment (*x*); and in India it has been said that a suit for redemption of a usufructuary mortgage is in substance a suit for possession (*y*). When the debt is satisfied out of the rents and profits the mortgagor recovers possession on his title (*z*). Thus in *Nidha Sah* v. *Murli Dhar* (*a*) the mortgage was a usufructuary mortgage for a term of 14 years and provided that at the expiry of that term the mortgagor was entitled to possession without an account. The mortgagee did not get possession of the whole property because of a misrepresentation by the mortgagor. Nevertheless the Privy Council held that as the mortgagor's suit was not on contract but on title, he was entitled at the end of the term to recover the part of which the mortgagee had possession. But the so-called mortgage in this case was not really a mortgage, for the transfer was not security for the payment of any money or for the performance of any engagement, but simply a grant for a fixed term free of rent in consideration of a sum made up of past and present advances. S. 62 (a)

Clause (a).—This refers to cases where the principal and interest are paid out of the usufruct, and the suit is one for the recovery of possession rather than redemption. The words "when such money is paid" refer to payment out of the rents and profits (*b*). In such cases the mortgagee pays himself out of the rents and profits, and surrenders possession when the debt is paid off. If the mortgagor sues to recover possession before the debt is discharged out of the usufruct, the suit must be dismissed as premature (*c*). In some obsolete cases the mortgagor was allowed to redeem by making a cash payment before the mortgage was discharged out of the usufruct (*d*). The Chief Court of Oudh made a similar order in a more recent case (*e*); but the decision proceeds on the erroneous notion that the mortgagor can redeem at his convenience, and it makes no reference to the Privy Council decision in *Bakhtawar Begam* v. *Husaini Khanam* (*f*). In a Madras case (*g*), the mortgage was usufructuary with a condition that the mortgagee should remain in possession until the mortgage debt and interest were discharged out of the usufruct. There was also an option given to the mortgagor to redeem by payment of the balance due at the end of 10 years. The mortgagor did not exercise this option at the end of the period of 10 years, but sued after the 10 years but before the mortgage was satisfied out of the usufruct. The suit was dismissed as premature. This was on the principle that the law will not allow the mortgagor to discharge the debt before the prescribed period in a manner not contemplated by the contract (*h*).

If the interest or the interest and defined portions of the principal are to be satisfied out of the usufruct, the mortgagee would not be liable to account on redemption—see sec. 77. If, however, the mortgagee has remained in possession after date of tender or

(*w*) *Panaganti* v. *Maharaja of Venkatagiri* (1927) 50 Mad. 180, 54 I.A. 68, 100 I.C. 86, ('29) A.PC. 82.

(*x*) *Yates* v. *Hambly* (1742) 2 Atk. 360.

(*y*) *Annada Hait* v. *Khudiram Hait* (1914) 19 Cal. L.J. 582, 25 I.C. 558; *Appanna* v. *Venkatasami* (1924) 47 Mad. 203, 208, 79 I.C. 510, ('24) A.M. 292.

(*z*) *Ram Prasad* v. *Bishambhar* (1946) A.A. 400.

(*a*) (1903) 25 All. 115, 30 I.A. 54.

(*b*) *Tirugnana* v. *Nallatambi* (1893) 16 Mad. 486, 489; *Immani Seshayya* v. *Dronamraju Lakshminarasimha* (1930) 57 Mad. L.J. 800, 124 I.C. 282, ('30) A.M. 160.

(*c*) *Tirugnana* v. *Nallatambi*, *supra*.

(*d*) *Sahib Zadah* v. *Parmeshar* (1877) 1 All. 524; *Raja Barda Kant* v. *Bhagwan Das* (1877) 1 All. 344.

(*e*) *Hardeo Bakhsh* v. *Deputy Commissioner* (1926) 1 Luck. 367, 98 I.C. 542, ('26) A.O. 281.

(*f*) (1914) 36 All. 195, 41 I.A. 84, 23 I.C. 365.

(*g*) *Aga Mohammadally* v. *Venkatappayya* (1918) 35 Mad. L.J. 287, 48 I.C. 879; *Satrucherla Ramabhadra* v. *V. Surianarayanaraju* (1878) 2 Mad. 314.

(*h*) *Immani Seshayya* v. *Dronamraju Lakshminarasimha*, *supra*.

S. 62 (b) deposit and has realised a surplus in excess of the mortgage money he is liable to account for such surplus but the mortgagor must include a claim for it in his suit, the surplus being really mesne profits, for otherwise he will be barred from filing another suit (*i*).

Usufructuary mortgages under clause (a) sometimes fix a term when the right to recover possession arises. This is when the parties make an estimate of the rents and profits and agree that the mortgage will be discharged by possession for the term fixed. In such cases the mortgagor will not be entitled to recover possession before the expiry of the term, for "when the parties to a mortgage agree to certain terms it is the duty of both parties to adhere to the terms of the mortgage" (*j*).

But the mortgagor may on equitable grounds be allowed to redeem before the expiry of the term by reason of the conduct of the mortgagee. Thus in *Immani Seshayya* v. *Dronamraju Lakshminarasimha* (*k*) a usufructuary mortgage provided that the mortgage should be discharged by the rents and profits for 55 years less an annual sum of Rs. 60 to be paid out of the rents and profits to the mortgagor. The mortgagee did not make these payments to the mortgagor, and it was held that he was bound to apply the sums to the reduction of the debt, so that the mortgagor could redeem within the fixed period as soon as the debt was discharged. See in this connection the note "When the right of redemption arises" under sec. 60, and the case of *Chhotku Rai* v. *Baldeo* (*l*).

Clause (b).—This clause in the old section referred to the one case in which the mortgagee took the profits in lieu of interest. It has now been expanded in order to cover all the classes of usufructuary mortgage as defined in sec. 58 (d) which are not included in clause (a). There are three classes in sec. 58 (d). These are when the whole or part of the rents and profits are taken :

(1) in lieu of interest,

(2) in payment of the mortgage money,

(3) part in lieu of interest and part in payment of mortgage money.

Class (2) is covered by clause (a) ; and clause (b) covers classes (1) and (3).

In class (1) the interest is part of the mortgage money and the mortgagor redeems when he tenders the balance of the mortgage money, *i.e.*, the principal. If the usufructuary mortgagee leases the property to the mortgagor for a rent equivalent to the interest so that the lease and mortgage are one transaction the mortgagor cannot redeem without payment of arrears of rent (*m*). But if the lease and the mortgage are independent transactions the mortgagor can redeem on payment of the principal money irrespective of the amount due under the lease (*n*).

In class (3) part of the rents and profits is set apart as equivalent to interest and the rest or part of the rest goes in reduction of the principal.

If no term is fixed and if the contract is for payment of the debt out of the rents and profits alone, the mortgagor would be entitled to redeem when the principal was discharged out of the residue or part of residue of the rents and profits. Otherwise the mortgagor could redeem at any time on payment of the balance of the mortgage money. If a term

(*i*) *Rukhminibai* v. *Venkatesh* (1907) 31 Bom. 527.

(*j*) *Narasimha Rao* v. *Seshayya* (1925) 48 Mad. L.J. 363, 366, 90 I.C. 138, ('25) A.M. 825 ; *Rangayya Naidu* v. *Basana* (1926) 94 I.C. 639, ('26) A.M. 594 ; *Subratan* v. *Dhanpat Godariya* (1932) 54 All. 1041, 1932 All. L.J. 1021, 143 I.C. 409, ('33) A.A. 70.

(*k*) (1930) 57 Mad. L.J. 900, 124 I.C. 282, ('30) A.M. 160 ; *Jaiju Rai* v. *Gobind Tiwari* (1884) 6 All. 308 ; *Narasimha Rao* v. *Seshayya*, *supra*.

(*l*) (1912) 34 All. 659, 17 I.C. 340.

(*m*) *Imdad Hasan* v. *Badri Prasad* (1898) 20 All. 401, 407.

(*n*) *Khuda Bakhsh* v. *Alim-un-nissa* (1905) 27 All. 313.

is fixed the right of redemption would arise at the expiry of the term, and there would be an account to ascertain the balance due unless such account were dispensed with by the terms of the mortgage.

In *Subban Chettiar* v. *Rangan Chetti* (*o*) there was a usufructuary mortgage to *A* for a term of 12 years, then a second usufructuary mortgage to *B* who was to redeem *A* and take possession for a further term of 10 years, and a third mortgage to *C*. *B* failed to redeem *A* at the end of the first term and so *C* redeemed *A* and took possession. Then *B* sued to redeem *C* as first mortgagee and *C* delayed giving possession for 15 months *C* then sued to redeem *B* at the expiry of the second term of 10 years. *B* was not entitled to add the period of 15 months to his term. Whatever remedy *B* might have in damages or otherwise for *C*'s wrongful conduct, he could not extend the period of the mortgage.

If by the terms of the mortgage, part of the rents and profits are to be taken in lieu of interest and the balance paid to the mortgagor, arrears of such balance should be deducted in the redemption suit (*p*).

Anomalous mortgages.—Sec. 62 applies to usufructuary mortgages pure and simple and has no application to anomalous mortgages which contain a covenant to pay (*q*). To an anomalous mortgage the provisions of sec. 60 apply.

Usufructuary mortgage and deed of further charge.—If the usufructuary mortgage is followed by a deed of further charge or a puisne simple mortgage then in the absence of a covenant for consolidation the mortgagor is entitled to redeem each mortgage separately (*r*). He may recover possession from the usufructuary mortgagee by suit under sec. 62 and then redeem the simple mortgage by suit under sec. 60. In an Oudh case (*s*) it was said that sec. 62 has no application where after the execution of a usufructuary mortgage other mortgages by way of further charge have been executed by the same mortgagor. This is incorrect, and the Privy Council have observed that sec. 62 is not in any way inconsistent with the provisions of sec. 61 (*t*). On the other hand if there is a contract for consolidation, the mortgagee is entitled to remain in possession until the further charge or mortgage is paid off (*u*).

Illustration.

A borrowed Rs. 5,500 from *B*, and in July 1881 executed a usufructuary mortgage of his village to *B* for a period of 15 years. In November 1881 *A* borrowed a further sum of Rs. 2,500 from *B* and executed another document promising to repay the sum with interest within the period of 15 years. The deed then provided: "I shall first pay up this debt, including principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgage money. Without the payment of this debt I cannot redeem the mortgaged village." Held that this subsequent deed created a further charge on the village and that he was entitled to remain in possession until both debts were discharged: *Aditya Prasad* v. *Ram Ratan Lal* (1930) 5 Luck. 365, 57 I.A. 173, 175, 123 I.C. 191, ('30) A. PC. 176.

(*o*) (1927) 51 Mad. L.J. 706, 99 I.C. 550, ('27) A.M. 178.

(*p*) *Bihari Lal* v. *Shib Lal* (1924) 46 All. 633, 82 I.C. 25, ('24) A.A. 591; *Mahabal Singh* v. *Rajeshwari* (1927) 101 I.C. 200, ('27) A.O. 208.

(*q*) *Panaganti* v. *Maharaja of Venkatagiri* (1927) 50 Mad. 180, 54 I.A. 68, 100 I.C. 86, ('27) A.PC. 32.

(*r*) *Khuda Bakhsh* v. *Alim-un-nissa* (1905) 27 All. 313; *Tajjo Bibi* v. *Bhagwan Prasad* (1894) 16 All. 295.

(*s*) *Zahid Ali* v. *Kedar Nath* (1914) 17 O.C. 383, 27 I.C. 427, followed by one of the Judges *Lallu Singh* v. *Ram Nandan* (1930) 52 All. 281, 124 I.C. 733, ('30) A.A. 186.

(*t*) *Panaganti* v. *Maharaja of Venkatagiri*, *supra*.

(*u*) *Aditya Prasad* v. *Ram Ratan Lal* (1930) 5 Luck. 365, 57 I.A. 173, 123 I.C. 191, ('30) A.PC. 176, approving *Janardan* v. *Anant* (1908) 32 Bom. 386; *Ram Ratan Lala* v. *Babu Aditya* (1928) 3 Luck. 459, 112 I.C. 481, ('28) A.O. 273; *Har Prasad* v. *Ram Chandar* (1922) 44 All. 37, 63 I.C. 750, ('22) A.A. 174 F.B.; *Ram Das Chaube* v. *Mst. Simirkha Kuar* (1907) 2 I.C. 144; *Paras Ram Chaubey* v. *Sheo Dhan Panday* (1932) 138 I.C. 492, 1932 All. L.J. 506, ('32) A.A. 568; *Jagannath Kunwar* v. *Jaipal* (1933) 55 All. 359, 1933 All. L.J. 151, 142 I.C. 410, ('33) A.A. 257.

S. 63

Accession to mortgaged property.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of transferred ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, *with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum.*

In the case last mentioned, the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Amendment.—The words "with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum" were substituted for the words "at the same rate of interest" by the amending Act 20 of 1929. This amendment was necessary in order to provide for cases where the mortgage deed is silent as to the rate of interest.

Accessions.—The section deals with—

(1) Natural accessions.
(2) Acquired accessions which are separable.
(3) Acquired accessions which are inseparable.

This section refers to the mortgagor's rights to accessions made by the mortgagee, while sec. 70 refers to the mortgagee's right to accessions made by the mortgagor. Natural accessions, unless they have been the subject of a special contract, follow the general rule, *accessio cedit principali*, of which secs. 70 and 108 (d) are examples.

Accessions are treated as accessions to the mortgaged property; but although the section does not make it a condition that the mortgagee should have made the acquisition by availing himself of his position as such mortgagee, yet the judgment of the Privy

Council in *Sorabjee* v. *Dwarkadas* (v) shows that the section is only an application of the equitable principle enacted in sec. 90 of the Trusts Act. That section is as follows:— **S. 63**

"Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, *by availing himself of his position as such*, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage."

As to this section their Lordships in the case cited above said:—

"In their Lordships' opinion there is nothing inconsistent with that section (s. 90, Trusts Act) in the provisions of sec. 63 of the Transfer of Property Act as to accessions to mortgaged property and the terms on which the mortgagor may upon redemption obtain the benefit of them. The word 'accession' is not defined in the Act, but the section dealt expressly with accessions which have been acquired at the expense of the mortgagee and would appear to be clearly applicable to cases in which a subordinate tenure has admittedly been acquired by the mortgagee as an accession to the mortgaged property. Whether the term 'accession' as used in this section should also be held to cover acquisitions which the mortgagee has made for his own benefit but is bound, under sec. 90 of the Trusts Act to hold for the benefit of the mortgagor need not be discussed. Sec. 90 itself provides for the mortgagor bearing the cost of the acquisition in such a case, but sec. 63 goes somewhat further and contains as well an express provision as to profits arising from the accession where the mortgage is usufructuary. In the present case it is sufficient to say that their Lordships are clearly of opinion that sec. 63 of the Transfer of Property Act, cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit *in circumstances which do not bring him within sec. 90 of the Indian Trusts Act*."

Sec. 90 of the Trusts Act enacts a wider rule than that in sec. 63 and deals with a tenant for life, a co-owner, a mortgagee or other qualified owner who by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested. An acquisition by the mortgagee is an advantage gained and illustration (c) to sec. 90 shows that such an acquisition may not be an accession though the Privy Council refrain from saying that this is necessarily the case. But their Lordships do decide that when the acquisition is an accession made by the mortgagee for his own benefit, the mortgagor is not entitled to it except under the equitable rule enacted in sec. 90 of the Trusts Act. In other words, the mortgagor must show that the mortgagee *by availing himself of his position as such* acquired the accession in derogation of the rights of the mortgagor. The case before the Privy Council was that of a mortgagee of a share of a village who also became a co-owner by the purchase of a half share in the equity of redemption and by the purchase of two fields. He required these fields for a ginning factory and therefore purchased the tenancy right in them during the continuance of the mortgage. On redemption the tenancy right was claimed as an accession, but the Privy Council held that to justify the mortgagor's claim it was incumbent on him to show that the tenancy right was acquired under such circumstances as to bring the acquisition within sec. 90 of the Trusts Act. Their Lordships dissented from a decision of the Calcutta High Court (w) that the mortgagor was entitled to a subordinate tenure acquired by the mortgagee

(v) (1932) 59 I.A. 366, 371, 36 C.W.N. 947, 56 Cal. L.J. 65, 63 Mad. L.J. 116, 34 Bom. L.R. 1310, 1932 All. L.J. 869, 136 I.C. 557, ('32) A.PC. 199.

(w) *Ram Birch Narain* v. *Ambika Prasad* (1912) 17 C.W.N. 586, 19 I.C. 90.

S. 63

without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them.

Rajah Kishendatt v. *Rajah Mumtaz Ali* (x) was a case decided by the Privy Council before the Transfer of Property Act, but the same principle was applied. In that case the mortgagee of a taluka, during the continuance of the mortgage, acquired subordinate tenures known as birts. Their Lordships referred to the general principle of English law "that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption." But this rule was only referred to as an equity applicable to the case and it was held to be applicable because on the facts their Lordships had found that the mortgagee taking advantage of his position as *de facto* talukdar had acquired the birts on very favourable terms and had allowed them to merge in the taluka and that it would be inequitable to allow him on redemption to revive them for his benefit.

During the continuance of the mortgage.—An acquisition made after a decree extinguishing the mortgage is not within the section (y). But when the usufructuary mortgagee of a share of a village took a mortgage by conditional sale of a tenant's holding and foreclosed the tenant after the expiry of the usufructuary mortgage, the mortgagor was entitled to the tenancy as an accretion (z).

Natural accession.—Natural accessions are, under sec. 70, additions to the security and, becoming incorporated in it, are subject to redemption. When the area of a village mortgaged without specification of boundaries was increased at a survey settlement the mortgagor was on redemption entitled to the increase (a). When the mortgagee was, by mistake, put in possession of a greater area of land the mortgagor was entitled to redeem the excess as well (b).

Acquired accession—separable.—Such accession being separable, the mortgagor is not bound to take them, but if he does take them he must pay the mortgagee the expense of acquiring them. In the case cited above (c) the mortgagor had to pay the mortgagee the expense incurred in acquiring the sub-tenures. The mortgagor can take the accretion even if the mortgagee has acquired it benami in the name of a relation (d). In a Bombay case before the Act, Government trees standing on the land mortgaged and purchased at a favourable rate by the mortgagee, were held to be accretions to which the mortgagor was entitled on redemption on payment of the purchase price and other reasonable expenses (e). The mortgagor's right only accrues on redemption and so he may be held to have abandoned his right if he does not at the time of redemption tender to the mortgagee the cost incurred by the mortgagee in making the acquisition (f). Adjoining Government waste land brought into cultivation by the mortgagee is not an accession (g).

Acquired accession—inseparable.—When the accessions are inseparable the mortgagor has no option but to take them on redemption. He is therefore liable to

(x) (1880) 5 Cal. 198, 6 I.A. 145, 159.
(y) *Sivananjiah* v. *Sithay Gouder* (1921) 41 Mad. L.J. 490, 70 I.C. 867, ('21) A.M. 627.
(z) *Mst. Kalki* v. *Dinabandhu* (1909) 10 Cal. L.J. 83, 3 I.C. 395; *Mohanlall* v. *Chaodhry* (1901) 14 C.P.L.R. 169.
(a) *Sadashiv Anant* v. *Vithal* (1874) 11 Bom. H.C.R. 32 A.C.J.
(b) *Nanchi* v. *Shitili* (1923) 72 I.C. 1002, ('23) A.B. 42.
(c) *Rajah Kishendatt* v. *Rajah Mumtaz Ali* (1880) 5 Cal. 198, 6 I.A. 145; *Mst. Kalki* v. *Dinabandhu* (1909) 10 Cal. L.J. [illegible] I.C. 395; *Mohanlall* v. *Chaodhry* (1901) 14 C.P. L.R. 169.
(d) *Venkatachariar* v. *Srinivasa* (1909) 4 I.C. 357.
(e) *Bakshiram* v. *Darku* (1873) 10 Bom. H.C.R. 369.
(f) *Ram Lagan* v. *Mary Coffin* (1926) 97 I.C. 159, ('26) A.P. 572.
(g) *Maung Shwe* v. *Pethiah* (1923) 1 Bur. L.J. 262, 83 I.C. 787, ('23) A.R. 127; *The Dun* v. *The San* (1911) 11 I.C. 898.

pay the cost only (1) if the acquisition was necessary to preserve the property from destruction, forfeiture or sale, or (2) if the acquisition was made with his consent. Thus if a mortgagee makes the necessary repairs to a well with the consent of the mortgagor, the mortgagor must pay the cost (*h*). But when the mortgagee without the consent of the mortgagor added an upper storey to a building (*i*) or constructed a well (*j*), or planted a grove (*k*), he was not entitled to recover compensation from the mortgagor. The last case may seem inconsistent with the Bombay case already cited (*l*) but in the Bombay case the trees were Government property and so possibly capable of separate enjoyment. In *Raghunandan Rai* v. *Raghunandan* (*m*) a Full Bench of the Allahabad High Court said that a mortgagee who had planted a grove without the consent of the mortgagor could fell the trees and remove the timber; but in *Nagesgar Rai* v. *Nand Lal* (*n*) the same Court said that the matter must be considered from the mortgagor's point of view and that the grove cannot be treated as separable for although the mortgagee might remove the timber that would be destructive of the land. In the latter case the Court allowed the mortgagor a grove of 110 mango trees as an inseparable accession as they had been planted without his consent. The distinction between these two cases is that in the former the trees were regarded as separable and in the latter as inseparable. This, it is submitted, is a question of fact. If the trees are young saplings the mortgagee may remove them or receive compensation, but if the trees are old trees deeply rooted the mortgagor is entitled to keep them if they have been planted without his consent. In another case the grove was planted with the mortgagor's consent and the mortgagee was allowed compensation (*o*). The Bombay High Court has held that, whether or not the mortgagor can claim a tree planted by the mortgagee as an accession, the mortgagee does not commit waste if he cuts down a tree planted by himself, in the absence of evidence that it is within the meaning of sec. 76 (e) destructive or permanently injurious to the property (*p*). A house has been held to be an accession that is separable (*q*) but that view had been dissented form (*r*). In an Allahabad case (*s*) the mortgagee rebuilt a house that was in a dilapidated condition when mortgaged, and the Court held that as the house was already fallen down there was no question of preserving it from destruction and that the mortgagor was not liable for the cost of rebuilding. Such a case would now probably fall under sec. 63A. S. 63.

When the mortgagee has evicted a tenant of tenancy lands, the lands are an accession to the mortgaged property to which the mortgagor is entitled (*t*). The same rule applies when the mortgagor is a khot and the mortgagee purchases khot nisbat land without the Khot's permission (*u*).

(*h*) *Durga Singh* v. *Naurang Singh* (1895) 17 All. 282.

(*i*) *Arunachella* v. *Sithayi* (1896) 19 Mad. 327; *Rupan* v. *Champa Lal* (1915) 37 All. 81, 26 I.C. 521; *Sammo* v. *Abdul Wahid* (1883) All. W.N. 208.

(*j*) *Rajaram* v. *Vithal* (1914) 10 Nag. L.R. 166.

(*k*) *Zubeda* v. *Sheo Charan* (1900) 22 All. 83; *Madho Ram* v. *Shamsuddin* (1883) All. W.N. 203; *Jahangir* v. *Ram Harakh* (1926) 92 I.C. 262.

(*l*) *Bakshiram* v. *Darku* (1873) 10 Bom. H.C.R. 369.

(*m*) (1921) 43 All. 638, 61 I.C. 812, ('21) A.A. 353 F.B.; *Lallu Singh* v. *Raghunandan* (1925) 85 I.C. 690, ('25) A.A. 794: *Ram Brichh Singh* v. *Chhakauri Singh* (1925) 86 I.C. 929, ('25) A.A. 748.

(*n*) (1926) 48 All. 70, 88 I.C. 908, ('26) A.A. 67, followed in *Ma E* v. *Maung Po Ko* (1930) 8 Rang. 233, 126 I.C. 586, ('30) A.R. 63 and *Ajodhia* v. *Indra* (1929) 118 I.C. 405, ('29) A.A. 380.

(*o*) *Parmanand Pandit* v. *Mata Din* (1925) 47 All. 582, 87 I.C. 477, ('25) A.A. 427.

(*p*) *Ramchandra* v. *Shripati* (1926) 50 Bom. 692, 99 I.C. 400, ('26) A.B. 595.

(*q*) *Gopi Lal* v. *Abdul Hamid* (1928) 26 All. L.J. 887, 116 I.C. 91, ('28) A.A. 381.

(*r*) *Nannu Mal* v. *Ram Chandra* (1931) 53 All. 334, 132 I.C. 401, ('31) A.A. 277 F.B.

(*s*) *Kallu* v. *Ganesh* (1929) 116 I.C. 747, ('29) A.A. 348.

(*t*) *Ram Rai* v. *Maheshwar Prasad* (1925) 78 I.C. 466, ('25) A.P. 336; *C. Venkatacharlar* v. *Srinivasa* (1909) 4 I.C. 257; *Mahanlall* v. *Chaudhry* (1901) 14 C.P.L.R. 160.

(*u*) *Kondu* v. *Mahadeo* (1932) 34 Bom. L.R. 855, 139 I.C. 812, ('32) A.B. 526.

S. 63A

Improvements to mortgaged property.

63A. (1) *Where mortgaged property in possession of the mortgagee has during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not save only in cases provided for in sub-section* (2), *be liable to pay the cost thereof.*

(2) *Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.*

Amendment.—This section was inserted by the Amending Act 20 of 1929. Before that, the Act was silent as to improvements by a mortgagee.

Improvements.—As the Act formerly made no mention of improvements, the Madras High Court held that a charge for improvements was not admissible (*v*), and so did the Allahabad High Court (*w*). The mortgagor was liable for the cost only if the improvements were accessions under sec. 63 or repairs under sec. 72 and necessary for the preservation of the property (*x*).

In an old Bombay case (*y*), decided before the Act, Couch, C.J., allowed a mortgagee to charge double the cost of the original house for rebuilding it after a fire. The learned Chief Justice cited with approval the following passage from Fisher (*z*):—

> "The mortgagee in possession will be allowed the cost for proper and necessary repairs to the estate; and if buildings become ruinous, so as to be unfit for use, he may complete or pull them down and rebuild for the preservation of his security. And the rebuilding or repairing may be done in an improved manner, and more substantially than before but so that the work be done providently, and that no new or expensive buildings be erected for purposes different from those for which the former buildings were used; for the property when restored ought to be of the same nature as when the mortgagee received it; and if it be thus wholly or in part converted from its original purpose, the money expended will not be allowed to be charged upon it."

(*v*) *Arunachella Chetti* v. *Sithayi* (1896) 19 Mad. 327 followed in *Jangi Ram* v. *Sheoraj* (1916) 30 I.C. 234.

(*w*) *Rupan Singh* v. *Champa* (1915) 37 All. 81, 26 I.C. 521; *Chhammu Lal* v. *Bhajan Lal* (1924) 83 I.C. 985, ('24) A.A. 47.

(*x*) *Rahmatullah Beg* v. *Yusuf Ali* (1912) 10 All. L.J. 124, 16 I.C. 635; *Sam*[illegible]*bdul Wahid* (1883) A.W.N. 208; *Durga Singh* v. *Naurang* (1896) 17 All. 282; *Rupan Singh* v. *Champa*, *supra*; *Amba Prasad* v. *Wahidullah* (1922) 44 All. 708, 712, 68 I.C 261, ('22) A.A. 405, 407.

(*y*) *Mancharsha* v. *Kamrunisa* (1869) 5 Bom. H. C.R. 109 A.C.

(*z*) Fisher, 7th Ed. p. 728.

In *Sandon* v. *Hooper* (*a*) Lord Langdale said that the mortgagee must not be allowed to "*improve the mortgagor out of his estate*" but admitted that there might be a case for inquiry into improvements. In *Shepard* v. *Jones* (*b*) Jessel, M.R., assumed that a mortgagee would be allowed to charge for lasting improvements properly undertaken. This was followed by the Privy Council in a case from Jamaica (*c*), and the Bombay High Court adopted the same rule in cases decided before the amendment (*d*).

The present section lays down a uniform rule, and provides that the mortgagor is liable to pay the cost of the improvements only if they are necessary to preserve the property from destruction or deterioration, or (2) necessary to prevent the security from becoming inadequate, or (3) done under the orders of a public authority such as a Municipality. If the improvement fulfils any one of these tests, the cost is allowed to the mortgagee as an addition to the principal money secured by the mortgage. Interest at the rate specified in the section is allowed on the cost; but in a case before the Act, the Privy Council disallowed interest on money spent on improvements (*e*). Profits due to the improvements are credited to the mortgagor (*f*). In the case of accidental destruction by fire, the mortgagee would not, it is submitted, be allowed to rebuild a whole house as in the Bombay case already cited (*g*), but he would have to pursue his remedy under sec. 68. In the Punjab where the Act is not in force, reasonable expenditure on permanent improvements is allowed (*h*). If the improvement is not permanent he is only allowed to remove the material (*i*).

Contract to the contrary.—The section safeguards the right of private contract. The terms of the mortgage deed may allow the mortgagee to make improvements and to charge the cost to the mortgagor and in that case the mortgagee is entitled to a charge under the contract. Instances of such contracts are cited in footnote (*j*). A condition allowing the mortgagee to make reasonable improvements will not justify the demolition and rebuilding of the house at a cost equivalent to nine times the mortgage debt (*k*). In one reported case (*l*) the mortgagee was by the terms of the deed allowed to rebuild in the event of destruction of a house by fire. On the other hand if the mortgagee is *prohibited* from making improvements, the application of this section would be excluded.

Renewal of mortgaged lease.

64. Where the mortgaged property is a lease, * * * and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

(*a*) (1843) 6 Beav. 246, 248.

(*b*) (1882) 21 Ch. D. 469, 476 C.A.

(*c*) *Henderson* v. *Astwood* (1894) A.C. 150, 163.

(*d*) *Nijalingappa* v. *Chanbasawa* (1919) 43 Bom. 69, 47 I.C. 751; *Dnyanu Laxuman* v. *Fakira* (1921) 45 Bom. 1301, 64 I.C. 16, ('21) A.B. 250; *Ramappa* v. *Yellappa* (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150 (five times mortgage amount spent on improvements—disallowed).

(*e*) *Kishori Mohun* v. *Gunga Bahu* (1896) 23 Cal. 228, 22 I.A. 183.

(*f*) Cf. *Bombas* v. *King* (1886) 33 Ch. D. 279, 288; *Wasu Ram* v. *Mahomed Ramzan* (1940) A.L. 199, 42 P.L.R. 196, 188 I.C. 570.

(*g*) *Mancharsha* v. *Kamrunisa* (1869) 5 H.C.R. 109 A.C.

(*h*) *Labhu Ram* v. *Abdulla* (1923) 75 I.C. 183, ('23) A.L. 587; *Kirpa Ram* v. *Jowanda* (1922) 66 I.C. 755, ('22) A.L. 252 (improvements with the consent of the mortgagor); *Rikhi Kesh* v. *Jwala Sahai* (1919) P.R. 78, 52 I.C. 862; *Bali Ram* v. *Chuha Ram* (1898) P.R. 18; *Sher Singh* v. *Nihalu* (1896) P.R. 67; *Prabh Dial* v. *Bhai Sawaya* (1893) P.R. 67.

(*i*) *Pal Singh* v. *Bhola Singh* (1934) 149 I.C. 969, ('34) A.L. 242.

(*j*) *Mahl Singh* v. *Amar Nath* (1926) 7 Lah. 212, 94 I.C. 152, ('26) A.L. 480; *Qasim Bux* v. *Bhagwandeen* (1930) 126 I.C. 307, ('30) A.O. 337; *Abdul Aziz* v. *Rahmat Ullah* (1933) 148 I.C. 234, ('33) A.L. 155.

(*k*) *Surajpur* v. *Diwan Chand* (1920) 59 I.C. 764.

(*l*) *Saharomahet* v. *Antha Dalji* (1890) 14 Bom. 28; *Cheddi Lal* v. *Babu Nandan* (1944) A. 204.

Ss. 64, 65

Amendments.—The old section referred to a lease for a term of years. The "for a term of years" have been omitted by the Amending Act 20 of 1929 as unnecessary.

Renewal of Mortgaged Lease.—The mortgagee obtaining a renewal of a lease is one particular mode of accession. Under illustration (d) to sec. 3 of the Specific Relief Act a mortgagee obtaining a renewal of a lease in his own name is a trustee for those interested in the original lease. This is the law laid down in *Rowe* v. *Chichester* (*m*) that if the trustees, mortgagees and persons interested obtained a renewal, the new lease is always subject to the trusts and limitations of the old lease.

In a recent case before the Privy Council (*n*) their Lordships said that this section may be said to give statutory effect to the rule in *Rakestraw* v. *Brewer* (*o*) referred to in *Rajah Kishendatt's* case (*p*), as it was apparently thought better to provide for this particular acquisition by a mortgagee instead of leaving it to the general provisions of sec. 90 of the Indian Trusts Act. In *Rakestraw* v. *Brewer* (*q*), there was a mortgage of a lease of chambers in the Temple renewed for an additional term as a favour to the mortgagee who was a brother of a Bencher of the Inn, but the mortgagor was allowed to redeem and this was for the reason that "this additional term comes from the old root, and is of the same nature, subject to the same equity of redemption." The same principle was applied to a mortgage of a jote (*r*). The same principle has been applied to a case where the mortgagee of a leasehold with option to purchase the freehold reversion had purchased the freehold reversion (*s*).

Under sec. 72 (e) the mortgagee is entitled to recover the cost of renewal and may add it to the mortgage money. This is also the English law (*t*).

Implied contracts by mortgagor.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease, * * * that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down

(*m*) (1773) Amb. 715, 719: *Keech* v. *Sandford* (1726) Cas. Temp. King 61.

(*n*) *Sorabjee* v. *Dwarkadas* (1932) 59 I.A. 368, 36 C.W.N. 947, 56 Cal. L.J. 65, 63 Mad. L.J. 126, 34 Bom. L.R. 1310, (1932) All. L.J. 869, 138 I.C. 557, ('32) A.PC. 199.

(*o*) (1729) P. Wms. 511.

(*p*) (1879) 5 Cal. 198, 6 I.A. 145.

(*q*) (1729) 2 P. Wms. 511, 513.

(*r*) [illegible] *Singh* v. *Haribishen* (1901) 6 Cal. W.N. 872.

(*s*) *Nelson* v. *Hannam* (1943) 1 Ch. 59.

(*t*) *Manlove* v. *Bale and Bruton* (1688) 2 Vern. 84

to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

Amendment.—This section contained in its penultimate paragraph the following exception:—

"Nothing in clause (c), or in clause (d), so far as it relates to the payment of the future rent, applies in the case of an usufructuary mortgage."

This paragraph has been omitted by the Amending Act 20 of 1929, as the mortgagor is under an obligation to preserve the security and is liable to pay public charges and rent when the usufructuary mortgagee is not in possession.

Clause (d) of the old section referred to a lease for a term of years. But the words "for a term of years" have been omitted as unnecessary.

Contract to the contrary.—The mortgagor's covenants implied by this section are subject to any express contract the parties may have entered into. Such a contract may be presumed when the mortgagee was fully aware of the nature and extent of the mortgagor's title (*u*).

Estoppel.—Apart from the implied covenants for title referred to in this section there is a title by estoppel, for a mortgagor cannot derogate from his grant so as to defeat the mortgagee's title (*v*); nor can the mortgagor set up a title of a third person (*w*); or

(*u*) *Par[illegible]* (1906) 4 Mad. L.T. 437.

(*v*) *Hillaya Subbaya* v. *Narayanappa* (1912) 36 Bom. 185, 12 I.C. 918; *Chote Lal* v. *Sheopal* (1911) 33 All. 235, 9 I.C. 217; *Abdul Ahad* v. *Brij Narain Rai* (1935) All. L.J. 214, 153 I.C. 964, ('35) A.A. 269.

(*w*) *King* v. *Smith* (1900) 2 Ch. 425; [illegible] *Nath* v. *Mirza Abdul* (1909) 10 Cal. L.J. 150, 1 I.C. 264, citing *Doe* v. *Stone* (1846) 3 C.B. 176; *Joti Prasad* v. *Asia* (1908) 6 All. L.J. 5; *Rauffiban* v. [illegible] (1912) 16 Cal. L.J. 264, 16 I.C. [illegible]; *Damodar* v. *Rama Row* (1915) 39 Mad. 101, 29 I.C. 192.

S. 65 allege that the property does not belong to him (*x*). Even when the mortgagor is a trustee he has not been allowed to set up the trust as a defence for himself (*y*). Banerjee, J., in *Srimati Mallika* v. *Ratanmani* (*z*) held that there was no estoppel when the mortgagor was a trustee for a public purpose. The correctness of this decision has been doubted (*a*). But in such a case there is no estoppel against a succeeding trustee (*b*). The principle of estoppel is, however, not applicable when the mortgage is illegal (*c*).

Clause (a): Covenant for title.—The mortgagor's covenant for title is similar to that of a vendor under sec. 55 (2). It is twofold (1) as to the *quantum* of interest and (2) as to the interest being transferable. The mortgagor covenants his title and his power to deal with it.

Illustration.

A mortgaged property to *B*. *A* sold the equity of redemption to *C*. On *C*'s death *B* sued *C*'s sons for sale of the property mortgaged. *C*'s sons pleaded that the property was wakf and that *A* was not entitled to mortgage it. Held that this defence was barred by sec. 65 (a): *Achhaibar Singh* v. *Rajmati* (1929) 51 All. 802, 121 I. C. 111, ('29) A.A. 483.

As there is no estoppel against a statute it would be open to the mortgagor to show that the mortgage was forbidden by law, *e.g.*, an occupancy holding in the United Provinces (*d*).

The combined effect of sec. 8 and sec. 65 (a) is that the mortgagor transfers all the interest he has (*e*), subject of course to the right of redemption that is reserved. A breach of the covenant for title gives the mortgagee the right to sue for the mortgage-money under sec. 68; and before the Act a right to sue for damages (*f*). In a Rangoon case (*g*) a mortgagee was allowed compensation for breach of the covenant for title after he had purchased the property mortgaged in execution of his decree for sale on the mortgage. It has been said that this clause imposes no duty on the mortgagor to disclose an incumbrance (*h*). But it is submitted that if the mortgagor mortgages, as unincumbered, property which is subject to an incumbrance, he commits a breach of the covenant that the interest he professes to transfer subsists.

Clause (b): Defence of title.—The mortgagee being entitled to the full benefit of the security has a right to protect the title of the mortgagor, sec. 72 (c). The mortgagor is therefore under an implied covenant to defend the title if he is himself in possession or to assist the mortgagee in defending the title if the mortgagee is in possession.

This same rule was applied before the Act, and following the English law (*i*), the Bombay High Court held that the mortgagor is bound to indemnify the mortgagee against expenses incurred in defending his title (*j*). The assistance which the section requires would be, as in the English cases cited, expenses of litigation and probably also evidence of title.

(*x*) *Bholanath Sen* v. *Balaram Das* (1922) 27 Cal. W.N. 607, 70 I.C. 982, ('22) A.PC. 382.

(*y*) *Gulzar Ali* v. *Fida Ali* (1884) 6 All. 24; *Babu Brij Ratan Das* v. *Raghunandan* (1923) 71 I.C. 944, ('23) A.P. 203.

(*z*) (1897) 1 Cal. W.N. 493.

(*a*) *Mahamaya Debi* v. *Haridas* (1915) 42 Cal. 455, 27 I.C. 400, per Mookerjee, J., at p. 469.

(*b*) *Narayan* v. *Chintaman* (1881) 5 Bom. 393; *Shri Ganesh* v. *Keshavrao* (1891) 15 Bom. 625; *Nandan* v. *Jumman* (1912) 34 All. 640, 17 I.C. 632.

(*c*) *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti* (1896) 19 Mad. 200.

(*d*) See *Lallu Singh* v. *Rama Nandan* (1930) 52 All. 281, 124 I.C. 733, ('30) A.A. 136 F.B.

(*e*) *Chiranji Lal* v. *Bhagwan* (1911) 8 I.C. 826.

(*f*) *Dwarka Das* v. *Ruttun Singh* (1867) 2 Agra 199.

(*g*) *Ma Gun* v. *Maung Lu Gale* (1925) 85 I.C. 223, ('25) A.R. 130.

(*h*) *Ramkrishna* v. *Ganesh Narain* (1934) 150 I.C. 20, ('34) A.N. 149.

(*i*) *Godfrey* v. *Watson* (1747) 3 Atk. 517; *Sandon* v. *Hooper* (1843) 6 Beav. 246.

(*j*) *Damodar* v. *Vamanrao* (1885) 9 Bom. 435.

Clause (c): Public charges.—The mortgagor when in possession and after his death his heir is under a liability to pay public charges such as Government revenue and Municipal taxes (*k*). The same liability attaches under sec. 76 (c) to the mortgagee when in possession. The Madras High Court has held that when the mortgagor sells the equity of redemption, the purchaser is under no obligation to the mortgagee to pay public charges, though it may be to his interest to do so (*l*). The extinction of the right of redemption by a Court sale on the mortgagee's decree puts an end to the implied covenant of the mortgagor (*m*). If a stranger acquires the equity of redemption by adverse possession he is under no duty to the mortgagee to pay the revenue, and if after such acquisition the land is sold for arrears of revenue and purchased by him he holds it free of the mortgage (*n*).

If the mortgagor fails to pay and the property is sold for arrears of revenue the mortgagor if he purchases the property is still subject to the mortgage, for he cannot take advantage of his own wrong in order to better his position (*o*). The mortgagor has no claim against the mortgagee for moneys spent in payment of public charges whether accruing during, or before, the period of the mortgage, for he pays them for his own benefit, and if the mortgagee pays these on behalf of the mortgagor he cannot recover them from a subsequent mortgagee (*p*). In *Falcke* v. *Scottish Imperial Insurance Co.* (*q*) Cotton, L.J., cited as an example a mortgagor spending money in order to prevent a mortgaged mine from being flooded. Again in *Saunders* v. *Dunman* (*r*) a mortgagor was allowed no charges for expenses incurred in taking out letters of administration to perfect his title. A mortgagee on the other hand is entitled to be reimbursed for expenses incurred in the payment of public charges—sec. 72 (b); and if the land is sold through no fault of his he is entitled to a charge on the surplus sale proceeds, sec. 73.

Clause (d): Leaseholds.—If the mortgaged property is leasehold, the mortgagor covenants that he has paid the rent and observed the conditions of the lease for the period anterior to the mortgage. For the future, he covenants that as long as the mortgagee is not in possession he will pay the rent and perform the conditions of the lease. This clause has been held to imply that the mortgagee is liable to pay the rent when he takes possession (*s*). This is a liability to the mortgagor, for the mortgagee does not become liable to the lessor on the covenants in the lease that run with the land unless the mortgage is in English form and involves a complete transfer. See note under sec. 108 (j). It is to be observed that there is no covenant by the mortgagor to renew the lease. This is also the English law (*t*). See in this connection the commentary on sec. 72 (e).

Clause (e); Prior mortgages.—There is an implied covenant that the mortgagor will discharge prior mortgages, for otherwise the mortgagee may be deprived of his security.

A mortgagor left a sum of money with a mortgagee and empowered him to redeem a prior mortgage. The sum proved to be insufficient and the mortgagor was held liable under the principle of this clause to pay the excess amount incurred in discharging the prior mortgage (*u*).

(*k*) *Balwantrao* v. *Tulsa* (1937) 171 I.C. 40, (1937) A.N. 225.

(*l*) *Srinivasa Chari* v. *Gnanaprakasa* (1907) 30 Mad. 67, 70.

(*m*) *Balkrishna Mhadshet* v. *Vishwanath* (1895) 19 Bom. 528.

(*n*) *Subbiah* v. *Rami Reddi* (1916) 39 Mad. 959, 33 I.C. 326.

(*o*) *Sanagapally Lakshmayya* v. *Intoori Bolla Reddy* (1903) 26 Mad. 385; *Po Dua* v. *K. M. T. T. S. Chetty* (1919) 51 I.C. 574.

(*p*) *Syed Ibrahim* v. *Arumugathayee* (1915) 38 Mad. 18, 16 I.C. 877.

(*q*) (1886) 34 Ch.D. 234, 248.

(*r*) (1878) 7 Ch.D. 825.

(*s*) *Vithal Narayan* v. *Shriram* (1905) 29 Bom. 391, citing *Kannye Loll* v. *Nistoriny* (1884) 10 Cal. 443; *Macnaghten* v. *Bhikaree* (1878) 2 Cal. L.R. 323.

(*t*) *Lacon* v. *Mertins* (1743) 1 Atk. 1, 4.

(*u*) *Gauri Shankar* v. *Bhairon* (1926) 98 I.C. 17, ('26) A.O. 207.

This covenant does not affect the mortgagee's right to redeem prior encumbrances himself under sec. 92. A breach of this covenant entitles the mortgagee to sue for the mortgage money under sec. 68, although there may be no personal covenant in the mortgage (v). If the mortgagee was not informed of the previous mortgage he has a cause of action to sue for the mortgage money as soon as he discovers it (w).

Benefit of the contracts.—The benefit of the covenants implied by this section runs with the land, so that not only the mortgagee but anyone claiming under him is entitled to enforce them. The burden of the covenants cannot be enforced against a purchaser of the equity of redemption (x). There is a similar provision in sec. 76 (6) of Law of Property Act, 1925.

Mortgagor's power to lease.

65A. (1) *Subject to the provisions of sub-section* (2), *a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.*

(2) (a) *Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.*

(b) *Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.*

(c) *No such lease shall contain a covenant for renewal.*

(d) *Every such lease shall take effect from a date not later than six months from the date on which it is made.*

(e) *In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.*

(3) *The provisions of sub-section* (1) *apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section* (2) *may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.*

Amendment.—This section is new and was inserted by Act 20 of 1929.

(v) *Singlee* v. *Tiruvengadam* (1890) 13 Mad. 192.
(w) *Radha Churn* v. *Parbuttee Churn* (1876) 25 W.R. 51.
(x) *Srinivasa Chari* v. *Gnanaprakasa* (1907) 30 Mad. 67, 71.

Whether section retrospective.—Section 63 of the amending Act 20 of 1929 expressly enacts that this section shall not have retrospective effect (*y*).

Mortgagor's power to lease.—As no provision was made in the Act, before the insertion of this section, for the mortgagor's power to lease, the cases were not consistent. It will be convenient to state separately the old law before the enactment of the section and the new law as it is under the section.

Old Law.—Under the English Common law the mortgagor, as pointed out by Jenkins, C.J., (*z*) had no power to lease, for in an English mortgage the mortgagor has made an absolute conveyance of his rights and is in possession as tenant on sufferance and one tenant on sufferance cannot make another (*a*). But the lease granted by the mortgagor was not wholly without any effect. Such a lease was binding on the mortgagor who granted it vis-a-vis the lessee as the mortgagor was estopped from disputing it. As against the mortgagor or against anyone other than a person having a title paramount to the mortgagor, *e.g.* the mortgagee, such a lease was a good lease and the lessee was entitled to the benefit conferred thereby, but so far as the mortgagee was concerned the lessee had no estate or interest as against him except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession. This was the position in England prior to the Conveyancing Act, 1881 (*b*). This rule was followed as to English mortgages (*c*) and in a case from Zanzibar where the mortgage was an absolute conveyance of the property to the mortgagee the Judicial Committee said that the mortgagor could not grant a lease that would bind the mortgagee (*d*). In view of the recent decisions of the Privy Council in *Ramkinkar*'s case (*e*) and *Jagadamba*'s case (*f*) that a mortgage in the form of an English mortgage does not amount to an absolute transfer of the whole interest of the mortgagor the reasonings adopted in the cases under foot-note (*c*) cannot any longer be supported. In the premises it has to be conceded that even before the new section was added a lease by an English mortgagor stood on the same footing as a lease by any other mortgagor. But as to Indian mortgages some cases followed the English rule and held that a mortgagor could not ordinarily without the concurrence of the mortgagee execute a lease which would be binding on the mortgagee (*g*). Other cases pointed out that the rule in England was not applicable as the mortgagor in India remains the owner and when in possession can *prima facie* exercise the rights of ownership (*h*). The question was therefore decided with reference to sec. 66 and it was held that the mortgagor could grant leases which were not wasteful in their effect on the mortgagee's security (*i*). This is the principle which Jenkins, C.J., in the case already cited (*j*) deduced from the old case of *Banee Pershad* v. *Reet Bhunjun Singh* (*k*) and as the law then stood this was the correct view, for a

(*y*) *Dasain Sahu* v. *Mst. Ramdulari* (1931) 10 Pat. 332, 133 I.C. 169, ('31) A.P. 210.

(*z*) *Balmukund* v. *Moti Lal* (1905) 20 Cal. W.N. 350, 32 I.C. 195.

(*a*) *Keech* v. *Hall* (1778) 1 Doug. (K.B.) 21, 1 Smith L.C., Ed. 13, p. 562; *Corbett* v. *Plowden* (1884) 25 Ch. D. 678; *Robbins* v. *Whyte* (1906) 1 K.B. 125.

(*b*) *Iron Trades Employers' Insurance Association Ltd.* v. *Union Land and House Investors Ltd.* (1937) 1 Ch. 313.

(*c*) *Macleod* v. *Kissan* (1906) 30 Bom. 250; *Rustomji* v. *Kesharji* (1926) 28 Bom. L.R. 1162, 96 I.C. 486, ('26) A.B. 567. See also *Mangtulal Bagaria* v. *Upendra Mohan* (1930) 57 Cal. 52, 125 I.C. 661, ('30) A.C. 335.

(*d*) *Official Assignee* v. *Cowasji Dinshaw* (1930) 123 I.C. 655, ('30) A.P.C. 290.

(*e*) (1938) 66 I.A. 50.

(*f*) (1940) 68 I.A. 67.

(*g*) *Wazir Ali* v. *Moti Chand* (1905) 2 All. L.J. 294 followed in *Quarban Ali* v. *Sah* ... *w Dayal* (1912) 16 I.C. 299; cf. *Chunni* v. *Thakirdas* (1879) 1 All.

(*h*) *Subbarajee* v. *Seetharamaraju* (1916) 39 Mad. 283, 28 I.C. 232.

(*i*) *Balmukund* v. *Motilal* (1915) 20 Cal. W.N. 350, 32 I.C. 195; *Tana Peena* v. *Mammakanthakath Uma* (1916) 34 I.C. 24; *Syed Husain* v. *Bank of Upper India* (1916) 30 I.C. 289; *Choley Singh* v. *Baldeo Bux* (1925) 88 I.C. 947, ('25) A.O. 542; *Mansoora* v. *Jagmohan* (1931) 6 Luck. 546, 132 I.C. 582, ('31) A.O. 256; *Saidunnissa* v. *Faiyaz Hasan* (1931) 69 I.C. 97, ('23) A.O. 1; *Nathu Singh* v. *Lachu Singh* (1928) 107 I.C. 156, ('28) A.P. 238; *Nladar Singh* v. *Ram Chander* (1936) All. L.J. 360, 154 I.C. 1009, ('35) A.A. 511; *Beni Prasad* v. *Parmeshwar Singh* (1928) 132 I.C. 361, ('31) A.P. 193; *Bank of Up. India* v. *Juggan* (1927) 100 I.C. 728, (' A.O. 148. See also *Ramlal* v. *Muhs* (1890) All. W.N. 59 and *Ghure* v. ... *Kunwar* (1914) 36 All. 248, 25 I.C. 102.

(*j*) *Balmukund* v. *Motilal* (1915) 20 Cal. W.N. 350, 32 I.C. 195.

(*k*) (1868) 10 W.R. 325.

S. 65A

lease is a subsequent alienation and under sec. 48 the right of the lessee is subject to that of the mortgagee. But Mookerjee, J., citing an English authority (*l*) laid down a different rule, *viz.*, that a mortgagor in possession may grant a lease conformable to usage in the ordinary course of management but is not competent to grant a lease on unusual terms or to authorize the use of the land in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage (*m*). In any event a lease by a mortgagor, even if not binding on the mortgagee, was certainly binding on the mortgagor who granted it and who was therefore estopped from disputing it.

New Law.—The present section settles this conflict of decisions and confers upon the mortgagor in possession a statutory power of leasing subject to any express provision in the deed of mortgage. The power is similar to that conferred on an English mortgagor in possession by sec. 18 of the Conveyancing Act, 1881, now sec. 99 of the Law of Property Act, 1925. The section has been said in a Rangoon case (*n*) to embody the same law as in the Calcutta case already cited (*o*). Under this section the validity of a lease granted by a mortgagor in possession is determined with reference to the section and the terms of the deed of mortgage without regard to its effect on the mortgagee's security. It has, however, been recently held in England that neither the Conveyancing Act, 1881, nor the Law of Property Act, 1925, took away the right of the mortgagor in possession to do what he could, apart from those Acts, do namely grant a lease to a third party which, without the consent of the mortgagee, will not be binding on him but will be binding as between the lessor and the lessee (*p*). It is submitted, on a parity of reasoning that this new section, which expressly gives power to the mortgagor in possession to grant a lease binding on the mortgagee, does not take away the old right of the mortgagor to grant a lease which, without the consent of the mortgagee, will not be binding on the mortgagee, but will be binding on the mortgagor. Therefore if the mortgagor grants a lease which is not in conformity of this section, the lease, while it will not be binding on the mortgagee, will still be binding on the mortgagor and such a lessee will be entitled to redeem the mortgagee.

Contract to the contrary.—The right of contract is saved by sub-section (3), for under the sub-section the terms of the mortgage deed may altogether exclude the power to lease. If the power is varied or extended, such varied or extended power must be exercised according to the terms of the deed and according to such of the provisions of the section as are not varied (*q*). If the deed altogether and absolutely excludes the power to lease, a lease in contravention of such covenant will amount to a breach of that covenant. But suppose the covenant in the deed only provides that the mortgagor shall not without the consent of the mortgagee exercise the powers conferred by this section and the mortgagor without such consent grants a lease, will that amount to a breach of that covenant? This interesting question arose in *Iron Trades Employers' Insurance Association*'s case (*supra*) and was answered in the negative. The covenant adds an additional condition to the statutory conditions and prohibits the granting of a lease which will be binding on the mortgagee and therefore the granting of the lease without consent cannot be said to be exercising the powers conferred by the statute but is rather the exercise of the common law right which does make the lease binding on the mortgagee. The lease not being binding on

(*l*) *Reynolds* v. *Ashby & Sons* (1903) 1 K.B. 87.

(*m*) *Madan Mohan Singh* v. *Raj Kishore* (1916) 21 Cal. W.N. 88, 39 I.C. 182 followed in *Anandram Marwadi* v. *Dhanput Singh* [illegible]) 1 Pat. L.J. 563, 88 I.C. 37 and *Beni Prasad* v. *Ganga Singh* (1928) 7 Pat. 349, 110 I.C. 287, ('28) A.P. 372 and *Mathura Rai* v. *Mandil Das* (1920) 56 I.C. 805; *Kiran Chandra* v. *Dutt* (1925) 29 Cal. W.N. 94, 85 I.C. 522, ('25) A.C. 251; *Mangtulal* v. *Upendra* (1930) 57 Cal. 82, 125 I.C. 661, ('30) A.C. 335.

(*n*) *M.P.M.S. Firm* v. *Ko Pyu* (1932) 10 Rang. 210, 138 I.C. 213, ('32) A.R. 113.

(*o*) *Madan Mohan Singh* v. *Raj Kishore* (1916) 21 Cal. W.N. 88, 39 I.C. 182.

(*p*) *Iron Trades Employers' Insurance Association Ltd.* v. *Union Land and House Investors Ltd.* (1937) 1Ch. 313.

(*q*) *Public Trustee* v. *Lawrence* (1912) 1 Ch. 789.

the mortgagee cannot be said to be under the statute and, therefore, the granting of such a lease is not a breach of the covenant. The English statute contains provisions for the surrender of a lease which are not reproduced in the section.

Kanom.—The case of a kanom granted before the enactment of the section was decided on the principle of the effect of the lease on the mortgagor's security. A kanom is a combined lease and mortgage. It is granted by the owner or jenmi and is not redeemable for twelve years. At the end of twelve years the jenmi may redeem or grant a renewed kanom on receipt of a renewal fee. The jenmi in this case gave a simple mortgage of property which was subject to two kanoms. During the pendency of the simple mortgage the periods of twelve years expired; and the jenmi instead of redeeming the kanoms granted renewed kanoms and received renewal fees. The simple mortgagee brought the property to sale subject to the old kanoms which were before his mortgage. He purchased the property himself and sought to evict the renewed kanomdars whose kanoms were subsequent to his mortgage. The kanomdars did not seek as mortgagees to redeem the simple mortgagee auction purchaser but claimed to remain in possession as lessees for the remainder of their terms of twelve years each. The Court held (1) that as leases the renewed kanoms were invalid, as they had so impaired the security that the sale had not realized the mortgage money, and (2) the kanom transaction being indivisible the kanoms were also invalid as puisne mortgages (*r*).

Covenant against alienation.—Apart from this section it has been held that when a mortgage contained the not unusual covenant against alienation during the term of the mortgage the covenant only created a personal liability as between the mortgagor and the mortgagee and that a lease granted in spite of such a covenant was only voidable by the mortgagee so far it encroached upon the right to the maintenance of his security (*s*). But under the present section a lease in violation of such a covenant though valid by estoppel between the mortgagor and the lessee would be void as between the mortgagee and the lessee (*t*). The lessee might however avoid eviction by redeeming the mortgage (*u*); and it has been held that the mortgagee should give the lessee an opportunity of redeeming (*v*).

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Waste by mortgagor in possession.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

(*r*) *Moidunni Haji* v. *Madhavan Nair* (1933) 65 Mad. L.J. 836, 148 I.C. 1115, ('33) A.M. 876.

(*s*) *Chunni* v. *Thakur Das* (1876) 1 All. 126; *Ali Hassin* v. *Dhirja* (1881) 4 All. 518; *Radha Pershad* v. *Monohur* (1881) 6 Cal. 317; *Nihal Singh* v. *Ramchandra* (1935) All. L.J. 969, 154 I.C. 1009, ('35) A.A. 511.

(*t*) *Trent* v. *Hunt* (1853) 9 Ex. 14.

(*u*) *Tarn* v. *Turner* (1888) 39 Ch.D. 456 C.A.; *Paya Matathil* v. *Kovamel* (1896) 19 Mad. 151; *Raghunandan Prasad* v. *Ambika* (1907) 29 All. 679.

(*v*) *Radha Pershad* v. *Monohur* (1881) 6 Cal. 317.

S. 66

Waste.—The mortgagor when in possession is never liable to account for rent and profits received by him (*w*); and may do all such acts as are referable to his qualified ownership and which are consistent with the maintenance of sufficient security for the mortgagee. Thus in *Humphreys* v. *Harrison* (*x*) Lord Eldon refused an injunction to prevent a mortgagor cutting underwood as it was an ordinary act of husbandry. He is not responsible for premissive waste, *i.e.*, for omission to repair or to prevent natural deterioration. But he must not commit acts of waste so substantial as to reduce the value of the mortgagee's security below the standard fixed in the Explanation. Even felling timber may not be waste if the sum advanced on the mortgage is small in comparison with the value of the land and in *King* v. *Smith* (*y*) Wigram, V.C., said:

> "I think the question which must be tried is whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value which was the basis of the contract between the parties at the time it was entered into."

In a Madras case (*z*) a co-tenant of the mortgagor felled trees during the pendency of the mortgagee's suit for sale so that there was a deficit in the price realized at the sale. The mortgagee was held entitled to sue for damages for waste on the ground that he had the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or any other person to whose rights those of the mortgagor were superior. In another Madras case the first defendant mortgagor sold the mortgaged house to the second defendant who pulled it down and sold the materials. The mortgagee was given a decree for the sale proceeds in the hands of the first defendant and for the balance of the mortgage money against the second defendant (*a*). The principle of this section was applied in the Punjab where it was held that the validity of a grant by the mortgagor of a right to take water from a well on the premises mortgaged depended upon whether it would reduce the value of the security below the prescribed standard (*b*). English cases supply further instances of waste by a mortgagor in possession, *e.g.*, felling timber (*c*), undermining buildings (*d*) and removing fixtures (*e*).

Leases.—Before the insertion in the Act of sec. 65A the validity of the mortgagor's leases was determined with reference to their effect upon the security (*f*). See note under sec. 65A.

Easements.—Section 10 of the Indian Easements Act prohibits a mortgagor from burdening the mortgaged property, during the continuance of the mortgage, with an easement that is injurious to the security.

Explanation.—The standard of value for the security taken under the Explanation is the same as that under section 20 (e) of the Trusts Act and section 10 of the Indian Easements Act.

(*w*) *Higgins* v. *York Building Co.* (1740) 2 Atk. 106; *Yorkshire Banking Company* v. *Mullan* (1807) 35 Ch.D. 125; *Trent* v. *Hunt*, *supra*.

(*x*) (1820) 1 Jac. & W. 581.

(*y*) (1843) 2 Hare 239, 244.

(*z*) *Aiyappa* v. *Kuppusami* (1905) 28 Mad. 208.

(*a*) *Punnayya* v. *Venkatappa* (1926) 91 I.C. 754, ('26) A.M. 343.

(*b*) *Bhagwan Dei* v. *Secretary of State* (1902) P.L.R. 124.

(*c*) *Usborne* v. *Usborne* (1740) 1 Dick. 75.

(*d*) *Dugdale* v. *Robertson* (1857) 3 Jur. N.S. 687.

(*e*) *Ellis* v. *Glover & Hobson* (1908) 1 K.B. 388.

(*f*) *Tulsi Ram* v. *Muna Kuar* (1936) 13 Luck. 161, 162 I.C. 225 (1937) A.O. 146; *Ramasray Prasad Chaudhary* v. *C. G. Atkins* (1938) 175 I.C. 279 (1938) A.P. 189.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court *a decree* that the mortgagor shall be absolutely debarred of his right to redeem the property, or *a decree* that the property be sold. **S. 67**

Right to foreclosure or sale.

A suit to obtain *a decree* that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) *to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale ; or*

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Sections 67 to 77 deal with the rights and liabilities of the mortgagee just as 60 to 66 have dealt with the rights and liabilities of the mortgagor. Sections 67 and 68 to 73 refer to the mortgagee's rights and sections 67A, 76 and 77 refer to the mortgagee's liabilities. Section 67 is the counterpart of section 60, and gives the mortgagee a right of foreclosure or sale in default of redemption by the mortgagor. If the mortgagor has paid or deposited the mortgage-money, there is no occasion for the exercise of the right of

S. 67

foreclosure or sale. Again if a decree for redemption is made, a suit for foreclosure or sale would be barred, especially as a redemption decree itself provides for sale or foreclosure in default of payment.

Amendments.—The following amendments have been made by the amending Act 20 of 1929. The word "due" has been substituted for the word "payable." This corresponds to the same amendment in sec. 60. The word "decree" has been substituted for the word "order," for the amendments made in Order 34 of the Code of Civil Procedure, 1908, show that the right of redemption is extinguished by a decree.

Clause (a) is new and was substituted by the amending Act. The repealed clause (a) was as follows:—

> "(a) to authorize a simple mortgagee as such to institute a suit for foreclosure or an usufructuary mortgagee as such to institute a suit for foreclosure, or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or."

The object of the amendment as disclosed in the report of the Special Committee is to do away as far as possible with foreclosure, and to confine it to mortgages by conditional sale and to anomalous mortgages where by the express terms of the deed the parties have stipulated for foreclosure.

Mortgagee's remedies.—The mortgagee's remedies by suit are (1) on the covenant, (2) for sale, and (3) for foreclosure. There is a remedy on the covenant only if the mortgage imports a personal liability, express or implied. This is under sec. 68 (a). The suit for sale of the security is a statutory remedy, and avoids the hardship of the forfeiture of a security which may exceed in value the mortgage debt. Foreclosure is a legal term which implies that the relief given by equity against the forfeiture of the security is withdrawn (*g*). The effect of foreclosure therefore is that the conditional conveyance becomes absolute, and the property vests absolutely in the mortgagee (*h*). In the case of successive mortgages the procedure for foreclosure is complicated and dilatory. The rights of the parties are more easily adjusted by an order for sale. There is therefore statutory jurisdiction both in England (*i*) and in India (*j*) to direct a sale in lieu of foreclosure. The present Act goes a step further and the amended clause (a) of this section has the effect of abolishing the remedy of foreclosure except in mortgages by conditional sale and in anomalous mortgages where the parties have by the terms of the deed stipulated for foreclosure (*k*).

Benamidar mortgagee may sue.—The Judicial Committee have held that an action can be maintained by a benamidar in respect of property although the beneficial owner is in no way a party to it (*l*). A benamidar mortgagee may therefore sue for sale or for foreclosure (*m*).

Contract to the contrary.—The right of redemption is not subjected to a contract to the contrary, for the mortgagor requires protection against oppression, but the mortgagee not being in need of the same protection may curtail his right of foreclosure or sale by contract (*n*). Thus a mortgagee may bind himself not to enforce his security without giving notice on the day after the cultivating season, but that will not affect

(*g*) *Carter* v. *Wake* (1877) 4 Ch. D. 605.

(*h*) *Williams* v. *Morgan* (1906) 1 Ch. 804; *Ladu Chimaji* v. *Babaji* (1883) 7 Bom. 582.

(*i*) Conveyancing and Law of Property Act, 1881, sec. 25, now Law of Property Act, 1925, sec. 91.

(*j*) Civil Procedure Code, 1908, Order 34, rule 4 (3).

(*k*) *Ujagar Lal* v. *Lokendra Singh* (1941) A.A. 169 (1941) All. 240, (1940) A.L.J. 111, 194 I.C. 520.

(*l*) *Gur Narayan* v. *Sheo Lal Singh* (1919) 46 I.A. 1, 46 Cal. 556, 49 I.C. 1.

(*m*) *Surandra* v. *Kitindra* (1919) 29 Cal. L.J. 434, 53 I.C. 59; *Sachitananda* v. *Baloram* (1897) 24 Cal. 644; *Yad Ram* v. *Umrao Singh* (1899) 21 All. 380; *Subramaniam Chettyar* v. *V. K. Shiralkar* (1937) A.R. 508.

(*n*) *Velu Rangasami* v. *Bal Krishana* (1902) 12 Mad. L.J. 366; *Ram Sarup* v. *Gaya Prasad* (1932) 139 I.C. 61, ('32) A.O. 178.

the mortgagor's right to redeem (*o*). A contract to the contrary may also accelerate the mortgagee's right of foreclosure or sale. See note *infra* 'Default of payment of interest.' **S. 67**

After the mortgage money has become due.—In sec. 60 the phrase used with reference to the mortgagor's right of redemption is "after the *principal* money has become due," but there is no significance in this difference, for the mortgagee's right of foreclosure or sale is correlative to the mortgagor's right of redemption. Just as the mortgagor cannot redeem before due date, so also the mortgagee cannot enforce his security before due date (*p*). It has been held that if no time is fixed for payment, the mortgage money is due on the date of execution (*q*) and the mortgagee may foreclose at any time (*r*). On the other hand in *Nilkanth Balwant* v. *Vidya Narasingh Bharati* (*s*) the Judicial Committee said that, as there was no specific time for the payment of the mortgage debt the money did not become due and the cause of action of the mortgagee did not arise until demand for the payment of the mortgage debt was made by the mortgagee and refused by the mortgagor. In a Madras case (*t*) where in default of payment of interest, the condition was that principal and interest were payable on demand, no demand by the mortgagee before suit was necessary, the words being regarded as "a technical expression equivalent to 'immediately' or 'forthwith'." But when the mortgage money was payable "*if so required*" (*u*), or "when you require" (*v*), the mortgagee cannot sue for foreclosure until he has made a demand.

Default of payment of interest.—Default in payment of interest by the mortgagor does not accelerate the mortgagee's right to foreclose unless it is so expressly provided in the mortgage. An instance of such a provision is the case of *Yeo Hean Sew* v. *Abu Zaffer*(*w*) where the mortgagor covenanted to pay the principal in a year and the interest every month and that in default of paying interest for one month after becoming due, the total sum of principal and interest should thereupon become due and payable. In English law the mortgagee's engagement not to call in his money is construed as conditional on the mortgagor doing what is incumbent on him to do during the period of the mortgage. Accordingly the mortgagor's default in payment of interest gives the mortgagee an immediate right to foreclose (*x*). But this rule does not apply where the mortgagee's covenant not to call in his money is absolute; and it was held in *Burrows* v. *Molloy* (*y*) that the mortgagor's failure to pay rent did not accelerate foreclosure, for the default of the mortgagor cannot enable the mortgagee to commit a breach of his own covenant. The Bombay High Court, in the case of a mortgage before the Act, followed the rule in *Seaton* v. *Twyford* (*z*) and held that the mortgagor's failure to pay interest and to make good title to part of the property entitled the mortgagee to sue for sale before due date (*a*). The Court professed to follow the principles of the Act, but under this section the mortgagee is unable to realize his security before due date, unless there is a contract to the contrary, and the mortgagor's breach of covenant does not relieve the mortgagee of this disability. In a Madras case (*b*) a covenant to pay interest on specified dates and, in

(*o*) *Rarichan* v. *Manakkal* (1923) 44 Mad. L.J. 515, 74 I.C. 309, ('23) A.M. 553.

(*p*) *Williams* v. *Morgan* (1906) 1 Ch. 804; *Kannu* v. *Natesa* (1891) 14 Mad. 477; *Kamod* v. *Raja Raghoji* (1902) 15 C.P. L.R. 78. See note "Right of redemption and right of foreclosure co-extensive" under sec. 60.

(*q*) *Nilcomal Pramanick* v. *Kamini* (1893) 20 Cal. 269.

(*r*) *Chengiah* v. *Pichayya* (1907) 17 Mad. L.J. 177.

(*s*) (1930) 54 Bom. 495, 57 I.A. 194, 126 I.C. 417, ('30) A.PC. 188.

(*t*) *Perumal* v. *Alagirisami* (1897) 20 Mad. 245, 248. See also *Barkat-un-nissa* v. *Mahbub Ali* (1920) 42 All. 70, 73, 52 I.C. 684.

(*u*) *Hanmantram Sadhuram* v. *Arthur Bowles* (1884) 8 Bom. 561.

(*v*) *Nellakaruppa* v. *Kumarasami* (1899) 22 Mad. 20.

(*w*) (1900) 27 Cal. 938, 27 I.A. 93; *Perumal Ayyan* v. *Alagirisami* (1897) 20 Mad. 245.

(*x*) *Seaton* v. *Twyford* (1870) 11 Eq. 591.

(*y*) (1845) 2 Jo. & Lat. 521.

(*z*) (1870) 11 Eq. 591.

(*a*) *Venkatarao* v. *Mahableshvar* (1902) 26 Bom. 241.

(*b*) *Subbiah Chetty* v. *Kuppammal* (1916) 31 Mad. L.J. 437, 36 I.C. 104.

S. 67 default, at a higher rate, was said to be a contract to the contrary accelerating foreclosure. This again is erroneous, for the higher rate was compensation for the breach of the agreement to pay on specified dates and bore no relation to the mortgagee's right of foreclosure.

A usual contract to the contrary accelerating the mortgagee's right of foreclosure or sale is that in case of default of payment of interest on specified dates, or of any act of the mortgagor which causes loss to the mortgagee, the mortgagee shall have power to realize the mortgage without waiting for the due date. The Privy Council have held that such a condition is exclusively for the benefit of the mortgagee, and that it gives him the option either to enforce his security at once, or if the security is ample to stand by the investment for the full term of the mortgage (*c*). Their Lordship said that it gives the mortgagee "a right by appropriate action to make the mortgage money immediately due" (*d*). Such appropriate action may be a notice of demand (*e*), or the mere filing of a suit (*f*).

Interest is as much a charge on the property as the principal (*g*). It is as a rule accessory to the principal and not separately recoverable (*h*). There may however be cases in which there is a separate and independent covenant to pay interest (*i*). In such cases the mortgagee may sue for the interest as soon as it falls due. Each default constitutes a separate cause of action and so a subsequent suit for the principal is not barred (*j*). But apart from a special stipulation to that effect there is no right to demand a sale of mortgaged land for interest in arrear (*k*).

Instalments.—In the absence of a stipulation to that effect, the mortgagee is not bound to accept payment by instalments (*l*). But if the mortgage deed makes the amount payable by instalments the mortgagee is entitled to sue for the recovery of each instalment from the mortgagor as it falls due (*m*).

Mortgage money paid or deposited.—If a usufructuary mortgagee leases the property to the mortgagor for a rent equivalent to the interest so that the lease and the mortgage are one transaction, the rent is part of the mortgage money (*n*). Payment of mortgage money would render the mortgagee's suit unnecessary. The deposit referred to is the deposit under sec. 83 which provides a summary procedure for redemption. The security is extinguished and the mortgagee is debarred from suing, not by mere deposit but when the deposit is accepted and acted upon by the mortgagee in terms of sec. 83 (*o*). If notice of the deposit has not been served on the mortgagee, he is not debarred from suing (*p*). The section would seem to suggest that the mortgagee's suit is not maintainable after the deposit has been made and the Allahabad High Court have said (*q*) that if there is a valid deposit there is no subsisting mortgage which can be

(c) *Lasa Din* v. *Gulab Kuar* (1932) 59 I.A. 375, 7 Luck. 442, 138 I.C. 779, ('32) A.PC. 207; *Panchan* v. *Ansar Husain* (1926) 53 I.A. 187, 48 All. 457, 99 I.C. 650, ('26) A.PC. 85: *Bappu* v. *Venkatachalaputhy Ayyar & Co.* (1934) 64 Mad. L.J. 606, 148 I.C, 311, ('34) A.M. 227.

(d) (1926) 53 I.A. 187, 194, 48 All. 457, 99 I.C. 650, ('26) A.PC. 85, *supra*.

(e) *Raghubir Singh* v. *Kumar Rajendra Bahadur Singh* (1933) 8 Luck. 488, 144 I.C. 279, ('33) A.O. 237.

(f) *Abdul Rahman* v. *Sheo Daval* (1934) 56 All. 496, (1934) All. L.J. 188, 371, 151 I.C. 900, ('34) A.A. 152.

(g) *Ganga Ram* v. *Natha Singh* (1924) 5 Lah. 425, 51 I.A. 377, 379, 80 I.C. 820, ('24) A. PC. 183; *Manohi* v. *Dial Chand* (1926) 7 Lah. 559, 96 I.C. 447, ('26) A.L. 624; *Abbas Khan* v. *Ram Das* (1928) 9 Lah. 140, 112 I.C. 153, ('28) A.L. 342.

(h) *Dhondiram* v. *Taba Savadan* (1903) 27 Bom. 330, 333; *Hollis* v. *Palmer* (1836) 2 Beng. (N.C.) 713.

(i) *Madappa Hedge* v. *Ramkrishna* (1911) 35 Bom. 327, 12 I.C. 42 P.C.; *Kashi Pershad* v. *Jamuna* (1904) 31 Cal. 922; *Arunachala* v. *Raja of Kalasti* (1921) Mad. W.N. 172, 62 I.C. 505, ('21) A.M. 229; *Ma Schwe Tu* v. *Maung Ba San* (1937) 176 I.C. 818, (1938) A.R. 113.

(j) *Yeshvant* v. *Vithal* (1897) 21 Bom. 267.

(k) *Satrucherla* v. *Maharaja of Jeypore* (1919) 42 Mad. 813, 46 I.A. 151, 51 I.C. 185.

(l) *Behari Lal* v. *Ram Ghulam* (1902) 24 All. 461.

(m) *Ramaya* v. *Venkata* (1903) 13 Mad. L.J. 2; *Karnidan* v. *Megraj* (1915) 11 Nag. L.R. 153, 30 I.C. 981.

(n) *Altaf Ali Khan* v. *Lalta Prasad* (1896) 19 All. 496.

(o) *Horay Krishna* v. *Sashi Bhushan* (1941) A.C. 18, 45 C.W.N. 74, 192 I.C. 781.

(p) *Sitamayya* v. *Venkataramanna* (1808) 11 Mad. 371.

(q) *Rugad Singh* v. *Sat Narain* (1904) 27 All. 178.

enforced or redeemed. But this, it is submitted, is not correct, for the deposit does not discharge the mortgage (*r*) and the mortgagee continues in possession as mortgagee and is accountable for rents and profits (*s*). S. 67

Simple mortgagee.—A simple mortgagee cannot foreclose as the real right transferred is a right of sale—see notes "Mortgage" and "Right to cause the property to be sold" under sec. 58. The case of *Papamma Rao* v. *Pratapa Korkonda* (*t*) illustrates the impossibility of a simple mortgage leading to a foreclosure, for when the Court erroneously gave a simple mortgagee a decree for possession against which the mortgagor did not appeal, the Privy Council held 15 years later that the mortgagee was in possession as mortgagee and liable to be redeemed. The remedy of sale is also available in some anomalous mortgages which involve the transfer of a right of sale.

Limitation for a suit for sale is under Article 132 of the Limitation Act, 1908, twelve years from the time when the mortgage money becomes due (*u*). If the net proceeds of the sale are insufficient there will be a personal decree for the balance if the mortgagor is personally liable and if the personal claim is not barred by limitation. This is provided for in Order 34, rule 6 of the Code of Civil Procedure, but such an order may be made on a motion on a consent decree even though the terms of the decree are silent as to the personal remedy (*v*). Under the repealed sec. 88 of the Transfer of Property Act the decree for sale might be a composite decree including the remedy both against the property and against the person (*w*). But generally under sec. 88 there was a preliminary decree for sale enforced, in case of default by an application for an order absolute for sale (*x*). But under the amended rules 4 and 5 of Order 34 of the Code of Civil Procedure there are two decrees, a preliminary mortgage decree, followed in case of default by a final decree for sale (*y*).

Usufructuary mortgagee.—A usufructuary mortgagee is a transferee of a right of possession only and he retains possession until the debt is discharged. As usufructuary mortgagee he cannot sue either for sale or for foreclosure (*z*); though if the mortgagor is in possession as lessee of the mortgagee and the lease makes the rents a charge on the property, the mortgagee may sell the property in enforcement of the charge (*a*). The Madras High Court has held that before possession is given to a usufructuary mortgagee, he is not a usufructuary mortgagee and may therefore sue for sale of the property mortgaged (*b*); but this case has now been rendered obsolete by the amended definition of usufructuary mortgage as explained in the commentary on sec. 58 (d), *supra*. Of course the usufructuary mortgagee can do so if there is a covenant empowering him to sell in default of delivery of possession. It is then an anomalous mortgage, and the rights and liabilities of the parties are determined by the terms of the deed. Instances are cited under note "Simple mortgage usufructuary" under sec. 58.

(*r*) *Ahmad-ullah* v. *Abdul Rahim* (1923) 45 All. 592, 74 I.C. 763, ('24) A.A. 26; *Balasidhantam* v. *Perumal* (1914) 27 Mad. L.J. 475, 27 I.C. 162.

(*s*) *Rukhminibai* v. *Venkatesh* (1907) 31 Bom. 527.

(*t*) (1896) 19 Mad. 249, 23 I.A. 32.

(*u*) *Vasudeva* v. *Srinivasa* (1907) 34 I.A. 186, 30 Mad. 426.

(*v*) *Sundermal* v. *J. C. Galstaun* (1932) 36 Cal. W. N. 109, 62 Mad. L.J. 170, 54 Cal. L.J. 400, 137 I.C. 672, affirming 33 Cal. W.N. 300, 120 I.C. 110, ('29) A.C. 387.

(*w*) *Jamna Bahu* v. *Parmeshwar* (1919) 46 I.A. 294, 47 Cal. 370, 49 I.C. 620; *Falkrishna Pal* v. *Jagannath Marwari* (1932) 59 Cal. 184, 36 Cal. W.N. 709, 56 Cal. L.J. 187, 140 I.C. 786, ('32) A.C. 775.

(*x*) *Amlook Chand* v. *Sarat Chander* (1911) 38 Cal. 913, 11 I.C. 943 affirmed sub-nominee *Munna Lall* v. *Sarat Chunder* (1915) 42 I.A. 88, 42 Cal. 776, 27 I.C. 663.

(*y*) *M. A. L. M. Chettiar Firm* v. *Maung Po Hoyin* (1935) 13 Rang. 325, 157 I.C. 784, ('35) A.R. 239.

(*z*) *Umda* v. *Umrao Begam* (1889) 11 All. 367; *Chathu* v. *Kunjan* (1889) 12 Mad. 109, dissenting from *Venkatasami* v. *Subramanya* (1888) 11 Mad. 88; *Luchmeshar Singh* v. *Dookh* (1897) 24 Cal. 677.

(*a*) *Damodara Shanbhogue* v. *Chandayya Pujary* (1933) 56 Mad. 892, 65 Mad. L.J. 194, 143 I.C. 1029, ('33) A.M. 619.

(*b*) *Subbamma* v. *Narayya* (1918) 49 Mad. 259, 43 I.C. 4 F.B.

S. 67

Mortgagee by conditional sale.—In a mortgage by conditional sale, the mortgage works itself out into a sale or the conditional sale becomes absolute. The mortgagee is therefore not entitled under this section to an order for sale but his remedy is foreclosure (*c*). In the Punjab where the Act is not in force foreclosure proceedings are taken under Beng. Reg. 17 of 1806 and not under this Act (*d*).

There is no article in the Limitation Act which refers to foreclosure except Art. 147 which speaks of foreclosure or sale and applies to English mortgages only (*e*). Limitation for a suit for foreclosure is therefore under Art. 120 and is six years from the time when the right to sue accrues, *i.e.*, from due date. A mortgage by conditional sale is not necessarily accompanied by delivery of possession (*f*). But the mortgagee is entitled to possession when he obtains a decree for foreclosure (*g*). If the mortgagee by conditional sale is entitled to possession under the mortgage, and the mortgagor fails to deliver possession the mortgagee's suit for possession is subject to Art. 135 of the Limitation Act and must be filed within twelve years of the time when the mortgagor's right to possession determines. A mortgagee's suit for possession under this article will lie even though a suit for foreclosure would be time barred (*h*).

Anomalous mortgagee.—An anomalous mortgagee's rights depend upon the terms of the deed (*i*). Such mortgages are generally composite mortgages. If it is a simple mortgage usufructuary, the mortgagee is entitled to an order for sale. In some anomalous mortgages the mortgagee has the alternative of taking possession or of bringing the property to sale (*j*). In a case where a mortgage contained certain provisions which indicate a usufructuary mortgage and certain provisions which indicate a simple mortgage it was held that there was no right of sale on the mere failure to pay the mortgage money (*k*). The various types of anomalous mortgage are set forth in the note under the same heading under sec. 58. If it is a mortgage usufructuary by conditional sale the mortgagee is entitled to foreclose. The Court has however jurisdiction to order a sale instead of foreclosure under the Code of Civil Procedure, 1908, Order 34, rule 4 (3).

English mortgagee.—The section before the amendment by the Act of 1929 did not put any limitation on the right of an English mortgagee, and he could sue either for foreclosure or sale (*l*). In cases governed by the present section he can only sue for sale.

Mortgagee by deposit of title deeds.—The new sec. 96 inserted by the amending Act 20 of 1929 puts equitable mortgages on the same footing as simple mortgages and makes it clear that the remedy of the mortgagee by deposit of title deeds is by suit for sale. The previous practice was not settled. The Calcutta High Court held that the appropriate remedy was a decree for sale (*m*), but in a Bombay case a decree for sale or foreclosure was allowed (*n*). Article 132 of the Limitation Act has been amended

(*c*) *Venkatsami* v. *Subramanya* (1888) 11 Mad. 88, 89.

(*d*) *Badri Das* v. *Besu Singh* (1933) 145 I.C. 159, ('33) A.L. 174.

(*e*) *Vasudeva* v. *Srinivasa* (1907) 34 I.A. 186, 30 Mad. 426.

(*f*) *Ammanna* v. *Gurumurthi* (1893) 16 Mad. 64.

(*g*) C.P.C., O. 34, r. 3 (2).

(*h*) *Ganpat Bhujanga* v. *Hanmangauda Shidagauda* (1933) 57 Bom. 593, 35 Bom. L.R. 956, 147 I.C. 919, ('33) A.B. 439; *Aman Ali* v. *Asgar* (1900) 27 Cal. 185.

(*i*) See *Madho Rao* v. *Gulam Mohiuddin* (1919) 15 Nag. L.R. 134, 56 I.C. 717, ('19) A.PC. 121; *Gajadhar Agarwalla* v. *Sibananda* (1924) 28 Cal. W.N. 532, 81 I.C. 768, ('24) A.C. 592; *Mohan Das Talib* v. *Mehdi Khan* (1938) A.L. 145.

(*j*) *Lingam Krishna* v. *Maharaja of Vizianagram* (1911) 13 Bom. L.R. 447, 10 I.C. 272 P.C.; *Lalta Prasad* v. *Hari Lal* (1913) 16 O.C. 90, 19 I.C. 748; *Hundaldas* v. *Bulak Khan* (1943) A.S. 59, (1942) Kar. 452, 204 I.C. 574.

(*k*) *Kanhaiya Prasad* v. *Mt. Hamidan* (1938) A.A. 418, (1938) All. 714 (1938) A.L.J. 746, 176 I.C. 492 (F.B.).

(*l*) *Vasudeva Mudaliar* v. *Srinivasa* (1907) 30 Mad. 426, 34 I.A. 186; *Askaran* v. *Gobordhan* (1921) 26 Cal. W.N. 318, 70 I.C. 158, ('22) A.C. 52.

(*m*) *Oo Noung* v. *Moung Htoon* (1889) 13 Cal. 322; *Srinath Roy* v. *Godadhur Das* (1897) 24 Cal. 348 followed in *Badier Rahman* v. *M. A. R. R. M. R. M. Chetty* (1916) 35 I.C. 288.

(*n*) *Manekji* v. *Rustomji* (1890) 14 Bom. 269.

by sec. 9 of Act 21 of 1929 so as to include within the 12 years' period of limitation suits to enforce the payment of advances secured by mortgage by deposit of title deeds. Further, in order to prevent hardship in cases where the 60-year rule was supposed to apply, sec. 15 (2) of Act 21 of 1929 enacts that a suit by a mortgagee for foreclosure or sale, on a mortgage by deposit of title deeds, may be instituted within two years of the date when the Act came into force [1st April 1930] or within 60 years of due date whichever period expires first; and that no suit filed within the period of 60 years and pending on that date shall be dismissed on the ground that the 12-year rule is applicable. The application of this section is limited to Bombay and any area notified in this behalf.

Mortgagor trustee for mortgagee.—A mortgagor who is a trustee of the mortgagee may not in his representative character foreclose and so become trustee of what was his own property. In such a case, sale is the appropriate remedy (*o*). So also when the mortgagee is trustee for the mortgagor, for he would be acquiring property which it is his duty to preserve for his *cestui que trust* (*p*).

Mortgagee of public works.—A mortgagee of a Railway, Canal or other work which serves the public convenience may not foreclose or sell. This is in the interest of the general public. The proper remedy is the appointment of a receiver with a view to realizing the earnings of the undertaking as a going concern (*q*).

Bundelkhand Land Alienation Act.—*If the mortgagee's suit has been referred to* the Collector under sec. 9 of the Bundelkhand Land Alienation Act, 1902, the reference is a final disposal of the suit and the Court cannot pass a decree for sale (*r*).

Partial foreclosure or sale.—Sec. 67 (d) is the corollary to the last clause of sec. 60 and rests on the same principle of the indivisibility of the mortgage security. The reason has been explained in the case of *Nilakant* v. *Saresh Chunder* (*s*)—See note "Partial redemption" under sec. 60. Hence one of several mortgagees, or his assignee or a purchaser of part of the mortgagee's right, cannot foreclose or sell in respect of his fractional share (*t*); and on the other hand foreclosure proceedings must be taken against all persons interested in the equity of redemption (*u*). The proper remedy of the part mortgagee if he cannot obtain the other mortgagee's consent to the suit, is to join them as co-defendants and sue to realize the whole mortgage debt. The leading case on this point is *Sunitabala Debi* v. *Dhara Sundari* (*v*), where the rule was enforced though the mortgage was to two mortgagees to secure two separate sums, because the whole property was conveyed to the mortgagees as tenants in common and there was no covenant to repay each separately. In such a case the decree would provide for all proper accounts excepting that there would be no judgment as between the mortgagor and the defendant mortgagees (*w*). In *Lachmi Narain* v. *Babu Ram* (*x*) the deed of mortgage specified the separate sums which each mortgagee had advanced to make up the total consideration of the mortgage. One mortgagee was allowed to sue for sale

---

Cf. *Lucas* v. *Seale* (1740) 2 Atk. 56.
Tennant v. *Trenchard* (1869) 4 Ch. App. 537.
Gardner v. *London Chatham & Dover Railway Co.* (1867) 2 Ch. App. 201.

(*r*) *Ram Sahai* v. *Debi Din* (1932) 54 All. 482, 1932 All. L.J. 534, 139 I.C. 170, ('32) A.A. 614.

(*s*) (1886) 12 Cal. 414, 12 I.A. 171.

(*t*) *Bishan Dial* v. *Manni Ram* (1878) 1 All. 297; *Parsotam Saran* v. *Mulu* (1887) 9 All. 68 F.B.; *Lalju* v. *Janki Lal* (1887) All. W.N. 233.

(*u*) *Norender Narain Singh* v. *Dwarka Lal Mundur* (1887) 3 Cal. 397, 5 I.A. 18; *Chandika Singh* v. *Pokhar* (1880) 2 All. 906.

(*v*) (1920) 47 Cal. 175, 46 I.A. 272, 53 I.C. 131; *Gobind Ram* v. *Sundar Singh* (1892) All. W.N. 246; *Kanhai Lal* v. *Jwala Dei* (1896) All. W.N. 153; *Ray Satindra* v. *Ray Jatindra* (1927) 31 Cal. W. N. 374, 101 I.C. 530, ('27) A.C. 425; *Seth Bansiram* v. *Gunnia Naga Ayyar* (1930) 59 Mad. L.J. 928, 129 I.C. 45, ('30) A. M. 985; *Haidar Ali* v. *Mahammad Safiuddin* (1931) 54 Cal. L.J. 113, 134 I.C. 1068, ('32) A.C. 34; *Kailas Ayyar* v. *Sundaram Pattar* (1942) A.M. 205. (Court fees to be paid on whole amount); *Moti Lal* v. *Bijay Lal* (1943) A.C. 455, (1943) 1 Cal. 59, 76 C.L.J. 257, 46 C.W.N. 1015, 208 I.C. 483 (Court fees may be paid on the plaintiff share of the mortgage money).

Sunitabala Debi v. *Dhara Sundari*, *supra*.
(1935) All. L.J. 749, 154 I.C. 437, ('35) A.A. 891.

S. 67

of the entire property including the other mortgagees as co-defendants, the plaintiff mortgagee thus realized his share by sale, while the defendant mortgagees had a charge on the surplus sale proceeds.

As already explained in the notes under sec. 60, a purchase of a share in the equity of redemption by one of several part mortgagees does not justify partial redemption, for it is not equitable that one of several mortgagees should have the right to split the security (*y*). Where a mortgagee purchases the equity of redemption without the consent of his co-mortgagee, the latter can bring the whole of the property to sale to recover his share of the mortgage debt (*z*). But in a case where after such a purchase the other part mortgagee sued to recover his share of the debt, he was allowed to proceed against the rest of the property on the ground that his conduct in suing for a share of the debt was an admission that the security had been severed (*a*). This is erroneous and is contrary to the principle that a mortgage interest cannot be severed without the consent of all mortgagees and mortgagors (*b*). The question will, however, be otherwise where one of the co-mortgagees has by suing for his own share of the mortgage debt broken up the integrity of the mortgage (*c*). In cases in which a part mortgagee has been discharged, the other mortgagees are allowed to sue to recover their share of the debt on the ground that the mortgage security has been severed with the consent of the mortgagors. Thus, when a part mortgagee obtains a decree for his share of the debt and the mortgagors who are parties to the suit have not objected, the other mortgagee may sue to recover his share (*d*). Again in an Allahabad case (*e*) there was a simple mortgage by *K* to two mortgagees *B* and *J*, and another simple mortgage by *K*'s brother *G* also to *B* and *J*; and then a usufructuary mortgage was given by *K* and *G* to *B* in discharge of the two previous mortgages. This discharge was not binding on *J*, and as the action taken by *B* had operated as a severance with the consent of the mortgagors *J* was entitled to realize his share in the two previous mortgage debts. But a payment to one part mortgagee will not operate as a severance of the security and the other part mortgagee will be entitled to recover this share of the debt against the whole of the security (*f*).

Illustration.

A mortgaged his property to *B* and *C*. *A* then sold part of the property and out of the sale proceeds paid *B* Rs. 9,460 half for himself and half for *C* in full discharge of the mortgage. *C* had no knowledge of this transaction and contended that Rs. 1,000 more was due on the mortgage. The transaction was not binding on *C*; there was no severance of the security; and *C* was entitled to recover his share of the debt from the whole of the property: *Arunachalam* v. *Ramasamy* (1928) M.W.N. 518, 112 I.C. 501, ('28) A.M. 933.

When the mortgagee or, if there are several mortgagees, all the mortgagees, acquire by purchase or inheritance or otherwise a share of the equity of redemption the mortgage is extinguished *pro tanto*, and they may recover the balance of the debt against the residue

(*y*) *Mahtab Rai* v. *Sant Lal* (1888) 5 All. 276; *Velayudan Chetty* v. *Alangaram* (1912) 23 Mad. L.J. 475, 15 I.C. 605; *Subba Rao* v. *Sarvarayudu* (1924) 47 Mad. 7, 19, 72 I.C. 292, ('23) A.M. 533; *Jagmohan* v. *Harbans Singh* (1925) 85 I.C. 621, ('25) A.O. 609.

(*z*) *Sadasheo Rao* v. *Rupchand* (1939) 184 I.C. 719, (1939) A.N. 136; *Sadashiv* v. *Govind* (1945) A.B. 350.

(*a*) *Mohan Lal* v. *Prasadi Lal* (1923) 45 All. 46, 74 I.C. 999, ('24) A.A. 11.

(*b*) *Arunachalam Chetty* v. *Ramasamy Ayyar* (1928) Mad. W.N. 518, 112 I.C. 501, ('28) A.M. 933.

(*c*) *Narayan Sao* v. *Mt. Chattibai* (1937) Nag. 503, 171 I.C. 978, (1937) A.N. 262.

(*d*) *Vijayabhushanammal* v. *Evalappa* (1916) 39 Mad. 17, 35 I.C. 91.

(*e*) *Jauhari Singh* v. *Ganga Sahai* (1919) 41 All. 631, 51 I.C. 107.

(*f*) *Arunachalam* v. *Ramasamy* (1928) Mad. W.N. 518, 112 I.C. 501, ('28) A.M. 933.

of the property (*g*). This is the counterpart of the case referred to in the last clause of sec. 60 and the severance is effected by the merger which occurs when the mortgagee acquires a share in the equity of redemption. The sale by the mortgagor of his share to the mortgagee implies consent and brings the case within the terms of the section. So when the mortgagor of two villages sells one to the mortgagee the latter can foreclose the other village for a proportionate share of the debt (*h*). When the mortgagee purchases a third share in the equity of redemption from one of three sons of the mortgagor, he can foreclose the remaining two-thirds for two-thirds of the debt (*i*). So also when the mortgagee's purchasers inherited a share of the mortgaged property from their father who was one of the heirs of the mortgagor, they were held to be entitled to foreclose on the other heirs for their share of the debt (*j*). S. 67

Illustration.

A mortgaged his property to *B*. *A* died leaving three sons *C*, *D* and *E*. *B* purchased from *E* his share in the equity of redemption. *B* was then entitled to recover two-thirds of the debt from the shares of *C* and *D* as the integrity of the mortgage had been broken: *Mutty Lal* v. *Nandu Lal Neogi* (1907) 12 Cal. W.N. 745.

The merger may occur even after the final decree for sale. Thus in an Allahabad case (*k*) the mortgagee *K* obtained a final decree for sale against his mortgagor *T* in January; *M* purchased part of the mortgaged property in execution of a money decree against *T* in March; then in April *M* purchased from the mortgagee *K* the mortgage decree and proceeded to execute it against the residue of the property in the hands of *T*; but it was held that the decree was extinguished *pro tanto* and that it could only be executed for the balance of the amount. Again when a mortgagee purchases part of the property mortgaged at the execution sale on his mortgage decree, he splits his security and can realise a proportionate part of the debt from a purchaser of another part who has not been made a party (*l*).

The mere fact that there has been a division of the equity of redemption does not justify a suit for partial foreclosure or sale (*m*). But when the mortgagee has recognized the partition it has been held that such recognition effects a severance of the security with the consent of the mortgagors. This occurred in *Venkatchella Chetty* v. *Srinivasa* (*n*) where the property was partitioned into four equal shares between the defendant and his three cousins by a deed which directed that each share should bear a fourth of the mortgage debt. The mortgagee was not a party to the deed, but he allowed the three cousins to redeem their shares each for a fourth of the debt. Three-fourths of the mortgage being thus extinguished, the mortgagee was held entitled to recover the remaining one-fourth from the defendant. Again in *Mahadaji* v. *Ganpatshet* (*o*) when three mortgagors divided the mortgaged property and apportioned their liability under the mortgage, and the mortgagee accepted bonds from two of them in

(*g*) *Bisheshur Dial* v. *Ram Sarup* (1900) 22 All. 284 F.B.; *Dina Nath* v. *Lachmi Narain* (1903) 25 All. 446; *Shib Lal* v. *Bhawani Shankar* (1904) 26 All. 72; *Inukhan* v. *Naimudin* (1906) 3 Cal. L.J. 377; *Somanatha* v. *Anania* (1931) Mad. W.N. 891, 135 I.C. 911, ('32) A.M. 18; *Krishna Chandra* v. *Pabna Model Co.* (1932) 59 Cal. 76, 137 I.C. 260, ('32) A.C. 319. The contrary decision in *Jasodha* v. *Kali* (1930) 34 Cal. W.N. 673, 128 I.C. 111, ('32) A.C. 619 is incorrect and misunderstands *Bhora Thakar Das* v. *Collector of Aligarh* (1906) 26 All. 593 discussed in the note under sec. 82 *post*.

(*h*) *Bisheshar Singh* v. *Laik Singh* (1882) 5 All. 257.

(*i*) *Mutty Lal* v. *Nandu Lal Neogi* (1907) 12 Cal. W.N. 745.

(*j*) *Rashidunnissa* v. *Muhammad* (1912) 34 All. 474, 16 I.C. 85.

(*k*) *Sarju Kumar* v. *Thakur Prasad* (1920) 42 All. 544, 58 I.C. 743.

(*l*) *Venkatasami Naicken* v. *Ramanathan Chettiar* (1910) 8 Mad. L.T. 409, 8 I.C. 153; *Moro* v. *Balaji* (1888) 13 Bom. 45.

(*m*) *Soti Suraj* v. *Than Singh* (1922) 44 All. 146, 64 I.C. 451, ('22) A.A. 352.

(*n*) (1905) 28 Mad. 555.

(*o*) (1891) 15 Bom. 257.

S. 67 discharge of their liability, two-thirds of the mortgage was extinguished and the mortgagee could only recover one-third of the debt from the third mortgagor. Similarly in *H. V. Low & Co. Ltd.* v. *Pulin Beharilal Sinha* (p) the lessor of a coal mine had a charge for the royalty due under the lease. The lessee took a partner into the business and a registered deed of partition was executed declaring the shares of the lessee and his partner. The lessor opened separate accounts for each partner as being each liable for a share of the royalty. This he did at the request of the partners and it was held to effect a severance of the charge so that the lessor could enforce the charge against each sharer to the extent of his share.

The mortgagee may exempt some portion of the mortgaged property from the suit and realize the whole debt from the remainder (q). Cases in which it was held that such release made the mortgagee liable to contribution are no longer law (r). See note " Partial redemption " under sec. 60.

A prior mortgagee's suit for sale has been held to be maintainable although a puisne mortgagee is not made a party. This has been extended to a case where the mortgagee sues without making one of the heirs of the mortgagor a party. In such a suit the Court may, under the Code of Civil Procedure, Order 1, rule 9, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it and make an order for sale proportionate to the share of the defendant (s). This rule of procedure splits the security without the consent of the mortgagors, unless it be supposed that the omission of the parties to object implies consent.

Illustration.

A and *B* mortgage property to *C*. *B* dies and *C* files a suit for sale on the mortgage against *A* and *D*. It appears that *D* is not the heir of *B*. *C* is entitled to a decree for sale against *A* proportionate to his share: *Kherodamoyi Dasi* v. *Habib Shaha* (1925) 29 Cal. W.N. 51, 82 I.C. 638, ('25) A.C. 152.

Security for performance of decree.—When a security bond is executed by a judgment debtor to secure the performance of a decree, the property can be realized in execution and no suit under this section is necessary (t).

Charge.—In a charge the property is realized by a suit for sale under this section, as if it were a simple mortgage—sec. 100. But if the charge is created by a decree,

---

(p) (1933) 59 Cal. 1372, 143 I.C. 193, ('33) A.C. 154.

(q) *Sheo Prasad* v. *Behari Lal* (1903) 25 All. 79; *Sheo Tahal* v. *Sheodan Rai* (1906) 28 All. 174; *Jugal Kishore* v. *Kedar Nath* (1912) 34 All. 606, 16 I.C. 400; *Perumal* v. *Raman Chettiar* (1917) 40 Mad. 968, 42 I.C. 352; *Sanwal Singh* v. *Ganeshi Lal* (1913) 35 All. 441, 20 I.C. 41 (suit against one co-mortgagor time barred); *Ghasi Khan* v. *Kishori* (1929) 27 All. L.J. 846, 119 I.C. 437, ('29) A.A. 380.

(r) *Mir Eusuff Ali* v. *Panchanan* (1910) 15 Cal. W.N. 800, 6 I.C. 842; *Ponnusami Mudaliar* v. *Srinivasa* (1908) 31 Mad. 333; *Imam Ali* v. *Baij Nath* (1906) 33 Cal. 613; *Hakim Lal* v. *Ram Lal* (1907) 6 Cal. L.J. 46; *Surjiram* v. *Barhamdeo* (1905) 1 Cal. L.J. 337; *Surjiram* v. *Barhamdeo* (1905) 2 Cal. L.J. 202; *Budhmal Kevalchand* v. *Rama Valad Yesu* (1920) 44 Bom. 223, 55 I.C. 327; *Mayashankar* v. *Burjorji* (1925) 27 Bom. L.R. 1449, 91 I.C. 978, ('26) A.B. 31; *Muktakeshi* v. *Ramani Mohan* (1927) 98 I.C. 504, ('27) A.C. 195.

(s) *Shahasaheb* v. *Sadashiv Supdu* (1920) 43 Bom. 575, 51 I.C. 223; *Hari Kissen* v. *Veliat Hossein* (1903) 30 Cal. 755; *Har Chandra Roy* v. *Mahumed Husein* (1920) 25 Cal. W.N. 594, 66 I.C. 312, ('21) A.C. 554; *Kherodamoyi Dasi* v. *Habib Shaha* (1925) 29 Cal. W.N. 51, 82 I.C. 638, ('25) A.C. 152; *Mst. Waleyatunnissa* v. *Mst. Chalakhi* (1931) 10 Pat. 341, 132 I.C. 100, ('31) A.P. 164; *Haibat Shah* v. *Bohra Tarachand* (1931) 132 I.C. 31, ('31) A.A. 235; *Ganeshi Lal* v. *Charan Singh* (1913) 35 All. 247, 19 I.C. 614.

(t) *Jyoti Prakash* v. *Mukti Prakash* (1924) 51 Cal. 150, 81 I.C. 734, ('24) A.C. 485; *Subramanian* v. *Raja of Ramnad* (1918) 41 Mad. 327, 43 I.C. 187; *Tata Iron & Steel Co.* v. *Charles Joseph Smith* (1929) 8 Pat. 801, 124 I.C. 90, ('30) A.P. 108; *Raghubar Singh* v. *Jai Indra* (1919) 42 All. 158, 46 I.A. 228, 55 I.C. 550; *Mukta Prasad* v. *Mahadeo* (1916) 38 All. 327, 33 I.C. 982; *Shyam Sundar* v. *Bajpai* (1903) 30 Cal. 1060; *Rajindra Chandra Sarkar* v. *Bipin Chandra Shaha Bhowmik* (1933) 60 Cal. 1298, 37 Cal. W.N. 979, 149 I.C. 399, ('34) A.C. 64.

it may be realized in execution of the decree (u). But if the decree creating the charge is merely declaratory, the decree-holder is not entitled to sell the property charged in execution but must file a suit to enforce the charge (v). See note 'Charge' under O. 34, r. 14 of Mulla's Code of Civil Procedure, 10th Ed., pp. 1022, 1023. Some cases requiring a suit for sale even when the charge was executory were decided under the repealed sec. 99 and are no longer law (w).

Mortgagee when bound to bring one suit on several mortgages.

67A. *A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.*

Amendment.—This section is new and was inserted by the amending Act 20 of 1929.

Whether section retrospective.—Section 63 of the Amending Act 20 of 1929 expressly enacts that this section shall not have retrospective effect (x).

Mortgagee bound to consolidate.—This section is the counterpart of sec. 61 which deals with the mortgagor's right of redemption. The principle of consolidation is abolished by sec. 61 as regards mortgagors, and a mortgagor who has given different mortgages of different properties or successive mortgages of the same property is entitled to redeem each mortgage separately. But the principle of consolidation which is abolished as regards the mortgagor is applied by this section to the mortgagee. If the mortgagee holds different mortgages of different properties or successive mortgages of the same property from the same mortgagor, he must enforce all or none, unless there is a contract to the contrary.

The previous case law had been conflicting. The Madras High Court had inferred from sec. 60 that a mortgagee having successive mortgages of the same property from the same mortgagor cannot obtain an order for sale on one alone (y). This was approved in some Allahabad and Madras cases (z). The Bombay High Court held that if a mortgagee sues on a subsequent mortgage without reference to a prior mortgage, he is barred by

(u) *Kashi Chandra* v. *Priyanath* (1924) 28 Cal. W.N. 550, 83 I.C. 424, ('24) A.C. 645; *Hari* v. *Mst. Tapai* (1925) 4 Pat. 698, 88 I.C. 923, ('26) A.P. 31; *Raja Brajasunder* v. *Sarat* (1917) 2 Pat. L.J. 55, 38 I.C. 791; *Ambalal* v. *Narayan* (1919) 43 Bom. 631, 51 I.C. 929; *Shankar* v. *Ganpat* (1929) 31 Bom. L.R. 439, 119 I.C. 186, ('29) A.B. 227; *Fatehchand* v. *Indian Cotton Co.* (1935) 157 I.C. 292, ('35) A.N. 129; *Kawtikabai* v. *Bachraj* (1934) 150 I.C. 492, ('34) A.N. 147; *Venkatarao* v. *Zunkari Marwadi* (1934) 148 I.C. 196, ('34) A.N. 83.

(v) *Gobinda* v. *Kailas* (1917) 45 Cal. 530, 41 I.C. 78; *Gobind* v. *Kailash* (1916) 25 Cal. L.J. 354, 40 I.C. 230; *Posti Mal* v. *Radha Kisan Lalchand* (1932) 54 All. 763, 138 I.C. 603, ('33) A.A. 439.

(w) *Chandranath Dey* v. *Burroda Shoondury* (1895) 22 Cal. 813; *Abhoyeswari* v. *Gouri Sunkur* (1895) 22 Cal. 859; *Matangini Dassi* v. *Chooneymoney* (1895) 22 Cal. 903; *Hem Ban* v. *Behari Gir* (1905) 28 All. 58; *Rameshar* v. *Subbkaran* (1911) 8 All. L.J. 418, 10 I.C. 481.

(x) *Ko Aung Bye* v. *Ko Po Kyaing* (1931) 131 I.C. 725, ('31) A.R. 208; *V. R. S. Chettyar Firm* v. *Yaya* (1933) 150 I.C. 678, ('33) A.R. 377; *Corporation of Calcutta* v. *Arunachandra Singha* (1933) 60 Cal. 1470, 38 Cal. W.N. 153, 149 I.C. 24, ('34) A.C. 325 reversed on another point in 61 Cal. 1047; *Lasa Din* v. *Abdool Shakoor* (1940) 15 Luck. 399, 185 I.C. 540 (1940) A.O. 235; *Singheshwar Singh* v. *Medni Prasad* (1940) A.P. 65, 187 I.C. 339; *Bhau Nana* v. *Renappa Datappa* (1938) A.B. 196, 40 Bom. L.R. 109, 174 I.C. 174; *Mt. Fazal Nishan* v. *S. Hukum Singh* (1936) A.L. 1020.

(y) *Dorasami* v. *Venkataseshayyar* (1902) 25 Mad. 108.

(z) *Ranjit Khan* v. *Ramdhan* (1909) 31 All. 482, 492, 2 I.C. 859; *Balasubramania* v. *Sivaguru* (1911) 21 Mad. L.J. 562, 565, 11 I.C. 629.

S. 67A

res judicata from bringing a suit on the prior mortgage (*a*), and the Madras High Court held that a suit on a prior mortgage bars a suit on a subsequent mortgage of the same property (*b*). But it was generally held that a mortgagee might sue on a later mortgage reserving his rights on a prior mortgage (*c*). This was decided in the Madras Full Bench case of *Subramania* v. *Balasubramania* (*c*), which adopted the view taken by the Allahabad High Court in *Sundar Singh* v. *Bholu* (*d*), that the two mortgages constituted different causes of action and which had been dissented from in a previous Madras case (*e*). As the law then stood the Allahabad view was correct and was generally followed (*f*). In *Nilu* v. *Asirbad* (*g*) Mookerjee, J., quoted with approval the following passage from *Sundar Singh* v. *Bholu* (*h*): "there is nothing in the Code of Civil Procedure or in the Transfer of Property Act which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit." The learned Judge, however, held that the right was subject to this reservation, that the mortgagee cannot sell the property twice over nor sell it under the second decree subject to the first, and that the right course to follow was to direct that the property be sold free of both charges, whether the sale takes place in execution of the decree on the first mortgage or the decree on the second mortgage, and that the balance of the sale proceeds be applied in discharge of the dues on the first mortgage and the second mortgage one after the other, and the residue, if any, to stand to the credit of the holder of the equity of redemption.

The decree made in *Nilu* v. *Asirbad* (*i*) was not warranted by any provision of the Code of Civil Procedure or the Transfer of Property Act, but it showed that the Court was conscious that it was a hardship to the mortgagor to have his property sold twice. Property sold subject to a prior mortgage will never realize its proper value. If the remedy were foreclosure, the hardship to the mortgagor would be still greater, for he might lose the whole property on a decree for one of the debts.

This equitable consideration has led to the amendment of the law, and sec. 61 and 67A of this Act lay down the simple rule that if a mortgagor has made two or more mortgages of the same property or of different properties to the same mortgagee, the mortgagor may redeem each separately, but that the mortgagee must enforce all or none.

Same mortgagor.—This rule would not apply, unless the mortgagor were the same (*j*) or if one mortgage were by *A* and another mortgage by *A* & *B*. The case of *Moro Raghunath* v. *Balaji* (*k*) was decided on the principle of *res judicata*, but it will serve as an illustration. The first mortgage was by two brothers, and the second mortgage of part of the same property by one brother, and the Bombay High Court held that a suit to enforce the first mortgage did not bar a suit to enforce the second. Again in *Rajani Kanta* v. *Sourendra Nath* (*l*) there was a first mortgage by one co-sharer of a

(*a*) *Dhondo* v. *Bhikaji* (1915) 39 Bom. 138, 27 I.C. 1005; *Daluchand* v. *Appi* (1921) 45 Bom. 55, 59 I.C. 347, ('21) A.B. 282.
(*b*) *Nattu* v. *Annangara* (1907) 30 Mad. 358.
(*c*) (1915) 38 Mad. 927, 30 I.C. 317 F.B.; *Dhondo* v. *Bhikaji* (1915) 39 Bom. 138, 27 I.C. 1005; *Jagernath* v. *Mst. Mohra Kuver* (1917) 2 Pat. L.J. 118, 39 I.C. 76; *Rengasami Nadan* v. *Subbaroya* (1907) 30 Mad. 408; *Radhakrishna* v. *Muthu Sawmy* (1908) 31 Mad. 530; *Shankar Sarup* v. *Mejo Mal* (1901) 23 All. 313, 28 I.A. 203.
(*d*) (1898) 20 All. 322; *Raghunath Prasad* v. *Jamna Prasad* (1907) 29 All. 233; *Nazirunnisa* v. *Asifa* (1927) 100 I.C. 577, ('27) A.A. 341; *Dwarka Prasad* v. *Ulfat Rai* (1931) 53 All. 631, 132 I.C. 803, ('31) A.A. 546.
(*e*) *Nattu* v. *Annangara* (1907) 30 Mad. 358.
(*f*) *Lakshmanan* v. *Muthaya* (1921) 40 Mad. L.J. 126, 62 I.C. 833; *Parmeshwar* v. *Raj Kishore* (1924) 3 Pat. 829, 80 I.C. 34, ('25) A.P. 59; *Udai Chand* v. *Nagina Singh* (1919) 50 I.C. 40; *Gobind* v. *Harihar* (1910) 38 Cal. 60, 7 I.C. 320; *Nilu* v. *Asirbad* (1920) 25 Cal. W.N. 129, 60 I.C. 809; *Dwarka Nath* v. *Mritunjoy* (1909) 3 I.C. 175.
(*g*) (1920) 25 Cal. W.N. 129, 60 I.C. 809, followed in *Muhammad Tabarak* v. *Dalip Narain Singh* (1927) 98 I.C. 963, ('27) A.P. 117.
(*h*) (1898) 20 All. 322, 324.
(*i*) (1920) 25 Cal. W.N. 129, 60 I.C. 809.
(*j*) *Bhaiyalal* v. *Ramchandra* (1937) Nag. 349, 170 I.C. 126, (1937) A.N. 99;
(*k*) (1889) 13 Bom. 45. See also *Ko Aung Bye* v. *Ko Po Kyaing* (1931) 131 I.C. 725, ('31) A.R. 206.
(*l*) (1934) 38 Cal. W.N. 124, 151 I.C. 454, ('34) A.C. 421.

¼th share and then a second mortgage by all the shares of the whole property. Rankin, C.J., said that the second was an entirely different transaction and that separate suits could be brought.

Has a right to obtain.—These words imply that the mortgage money has become due on both mortgages. The section would not prevent a mortgagee obtaining a decree on a prior mortgage before the debt secured on a subsequent mortgage had become due. Such a case is, however, not likely to arise, for it is not to the advantage of the mortgagee to destroy the security of the puisne mortgage.

Charge.—The section has no application to a statutory charge (*m*).

Court-fee.—The section does not affect sec. 17 of the Court Fees Act. If the suit embraces several mortgages, Court fee will be separately assessed on each mortgage (*n*).

Same kind of decree.—The rule will not apply if the mortgagee is suing for foreclosure on one mortgage and for sale on another mortgage.

Section not applicable.—If the suit on all mortgages cannot be brought in the same Court, sec. 67A does not apply (*o*).

Right to sue for mortgage-money.

68. (1) *The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely :—*

(a) *where the mortgagor binds himself to repay the same* [*pp.* 465-468] ;

(b) *where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section* 66, *and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so* [*pp.* 468-469] ;

(c) *where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor* [*pp.* 469-470] ;

(d) *where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor* [*pp.* 470-473] ;

(*m*) *Corporation of Calcutta* v. *Arunchandra Singha* (1934) 61 Cal. 1047, 38 Cal. W.N. 917, 60 Cal. L.J. 312, 153 I.C. 972, ('34) A.C. 862.

(*n*) *Muthuswami Chettiar* v. *Krishna Aiyar* (1935) 68 Mad. L.J. 316, 156 I.C. 435, ('35) A.M. 262.

(*o*) *Daw Kyin* v. *Ko Ba Tin* (1939) 184 I.C. 284, (1939) A.R. 247.

S. 68

Provided that, in the case referred to in clause (a), *a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.*

(2) *Where a suit is brought under clause* (a) *or clause* (b) *of sub-section* (1), *the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property* [*pp.* 473-474].

Amendment.—This section was substituted for the original section by the amending Act 20 of 1929. The old section was as follows :—

"The mortgagee has a right to sue the mortgagor for mortgage-money in the following cases only :—

(a) where the mortgagor binds himself to repay the same,

(b) where the mortgagee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the mortgagor,

(c) where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed or the security is rendered insufficient as defined in sec. 66, the mortgagee may require the mortgagor to give him, within a reasonable time, another sufficient security for his debt, and, if the mortgagor fails to do so, may sue him for the mortgage-money."

The words "the mortgagor", which appeared in the first para. of the old section have been omitted to avoid the implication that the mortgagee can only sue the mortgagor himself and not an heir or transferee of the mortgagor. For the word "*only*" in the first paragraph the words "*and no others*" have been substituted. Clause (b) of the old section corresponds to clause (c) of the present section. Clause (c) of the old section corresponds to clause (d) of the present section. The word "mortgaged" has been inserted before the word "property" to make the meaning clearer; and after the word "person" the words "claiming under a title superior to that of the mortgagor" have been added to show that the clause does apply to cases of disturbance of the mortgagee's possession by a trespasser (*p*), but does apply to disturbance by a person claiming under title paramount (*q*). The last paragraph of the old section corresponds to clause (b) of the present section with some verbal changes. Sub-section (2) is new and has been enacted in order to show that the remedy under clause (a) or clause (b) is not concurrent with the remedy under sec. 67 against the security.

Amendments whether retrospective.—Sec. 63 of the amending Act 20 of 1929 enacts that the amendments in this section shall not have retrospective effect.

(*p*) *Gopalasami* v. *Arunachella* (1892) 15 Mad. 304; *Nulkhedi Ram* v. *Ram Charitar* (1897) 19 All. 191; *Kuppier* v. *Periakaruppa* (1919) 42 Mad. 578, 50 I.C. 758.

(*q*) *Ram Surat* v. *Gur Prasad* (1921) 43 All. 484, 63 I.C. 993, ('21) A.A. 48; *Sawaba Khandapa* v. *Abaji* (1887) 11 Bom. 475.

Scope of the section.—This section refers to the personal remedy of the mortgagee, while sec. 67 refers to the remedy against the property mortgaged (*r*). The section embraces two different classes of suit. The cause of action in a suit under clause (a) is different from the cause of action in a suit under clause (b) or (c) or (d). The suit under clause (a) is a suit to enforce the personal covenant expressed or implied in the mortgage. But the suit under clauses (b), (c) or (d) is in the nature of a suit for compensation when the mortgagee is deprived of his security. The cause of action being different there is a difference in the period of limitation. See note infra "Limitation." There is also a distinction as to interest. In cases under clause (a) the interest is at the contractual rate and the interest which may be decreed is determined under O. 34, r. 11 of the Code of Civil Procedure (*s*). In cases under clauses (b), (c) and (d) the suit being for compensation, interest is by way of damages and the rate is in the discretion of the Court (*t*). The fact that the deed is not attested makes no difference, for the Privy Council have held that the position of the mortgagor under this section cannot by reason of the non-attestation of the deed be better than it would have been if the mortgage had been duly attested (*u*).

Limitation.—The suit under clause (a) is a suit to enforce the personal covenant and limitation is six years from due date (*v*). If the mortgage money is payable on demand, time runs from the date of the mortgage bond (*w*). The decision of the Privy Council in *Ram Raghubir Singh Lal* v. *The United Refineries* (*x*) makes it clear that Article 116 of the Limitation Act is applicable (*y*). The suit under clauses (b) or (c) or (d) is in the nature of a suit for compensation when the mortgagee is deprived of his security. The mortgagee is not bound to wait for the expiry of the period fixed by the mortgage (*z*) and limitation is under Article 120 from the date of deprivation (*a*), and not from the date when the mortgage money is payable (*b*).

Sub-sec. (1)—Clause (a).—The suit under this clause is a suit on the personal covenant expressed or implied. The mortgagor is liable to be sued on the personal covenant at due date. Under Order 34, rule 14, the mortgagee may sue on the personal covenant first and then sue for sale on the mortgage. The Calcutta High Court have held that when a mortgagee is suing on the covenant under sec. 68 (a) it is not open to him to ignore the mortgage (*c*). This is not a correct statement of the Law before the amending Act 20 of 1929. It was no doubt a hardship that the mortgagee should be able to enforce a personal decree while maintaining his security intact and it was this hardship which led to the amendment of the section by the addition of sub-section (2).

(*r*) *Arunachalam Chetty* v. *Ayyavayyan* (1898) 21 Mad. 476, 481 F.B.; *Appasami Theran* v. *Virappa* (1906) 29 Mad. 362; *Bhikkam Lal* v. *Mt. Janki Dulari* (1937) 171 I.C. 296, (1937) A.O. 517.

(*s*) See Mulla's Code of Civil Procedure, 10th Ed., pp. 1015, 1016, and *Jagannath Prasad* v. *Surajmal* (1927) 54 I.A. 1, 54 Cal. 161, 99 I.C. 686, ('27) A.PC. 1; *Chhote Lal* v. *Raja Mahommad Ahmad Ali Khan* (1933) 8 Luck. 315, 144 I.C. 983, ('33) A.O. 128.

(*t*) *Rudra Prasad* v. *Nasiruddin* (1927) 102 I.C. 630, ('27) A.O. 315.

(*u*) *Ram Narain Singh* v. *Adhindra Nath* (1916) 44 I.A. 87, 44 Cal. 388, 38 I.C. 982.

(*v*) *Miller* v. *Ranganath* (1885) 12 Cal. 389; *Ramdin* v. *Kalka Prasad* (1885) 12 I.A. 12, 7 All. 502; *Lachmi Narain* v. *Turabunissa* (1912) 34 All. 246, 14 I.C. 505; *Shyam Behari Singh* v. *Rameshwar Prasad* (1941) 20 Pat. 904, 198 I.C. 206, (1942) A.P. 213.

(*w*) *Kamalambal* v. *M. Purushotam Naidu* (1934) 67 Mad. L.J. 499, 152 I.C. 437, ('34) A.M.

(*x*) (1933) 60 I.A. 183, 11 Rang. 186, 37 Cal. W.N. 633, 57 Cal. L.J. 308, 64 Mad. L.J. 655, 35 Bom. L.R. 753, 142 I.C. 788, ('33) A.PC. 143.

(*y*) *P. S. A. Alagan* v. *Maung Po Peik* (1934) 151 I.C. 426, ('34) A.R. 227; *Shambu Dat* v. *Shiam Narain* (1934) 151 I.C. 448, ('34) A.O. 415; *Lalta Singh* v. *Mathura Upadhia* (1931) 6 Luck. 374, 129 I.C. 168, ('31) A.O. 5.

(*z*) *Linga Reddi* v. *Sama Rau* (1894) 17 Mad. 469; *Hira Lal* v. *Ghasitu* (1894) 16 All. 318 F.B.; *Venkatrao* v. *Mahableshwar* (1902) 26 Bom. 241; *Samaya* v. *Nagalingam* (1889) 15 Mad. 174.

(*a*) *Unichaman* v. *Ahmed* (1898) 21 Mad. 242; *Ram Jewan* v. *Jagarnath* (1898) 25 Cal. 450; *Maung Yan Kuin* v. *Maung Po Ka* (1925) 3 Rang. 60, 89 I.C. 56, ('25) A.R. 223; *Shambu Dat* v. *Shiam Narain* (1934) 151 I.C. 448, ('34) A.O. 415.

(*b*) *Appasami* v. *Virappa* (1906) 29 Mad. 362; *Afiruddi* v. *Joy Chandra* (1930) 35 Cal. W.N. 108, 129 I.C. 408, ('30) A.O. 703.

(*c*) *Sukhada Kanta Bhattacharjee* v. *Jogines Kant Bhattacharjee* (1933) 60 Cal. 1197, 37 Cal. W.N. 1087, 149 I.C. 878, ('34) A.C. 73.

S. 68 (1)(a)

Personal liability of the mortgagor.—As pointed out by Lord Parker in a case already cited (*d*) a loan prima facie involves a personal liability, but the nature and the terms of the security may negative any personal liability. Thus while there is a personal liability express or implied, in a simple mortgage (*e*) or in an English mortgage, there is none in a mortgage by conditional sale (*f*) or in a usufructuary mortgage (*g*). Therefore in the last two classes of a mortgage a personal liability can be created only by a covenant expressed or clearly implied (*h*). Again, a promise to pay does not give the right of personal remedy, if the mortgagor binds himself to pay only out of the property mortgaged or a particular fund (*i*). It is always a matter of construction whether there is a covenant enforcible against the person of the mortgagor personally (*j*). The personal covenant may be contingent as where the mortgagor covenants that if the property mortgaged is sold for arrears of revenue or other causes, the mortgage money may be recovered from him personally, and if it is contingent it cannot be enforced until the contingency has happened (*k*). The personal covenant has in some cases been too readily assumed on the analogy of English mortgages without regard to the nature of the security (*l*). Express covenants take many forms (*m*). The words "whenever we pay the same to you, you shall receive it and give back the deed," were held not to amount to a covenant to repay, as they merely gave the mortgagor the option of paying (*n*). Again the words "having paid the principal money in the month of Chaitra 1927 we shall take back the document and the land. In case we fail to repay the principal money at due date this subdharna bond shall remain in force," were held not to import a personal covenant, but merely to express the right of redemption (*o*). In a Lahore case (*p*) a provision that the mortgagees could recover the interest for the first five years in any way they liked was held to import a personal covenant. In an anomalous mortgage, the right of the mortgagee to sue on a personal covenant is not affected by his right to enforce his right to recover *possession* (*q*). In another case where by the terms of the deed. the mortgagee was to repay himself as far as interest was concerned out of the rents and profits, but the deed provided that after the expiry of a certain period the mortgagor was bound to pay the entire sum, it was held that the deed contained a personal covenant to pay the mortgage money and the mortgagee was entitled to a decree under the section (*r*).

(*d*) *Ram Narain Singh* v. *Adhindra Nath*, *supra*; cf. *Kerr* v. *Ruxton* (1904) 4 Cal. L.J. 510.

(*e*) *Wahidunnissa* v. *Gobardhan* (1900) 22 All. 453, 461; *Abbakke Heggadthi* v. *Kinhiamma* (1906) 29 Mad. 491; *Bhugwan* v. *Parmeshwari* (1907) 5 Cal. L.J. 287; *Jangi Singh* v. *Chandar Mol* (1908) 30 All. 388; *Ram Kishore* v. *Surajdeo* (1911) 9 Cal. L.J. 5, 1 I.C. 442.

(*f*) *Balkishen* v. *Legge* (1900) 22 All. 149, 159, 27 I.A. 58; *Ramasami* v. *Samiyappanayakan* (1882) 4 Mad. 179, 183; *Bhikkam Lal* v. *Mt. Janak Dulari* (1937) A.O. 517; *Bishen Dutt* v. *Mathura Prasad* (1930) A.A. 260.

(*g*) *Gopalasami* v. *Arunachella* (1892) 15 Mad. 304.

(*h*) *Pell* v. *Gregory* (1925) 52 Cal. 828, 844, 89 I.C. 1, ('25) A.C. 834 F.B.; *Pars Ram Jaishi Ram* v. *Brij Mohan* (1932) 13 Lah. 259, 135 I.C. 33, ('32) A.L. 164.

(*i*) *Narotam Das* v. *Sheo Pargash* (1884) 10 Cal. 740, 11 I.A. 83; *Kalka Singh* v. *Parasram* (1895) 22 Cal. 434, 22 I.A. 68; *Singhee* v. *Tiruvengadam* (1890) 13 Mad. 192; *Anglo-Indian Trading Co.* v. *Brierly* (1910) 8 I.C. 302 (covenant to pay out sale proceeds of manganese ore).

(*j*) *Ghasiram* v. *Raja Mohan Bikram* (1907) 6 Cal. L.J. 639, 649; *Rajagopalachariar* v. *Thiagaraya* (1925) 86 I.C. 481, ('25) A.M. 991; *Bhikam Lal* v. *Mt. Janak Dulari* (1937) 171 I.C. 296, (1937) A.O. 517.

(*k*) *Bunseedhur* v. *Sujaat Ali* (1889) 16 Cal. 540; cf. *Miller* v. *Runga Nath* (1886) 12 Cal. 389.

(*l*) *Kalee Pershad* v. *Raye Kishoree* (1873) 19 W.R. 281; *Musaheb Zaman* v. *Inayatullah* (1892) 14 All. 513, 519 ("the mortgage contains within itself so to speak a personal liability to repay"); *Parbati* v. *Gobinda* (1906) 4 Cal. L.J. 246; *Bhugwan Das* v. *Parmeshwari* (1907) 5 Cal. L.J. 287; *Seth Jiwandas* v. *Janki* (1922) 18 Nag. L.R. 145, 65 I.C. 53, ('22) A.N. 98; *Gopikisan* v. *Mankuar* (1924) 20 Nag. L.R. 46, 78 I.C. 239, ('24) A.N. 97.

(*m*) Cf. *Jogeswar* v. *Nitaichand* (1870) 4 Beng. L.R. App. 48; *Annaswami* v. *Narranaiyan* (1862) 1 Mad. H.C.R. 114; *Sivakami Ammal* v. *Gopala* (1899) 17 Mad. 131.

(*n*) *Rangappa* v. *Thamayappa* (1914) 26 Mad. L.J. 514, 516, 24 I.C. 372.

(*o*) *Luchmeshar Singh* v. *Dookh* (1897) 24 Cal. 677, 679, followed in *Kamal Nayan* v. *Ram Nayan* (1930) 120 I.C. 308, ('30) A.P. 152; *Jamuna Singh* v. *Sheonandan Singh* (1941) 194 I.C. 392, (1941) A.P. 486.

(*p*) *Pars Ram Jaishi Ram* v. *Brij Mohan* (1932) 13 Lah. 259, 135 I.C. 33, ('32) A.L. 164.

(*q*) *Har Kuar* v. *Udham Singh* (1939) A.L. 112.

(*r*) *Raj Kumar Bharathi* v. *Surajdeo Sahi* (1938) 17 Pat. 737, 177 I.C. 538, (1938) A.P. 585.

Personal liability not enforceable against purchaser from mortgagor.—The personal covenant does not run with the land and no personal decree can be made against a purchaser of the equity of redemption (*s*). Thus in *Jamna Das* v. *Ram Autar* (*s*) a purchaser of the equity of redemption retained a part of the purchase money under an agreement with the mortgagor to pay the mortgage debt, but the Judicial Committee held that he was not personally liable to the mortgagee under sec. 90 of the Transfer of Property Act, now the Code of Civil Rrocedure, Order 34, rule 6, as he was not party to the sale, nor could he be held liable on the ground that he held the money in trust for the mortgagee (*t*). There is, however, an implied covenant by the purchaser of the equity of redemption to indemnify the mortgagor (*u*). The word "mortgagor" includes persons who derive title from the mortgagor, unless otherwise expressly provided —sec. 59A. The word "himself" therefore excludes the liability of a transferee or an heir, though an heir would be liable to the extent of the assets of the deceased in his hands. The assignee can make himself liable by entering into a fresh covenant with the mortgagee (*v*), but liability is not implied from the payment of interest (*w*). The mortgagor continues liable for the payment of the mortgage debt after he has assigned the equity of redemption, but if he is sued for payment it has been held that he acquires a new right to redeem (*x*). The mortgagee when so redeemed conveys the property to him subject to the right of redemption vested in the assignee.

Personal liability not affected by want of registration or of attestation.—The remedy on the personal covenant is available if the mortgage is invalid for want of registration (*y*). See note 'Personal covenant in a mortgage bond' at p. 184 of Mulla's Registration Act 3rd Ed. The remedy is also available even though the mortgage be invalid for want of attestation (*z*). See note 'Attested' under sec. 59.

No personal liability if mortgage illegal.—A suit will not lie on the personal covenant if the transaction of mortgage is illegal (*a*). If the mortgage is forbidden by law, any subsidiary covenant also fails (*b*). But where the mortgage was void under paragraph 11 of the third schedule to the C.P.C. it has been held that the personal covenant is not affected and even if the claim or the personal covenant is abandoned the mortgagee may claim restitution under section 65 of the contract Act (*c*).

(*s*) *Re Errington, Ex parte Mason* (1894) 1 Q.B. 11; *Jamna Das* v. *Ram Autar* (1912) 34 All. 63, 39 I.A. 7, 13 I.C. 304; *Tara Chand* v. *Brojo Gopal* (1913) 17 Cal. L.J. 120; 18 I.C. 747; *Nanku Prasad* v. *Kamta Prasad* (1923) 26 Cal. W.N. 771, 95 I.C. 970, ('23) A.PC. 54; *Mt. Boota* v. *Gur Prasad* (1936) 12 Luck. 313, 164 I.C. 817, (1937) A.O. 20.

(*t*) *Jamna Das* v. *Ram Autar* (1912) 34 All. 63, 39 I.A. 7, 13 I.C. 304.

(*u*) Sec. 55 (5) (d); *Ram Barai Singh* v. *Sheodeni* (1912) 16 Cal. W.N. 1040, 16 I.C. 73; *Izzat-un-Nissa Begam* v. *Kunwar Pertab Singh* (1909) 36 I.A. 203, 208, 31 All. 583, 3 I.C. 793; *Janki Saran Singh* v. *Syed Mahammad Ismail* (1932) 139 I.C. 525, ('32) A.P. 273; *Warington* v. *Ward* (1802) 7 Ves. 332, 337; *Bridgeman* v. *Daw* (1891) 40 W. R. 253.

(*v*) *Shore* v. *Shore* (1847) 2 Ph. 378.

(*w*) *Re Errington, Ex parte Mason*, (1894) 1 Q.B. 11.

(*x*) *Kinnaird* v. *Trollope* (1888) 39 Ch.D. 636, 645; *Delhi and London Bank* v. *Bhikari* (1902) 24 All. 185; *Dhana Koeri* v. *Ram Kewal* (1930) 129 I.C. 664, ('30) A.P. 570; *Lockhart* v. *Hardy* (1845) 9 Beav. 349.

(*y*) *Krishnaswami* v. *Kamalamma* (1941) 68 I.A. 136, (1941) A.PC. 90 (where the memorandum of deposit of title deeds being ineffective for want of registration, a personal decree was passed on the pronote). But see *Kesari Ram* v. *Musafir Tewary* (1937) A.A. 711 where the usufructuary mortgage being invalid for want of registration no personal decree was passed, as there was no personal covenant.

(*z*) *Ram Narain Singh* v. *Adhindra Nath* (1916) 44 I.A. 87, 44 Cal. 388, 38 I.C. 282.

(*a*) *Tulshi Ram* v. *Sat Narain* (1921) 43 All. 81, 57 I.C. 445, ('21) A.A. 392; *Har Prasad* v. *Sheo Gobind* (1922) 44 All. 486, 67 I. C. 793, ('22) A.A. 134; *Kanhai* v. *Tilak* (1918) 16 I.C. 42; *Hamad Yar Khan* v. *Shankar Das* (1923) 85 I.C. 802, ('23) A. L. 357 (Mortgage in contravention of the Colonization of Government Lands Act); *Bhikan Lal* v. *Mt. Janaki Dulari* (1937) 171 I.C. 296, (1937) A.O. 517. (Mortgage in contravention of Para 11 of Schedule 3, C.P.C.)

(*b*) *Bhuri Ram* v. *Ganesh Rai* (1927) 25 All. L.J. 793, 103 I.C. 160, ('27) A.A. 499 F.B.

(*c*) *Nisar Ahmad* v. *Raja Mohan Manucha* (1940) A.PC. 204, 67 I.A. 431; *Raja Mohan Manucha* v. *Manzoor Ahmad Khan* (1942) 70 I.A. 1; *Sanaullah* v. *Jai Narain* (1942) A.A. 409.

Illustration.

S. 68 (1) (b)

A executes a usufructuary mortgage of his occupancy holding to *B*, and covenants that in case of dispossession *B* shall have the right to recover the principal money with damages or interest. The deed also contains a subsidiary simple mortgage of two houses to secure repayment of the principal money with damages or interest. The mortgage of the occupancy holding is illegal under the provisions of the Agra Tenancy Act. The subsidiary mortgage of the houses falls with it. *Bhusi Ram* v. *Ganesh Rai* (1927) 25 All. L.J. 793, 103 I.C. 160, ('27) A. A. 499 [F.B.].

The Punjab Alienation of Land Act, 1900, does not forbid mortgages but only requires mortgages of land of an agricultural tribe to be in a particular form, and renders null and void conditions that do not accord with that form. Under that Act a condition for possession by the mortgagee for more than twenty years is illegal. Therefore a simple mortgage usufructuary which provides for possession for more than twenty years is invalid as a usufructuary mortgage but will be effective as a simple mortgage; but as the Act forbids sale of such land in execution the mortgagee can only obtain a decree on the personal covenant expressed or implied (*d*).

Proviso.—The liability on the personal covenant does not run with the land and no personal decree can be made against the purchaser of an equity of redemption. See note *supra*. 'Liability on personal covenant not enforceable against purchaser from mortgagor.'

Sub-sec. (1)—Clause (b).—This clause refers to cases where the security is destroyed by accidental causes such as a fire or flood or *vis major*, without default of either party. It accords with the Hindu law rule that a creditor in whose hands a pledge has perished is nevertheless entitled to recover the debt (*e*). So also in English law a mortgagee who has been evicted without his default, *e.g.*, on forfeiture of the mortgaged leasehold is entitled to sue for payment of the debt (*f*). When the mortgagor being in possession as lessee of the mortgagee got his rent reduced by the Revenue Court the Allahabad High Court held that the mortgagee was entitled to sue for the debt (*g*). In a later case the same High Court held that such a case would not fall under the old clause (b), *i.e.*, the present clause (c), as the reduction of the rent was not a default or wrongful act (*h*). It is open to the mortgagee to relinquish his security and sue only on the personal covenant of the mortgagor to pay (*i*) but he cannot, on receipt of some money from the assignee of the equity of redemption, give up the security and sue the heirs of the mortgagor on the personal covenant (*j*). It is submitted that it would fall under the present clause (b). As the mortgagor is not in default, the mortgagee must first give him an opportunity of substituting another security that is sufficient as explained in sec. 66. He must, therefore, before suing require the mortgagor to furnish another sufficient security (*k*) and allow him a reasonable time for that purpose. What is reasonable time depends upon the circumstances of each case. In one case the Court assumed that six months would be reasonable time (*l*). Cases have arisen, both before and after the Act, of destruction by

(*d*) *Sochet Singh* v. *Hidayat Ullah* (1932) 13 Lah. 508, 140 I.C. 863; ('32) A.L. 630; *Quader Parast Khan* v. *Nur Mahomed* (1935) 16 Lah. 612, 158 I.C. 206, ('35) A.L. 103.

(*e*) *Vithoba* v. *Chotalal* (1871) 7 Bom. H.C. 116 A.C.J.

(*f*) *Re Burell, Burrell* v. *Smith* (1869) L.R. 7 Eq. 399.

(*g*) *Fateh Din* v. *Kishen Lal* (1923) 73 I.C. 902, ('23) A.A. 584.

(*h*) *Boochi* v. *Bohra Nath* (1931) 133 I.C. 402, ('32) A.A. 51.

(*i*) *Mote Ram* v. *Bisheshwar Nath* (1939) 183 I.C. 833, (1939) A. Pesh. 34.

(*j*) *Mt. Boota* v. *Gur Prasad* (1936) 12 Luck. 313, 164 I.C. 317, (1937) A.O. 20.

(*k*) *Kuppier* v. *Periakaruppa* (1919) 42 Mad. 578, 580, 50 I.C. 758; *Kamalambal* v. *M. Purushotam Naidu* (1934) 67 Mad. L.J. 499, 152 I.C. 437, ('34) A.M. 644.

(*l*) *Bhawani* v. *Jang Bahadur* (1909) 7 All. L.J. 391, 6 I.C. 569.

diluvion (*m*), and by fire (*n*). If the land is wholly or partially destroyed by diluvion, the mortgagee has a right to sue for the mortgage money under sec. 68, but limitation for a suit under sec. 67 is not suspended while the land is submerged (*o*). It has been said that the acquisition of the property under the Land Acquisition Act is destruction of the security (*p*). This case is now specially provided for in sec. 73 (2).

In an Allahabad case the mortgage deed itself provided for the substitution of another security in case the house mortgaged was destroyed or proved insufficient to satisfy the debt, and this was enforced when the house was sold in execution by a prior mortgagee (*q*). Where the mortgagee knows already that the mortgagor is not in possession of the property, but has only a doubtful and disputed title thereto, the transaction is not a mortgage and the section has no application and further that a compromise by the mortgagor with the person disputing his title cannot be regarded as a wrongful act or default within the meaning of the section (*r*).

Sub-sec. (1)—Clause (c).—Where the mortgagee is deprived of his security wholly or in part by the wrongful act or default of the mortgagor, the mortgagee may sue the mortgagor for the mortgage money. It is not reasonable that, if the mortgagee's security is impaired, he should be obliged to realize the security before enforcing the personal covenant if there is one, and this rule applies equally if there is no personal covenant or if the remedy under the personal covenant is time barred (*s*). A breach of duty imposed upon the mortgagor by sec. 65 is a default, so that if the mortgagor does not pay off a prior encumbrance when it becomes due the mortgagee is entitled to sue the mortgagor personally (*t*). So also if the title of the mortgagor is defective, *e.g.*, when the property is subject to a prior mortgage which has not been disclosed (*u*), or when the mortgagor knows that the property mortgaged is not transferable (*v*). But in some cases in which the mortgagor included in the security property which was not his own the Court held that the remedy was by action for deceit and not under this section (*w*). In two Oudh cases when a mortgagor mortgaged joint family property without authority the mortgagee was given a personal decree (*x*). It is not sufficient that the mortgagee merely suspects a defect in title (*y*). Again a breach of duty under section 66 is a default and if the mortgagor commits waste the mortgagee may sue him personally for the debt (*z*). Where the mortgaged property was allowed to fall in disrepair so as to diminish its letting value, it was held that the mortgagee could enforce his right under clause (c) (*a*). When the mortgagor sold the property by registered deed to a vendor who had no notice of the unregistered mortgage, the mortgagee was deprived of his security and was therefore entitled to sue the mortgagor personally (*b*).

(*m*) *Sheo Golam* v. *Roy Dinkar Dayal* (1874) 21 W.R. 226; *Bhawani* v. *Jang Bahadur*, *supra*; *Ram Sewak* v. *Sheo Naik* (1923) 45 All. 388, 78 I.C. 945, ('23) A.A. 433.

(*n*) *Vithoba* v. *Chotalal* (1871) 7 Bom. H.C. 116 A.C.J.; *Venkateshwara* v. *Kesava* (1879) 2 Mad. 187.

(*o*) *Raghunath Bhagat* v. *Maghu Mander* (1933) 146 I.C. 856, ('33) A.P. 693.

(*p*) *Sajjadi Begum* v. *Janki Bibi* (1917) 20 O.C. 256, 42 I.C. 793; *Prokash Chandra* v. *Hasan Banu* (1918) 42 Cal. 1146, 1152, 28 I.C. 450.

(*q*) *Ganesh Das* v. *Maya Ram* (1882) All. W.N. 90.

(*r*) *Gajanand* v. *Rani Prayag Kumari* (1938) A.C. 48, 176 I.C. 913.

(*s*) *Appasami Theran* v. *Virappa* (1906) 29 Mad. 362; *Ram Narayan* v. *Adhindra Nath* (1916) 44 Cal. 388, 38 I.C. 932, ('16) A.PC. 119.

(*t*) *Singjee* v. *Tiruvengadam* (1890) 13 Mad. 192.

(*u*) *Radha Churn* v. *Parbuttee Churn* (1876) 25 W.R. 51; *Bhola Nath* v. *Hira Mohan* (1920) 7 I.C. 251.

(*v*) *Ganesh Singh* v. *Sujhari* (1888) 10 All. 47; *Kunhiraman* v. *Aruthalai Kutti* (1910) 7 I.C. 178; cf. *Bhugwan Acharjee* v. *Gobind* (1883) 9 Cal. 234 (a case before the Act).

(*w*) *Raghunath* v. *Dadaji* (1922) 70 I. C. 423, ('22) A.B. 217; *Shahzad Singh* v. *Narain Kurmi* (1927) 25 All. L. J. 37, 101 I.C. 257, ('27) A.A. 190.

(*x*) *Rudr Prasad* v. *Nasiruddin* (1927) 102 I.C. 630, ('27) A.O. 315; *Debi Prasad* v. *Sheo Narain* (1914) 21 I.C. 581.

(*y*) *Amirulla* v. *Rasul Baksh* (1919) 17 All. L.J. 474, 50 I.C. 744.

(*z*) *Ramakrishnamma Chetty* v. *Vuvvati Chengu* (1914) 27 Mad. L.J. 494, 33 I.C. 321.

(*a*) *Mt. Mathura Devi* v. *Mohan Lal* (1938) A.O. 210.

(*b*) *Appasami* v. *Virappa* (1906) 29 Mad. 362.

Illustrations.

S. 68 (1) (d)

(1) *A* mortgaged property to *B* and then to *C*. *A* failed to perform the covenant implied by sec. 65 (e) to pay off the prior incumbrance when it became due and *B* brought the property to sale. *C* was entitled to sue at once for his mortgage money : *Singjee* v. *Triuvengadam* (1890) 13 Mad. 192.

(2) A Hindu coparcener under the Mitakshara law as administered in Oudh mortgaged property to *B* by simple mortgage for a term of twelve years. *B* discovered that the property was coparcenary property and that the mortgage was without legal necessity. *B* was entitled to sue for the mortgage money although the term had not expired : *Rudr Prasad* v. *Nasiruddin* (1927) 102 I. C. 630, ('27) A.O. 315.

(3) *A* mortgaged certain property to *B* by a usufructuary mortgage, but remained in possession as *B*'s tenant. *A*'s failure to pay rent would not entitle *B* to sue under this section. *Balu Ram Kumar* v. *Mahpal Singh* (1938) A.A. 188, (1938) All. 218, (1938) A.L.J. 18, 174 I.C. 292.

A sale by the mortgagor of the equity of redemption, whether voluntary (*c*) or enforced by an execution creditor (*d*), is not a wrongful act or default so as to invoke the application of this section.

The default or wrongful act of the mortgagor must be anterior to the deprivation. Thus, although it is the duty of the mortgagor to defend his title to the mortgaged property, he will not be liable under this clause if he fails to perform this duty when called upon after strangers have dispossessed the mortgagee (*e*).

The mortgagee has of course no remedy under this section when he is deprived of his security by his own default (*f*). There was a mortgage to *A* which was not as yet registered. *B* advanced money on a mortgage of the same property and took and registered a second mortgage in the erroneous belief that prior registration would give him priority over *A*. When *A*'s mortgage was completed by registration, *B* had no right to sue for the mortgage money on the ground that his security had been impaired (*g*).

Before the Act it was held that the mortgagee, when deprived of part of his security by wrongful act or default of the mortgagor, was entitled to sue not for the whole of the mortgage money but for a proportional part of it (*h*).

If the mortgagor's heir succeeding to possession as mortgagor commits waste he is liable under this sub-section (*i*) ; and the same would apply to a transferee of the mortgagor (*j*).

Sub-sec. (1)—Clause (d).—This clause refers to usufructuary mortgages and is not applicable to conditional mortgages (*k*). The mortgagor by the terms of the mortgage is bound to deliver possession and to authorize continuance of possession until payment of the mortgage money—sec. 58 (d). If the mortgagor performs these duties he is entitled to recover possession when the debt is discharged, out of the usufruct or otherwise—sec. 62. On the other hand if he makes default, the mortgagee is entitled under this clause to sue him personally for the mortgage money. This is a statutory right irrespective of any

(*c*) *Jhabbu Ram* v. *Girdhari* (1884) 6 All. 298 ; *Gokul* v. *Shrimal* (1904) 6 Bom. L.R. 288 ; cf. *Janki Singh* v. *Sheomangal Singh* (1881) A.W.N. 59. *Ma Pwa Thein* v. *Ma Me Tha* (1935) 161 I.C. 461, (1936) A.R. 80.

(*d*) *Gopalasami* v. *Arunachella* (1892) 15 Mad. 304.

(*e*) *Kuppier* v. *Periakaruppa* (1919) 42 Mad. 578, 50 I.C. 758.

(*f*) *Chitkale* v. *Mathura* (1905) 3 Cal. L.J. 220.

(*g*) *Jowand Singh* v. *Sawan Singha* (1933) 149 I.C. 1030, ('33) A.L. 836.

(*h*) *Pitambur* v. *Ram Surun* (1876) 25 W.R. 7.

(*i*) *Ramkrishna Chetty* v. *Vuvvati Chengu* (1914) 27 Mad. L.J. 494, 33 I.C. 321.

(*j*) *Haridas* v. *Jagannath* (1940) Nag. 63, 184 I.C. 579, (1939) A.N. 256.

(*k*) *Badri Das* v. *Besu* (1933) 145 I.C. 159, ('33) A.L. 174.

express covenant (*l*). If the mortgagee omits to sue under this clause so that his remedy under clause (d) is time barred, then, if there is no personal covenant in the usufructuary mortgage, the mortgagee has no other cause of action (*m*). If the mortgagee fails to obtain possession from the mortgagor on the execution of the mortgage (*n*) or during the term of the mortgage in accordance with a mortgagor's covenant for possession in default of payment of interest (*o*) the mortgagee may recover the debt by personal suit. So also if the mortgagee is dispossessed either by the mortgagor (*p*) or by the mortgagor's co-sharer (*q*) or by title paramount (*r*); or by a prior encumbrancer although the mortgagee omits to redeem that prior encumbrancer (*s*) or himself purchases the property at a sale enforced by that encumbrancer (*t*); or if the mortgagor who is in possession as the mortgagee's lessee wrongfully holds over (*u*). A liability under this section has been enforced when the mortgagor gave two successive usufructuary mortgages (*v*); when the mortgagee could not get possession of some plots because they did not belong to the mortgagor (*w*); and also when the mortgagor deprived a usufructuary mortgagee of the rents and profits (*x*). A transferee of the mortgagor may be liable under this clause, and when a usufructuary mortgagee was dispossessed at a Collector's partition he was held to be entitled to recover the mortgage money from a purchaser of the equity of redemption (*y*). Similarly, a usufructuary mortgagee who was dispossessed at a Collector's partition was held entitled to recover the mortgage money from a co-sharer of the mortgagor to whom the property had been allotted (*z*).

The words "any person claiming under a title superior to that of the mortgagor" have been substituted for the words "any other person" in the old section. It is now clear that the liability under this section does not arise if the disturbance is by a trespasser. Under the old section also it was held that the mortgagor was liable under this section for disturbance by title paramount (*a*).

If the mortgagee is dispossessed by a trespasser, he is entitled to sue him for possession (*b*), but if dispossessed by the mortgagor he may sue either under this section for the mortgage money or for possession (*c*). A mortgage provided that if the mortgagee did not obtain possession or if he lost possession, he could recover his money with interest by sale of the mortgaged property or any other property of the mortgagor. It was held that the mortgagee could sue either for possession or for the mortgage money (*d*).

(*l*) *Unichaman* v. *Ahmed* (1898) 21 Mad. 242; *Laljimal* v. *Mohan Lal* (1881) All. W.N. 71; *Abdul Issalam* v. *Musst. Rafiat* (1905) 2 Cal. L.J. 493.

(*m*) *Kirti Narayan* v. *Surendra Mohun* (1934) 152 I.C. 897, ('34) A.P. 624.

(*n*) *Moidin Kutti* v. *Valia* (1866) 2 Mad. H.C. 315.

(*o*) *Saravana* v. *Chinnammal* (1892) 15 Mad. 65; *Dip Narain* v. *Nageshar* (1930) 52 All. 338, 122 I.C. 872, ('30) A.A. 1 F.B.

(*p*) *Pargan Pandey* v. *Mahatam Mauto* (1905) 6 Cal. L.J. 143.

(*q*) *Talik Singh* v. *Jalal Singh* (1910) 11 Cal. L.J. 186, 5 I.C. 130; *Ramranandan Parbat* v. *Deni Sahi* (1924) 74 I.C. 877, ('24) A.P. 91; *Nand Bahadur* v. *Sita Ram* (1936) A.O. 174.

(*r*) *Sawaba Khandapa* v. *Abaji* (1887) 11 Bom. 475; *Ram Surat* v. *Gur Prasad* (1921) 43 All. 484, 63 I.C. 998, ('21) A.A. 48.

(*s*) *Ramjanam* v. *Kunj Behari* (1922) 6 Pat. L.J. 670, 63 I.C. 252, ('22) A.P. 154.

(*t*) *Ahmadullah Khan* v. *Salar Bakhsh* (1905) 27 All. 488.

(*u*) *Hira Lal* v. *Ghasitu* (1894) 16 All. 318 F.B.

(*v*) *Sukhdeo Misr* v. *Sheo Dial* (1901) All. W. N. 52.

(*w*) *Fateh Din* v. *Kishen Lal* (1923) 73 I.C. 902, ('23) A.A. 584.

(*x*) *Ram Narain Singh* v. *Adhindra* (1916) 44 Cal. 388, 38 I.C. 932, ('16) A.P.C. 252; *Pinto* v. *Narayan* (1932) 34 Bom. L.R. 984, 141 I.C. 471, ('32) A.B. 558.

(*y*) *Janki Saran* v. *Mohammad Ismail* (1932) 13 Pat. L.T. 373, 139 I.C. 525, ('32) A.P. 273.

(*z*) *Mt. Jeleshwar Kuer* v. *Sheonarayan Sah* (1934) 148 I.C. 23, ('34) A.P. 1.

(*a*) *Jhabbu Ram* v. *Girdhari* (1884) 6 All. 298; *Gopalasami* v. *Arunachella* (1892) 15 Mad. 304; *Nakchedi Ram* v. *Ram Charitar* (1897) 19 All. 191; *Kuppier* v. *Periakaruppa* (1919) 42 Mad. 578, 50 I.C. 758; *Sawaba* v. *Abaji* (1887) 11 Bom. 475; *Sadhu Saran* v. *Bahramdeo* (1927) 103 I.C. 592, ('27) A.P. 230; *Ram Surat* v. *Gur Prasad* (1921) 43 All. 484, 63 I.C. 998, ('21) A.A. 48; *Labh Singh* v. *Jammun* (1931) 134 I.C. 1116, ('31) A.L. 694.

(*b*) *Bechu Sahu* v. *Arjun* (1918) 3 Pat. L.J. 162, 43 I.C. 917; *Thakur Chowdhury* v. *Manrup Mahton* (1913) 16 I.C. 735; *Sankata* v. *Jagat Narain* (1899) 2 O.C. 24.

(*c*) *Linga Reddi* v. *Sama Rau* (1893) 17 Mad. 469.

(*d*) *Ram Padarath* v. *Nimar Singh* (1941) 17 Luck. 362, 197 I.C. 164, (1942) A.O. 172.

Illustrations.

S. 68 (1) (d)

(1) *A* mortgaged several plots of land to *B* by usufructuary mortgage. Two of the plots did not belong to *A*, and therefore *B* could not get possession of them. *B* was entitled to sue for the mortgage money: *Fateh Din* v. *Kishen Lal* (1923) 73 I. C. 902, ('23) A.A. 584.

(2) *A* mortgaged property to *B* by simple mortgage, and subsequently to *C* by usufructuary mortgage. *C* took possession under this mortgage. But *B* brought the property to sale and the execution purchaser evicted *C*. *C* was evicted by superior title and was entitled to sue for the mortgage money although he might have redeemed *B*: *Ramjanam* v. *Kunj Behari* (1921) 6 Pat. L.J. 670, 63 I.C. 252, ('22) A.P. 154.

(3) *A* mortgaged property to *B* by usufructuary mortgage. The property had been leased to tenants who wrongfully and without any instigation from *A* refused to pay rent to *B*. This was not dispossession by superior title. *B*'s remedy was against the tenants and he had no remedy against *A* under sec. 68 : *Nakchedi Ram* v. *Ram Charitar Rai* (1897) 19 All. 191.

The mortgagee is not entitled to relief under this clause if he is dispossessed by his own default, *e.g.*, when he neglects to pay the Government revenue out of the income and the land is sold for arrears of assessment (*e*), or when he omits to make a defence to a suit by a subsequent mortgagee which would have preserved his security (*f*), or when a mortgagee whose claim proceedings were disallowed under O. 21, Rule 62 Civil Procedure Code omits to file a suit for the recovery of possession (*g*).

Again, the mortgagee may lose his remedy by acquiescence in his dispossession (*h*). If a usufructuary mortgagee does not get possession of the whole of the property mortgaged and does not enforce his remedy under the section, he cannot claim interest in lieu of profits (*i*), unless there is an express stipulation to that effect (*j*). He is deemed in law to have acquiesced in his diminished security. A Privy Council case on this point is that of *Rajah Pertab Bahadur Singh* v. *Gajadher* (*k*), a suit to redeem 5 out of 12 villages mortgaged by an Oudh Zemindar in 1851. The mortgage was with possession but there was a covenant to pay interest until delivery of possession. The mortgagee was dispossessed of 6 villages by a Kabulayatdar of the King of Oudh in 1853, then recovered possession but was again dispossessed of 7 villages at the Summary Settlements of 1853 and 1864. The mortgagee claimed interest as he was dispossessed. But the Judicial Committee held that as he brought no suit to recover the mortgage money when he was dispossessed, he had acquiesced in his dispossession, and decreed redemption on payment of the principal sum only. But the mortgagee is not obliged to repudiate the mortgagee because he is dispossessed of part of his security. In a case where the mortgage was of 9 villages, 7 of which were subject to a prior mortgage, and the mortgagee was dispossessed first of

(*e*) *Kashi Lal* v. *Shaikh Nurul Huq* (1929) 8 Pat. 569, 121 I.C. 466, ('29) A.P. 209.

(*f*) *Dunia Lal* v. *Musst. Nowratan* (1917) 2 Pat. L.J. 490, 41 I.C. 806.

(*g*) *Bharat Ram* v. *Beni Dutt* (1936) 161 I.C. 821, (1936) A.O. 263.

(*h*) *Raja Pertab Bahadur Singh* v. *Gajadhar* (1902) 24 All. 521, 29 I.A. 148; *Khuda Baksh* v. *Alim-un-nissa* (1905) 27 All. 313; *Uchit Mandar* v. *Gosain Singh* (1919) 51 I.C. 816; *Jhunku Singh* v. *Chhotkan Singh* (1909) 31 All. 325, 2 I.C. 221; *Amjad Husain* v. *Zaimul Iba* (1927) 98 I.C. 778, ('27) A.O. 87; *Pranpati* v. *Hasiban* (1932) 135 I.C. 892, ('32) A.O. 57; *Prasanna Kumar Holdar* v. *Giris Chandra Ghosh* (1934) 58 Cal. L.J. 80, 37 Cal. W.N. 1162, 149 I.C. 667, ('34) A.C. 149.

(*i*) *Mahadaji* v. *Joti* (1893) 17 Bom. 425; *Jhunku Singh* v. *Chhotkan Singh*, *supra*; *Uchit Mandar* v. *Gosain Singh*, *supra*; *Bhawani Prasad* v. *Saheb Din* (1906) 9 O.C. 144; *Dubri* v. *Ram Naresh* (1926) 93 I.C. 297, ('26) A.O. 224; *Mahadeo* v. Sitla Baksh (1922) 65 I.C. 408, ('22) A.O. 102; *Sheo Shankar* v. *Raj Jas* (1927) 2 Luck. 676, 105 I.C. 164, ('27) A.O. 594; *Narul Hasan* v. *Mahbub Bux* (1945) A.A. 203 (F.B.).

(*j*) *Phulchand* v. *Sandilands* (1907) 10 O.C. 29.

(*k*) (1902) 24 All. 521, 29 I.A. 148.

the 7 and then some years later of the 2 villages, the fact that he acquiesced in the dispossession of the 7 villages did not prevent his recovering the mortgage money when dispossessed of the two villages (*l*).

Anomalous mortgage.—As to whether the remedy under this clause is available to an anomalous mortgagee who is dispossessed, see note 'Rights and liabilities' under sec. 98.

Charge.—The privilege conferred by this section on a mortgagee to sue for money cannot be availed of by a charge-holder, in proceedings in execution of a decree, without resorting to a suit, even if the security has been impaired by the conduct of the person creating the charge (*m*).

Succession Certificate.—The heirs of a mortgagee can sue on a cause of action accruing after the death of the mortgagee without obtaining a succession certificate, but not if the cause of action accrued in his lifetime (*n*).

Interest.—A usufructuary mortgagee who is dispossessed may not only require payment of the debt but also interest, by way of damages, for the unexpired period of the mortgage (*o*). So also is he entitled to interest, if he never obtained possession owing to the fault of the mortgagor (*p*). It has, however, been held by a Full Bench of the Allahabad High Court that the mortgagee at the time of redemption cannot claim by way of interest the profits of the property which has not been delivered to him (*q*).

Sub-section (2).—A suit under sec. 68 is not a suit on the mortgage. A suit on the mortgage is a suit under sec. 67 while in a suit under sec. 68 the only decree that can be passed is a decree for money (*r*). A usufructuary mortgagee who has been dispossessed has no remedy either by foreclosure or by sale but can only be given a simple money decree (*s*). He may also sue for possession but he cannot sue for sale. This is because there is no personal covenant in a pure usufructuary mortgage. But if there is a personal covenant which implies a right of sale it would seem that if the mortgage money has become payable under sec. 68 the mortgagee may also under sec. 67 sue for sale (*t*).

The suit under sec. 68 not being a suit on the mortgage, Order 34, rule 6, of the Code of Civil Procedure does not apply. It is therefore open to the mortgagee to execute his decree against the mortgagor personally while preserving his rights under the mortgage. This might be a great hardship to the mortgagor who finds himself pressed to pay while his property is under mortgage. To avoid this hardship the sub-section enacts that in cases where the mortgagor is not in default, *i.e.*, in clauses (a) and (b), the suit under sec. 68 shall be stayed until the mortgagee has exhausted his remedy against the security or what remains of the security. But the mortgagee may avoid the stay order and proceed with the suit if he surrenders his security, for a mortgagee who abandons his

(*l*) *Muhammad Hanif* v. *Ishri Prasad* (1922) 44 All. 77, 64 I.C. 768, ('22) A.A. 197.

(*m*) *Kesar Chand* v. *Uttam Chand* (1945) A.P.C. 91.

(*n*) *Umesh Chandra* v. *Mathura Mohan* (1901) 28 Cal. 246.

(*o*) *Sita Nath Ghose* v. *Thakurdas* (1919) 46 Cal. 448, 52 I.C. 433; *Linga Reddi* v. *Shama Rao* (1892) 17 Mad. 469; *Mahesh Singh* v. *Chauharja* (1882) 4 All. 245; *Subramania* v. *Panchanada* (1931) Mad. W.N. 751, 136 I.C. 785, ('32) A. M. 175; *Kumarappa* v. *Suppan* (1933) 145 I.C. 744, ('33) A.M. 672.

(*p*) *Dalsingh* v. *Sunder Koer* (1944) A.O. 208 following *Pratap Bahadur Singh* v. *Gajadhar Bakshi Sing* (1902) L.R. 29 I.A. 148, I.L.R. 24 All. 529.

(*q*) *Nurul Hasan* v. *Mahbub Baksh* (1945) All. 676 F.B.

(*r*) *Arunchalam Chetti* v. *Ayyavoyyan* (1898) 21 Mad. 476, 481 F.B.; *Appasami Thevan* v. *Virappa* (1906) 29 Mad. 363.

(*s*) *Aghore Nath* v. *Natabar* (1917) 41 I.C. 406; *Lazarannassa Bibi* v. *Mahomed Jaffer* (1912) 13 I.C. 336.

(*t*) *Mohammad Narsing Partab* v. *Yakub* (1929) 56 I.A. 299, 4 Luck. 363, 116 I.C. 414, ('29) A.PC. 139; *Gajadhar Agarwalla* v. *Sibananda* (1924) 28 Cal. W.N. 532, 81 I.C. 768, ('24) A.C. 582 (the right to sue under s. 68 would give a right to sell under s. 67); *Ram Khilawan* v. *Ghulam Husain* (1932) 8 Luck. 190, 141 I.C. 464, ('33) A.O. 96.

Ss. 68, 69

security is competent to bring a simple suit for the money advanced by him (u). When the security is released the enforcement of the money decree is no hardship on the mortgagor. The mortgage is then no longer subsisting and Order 34, rule 14, is no bar to the sale of the mortgaged property in execution of the decree (v).

In cases under clause (c) the mortgagor is in default and is not entitled to this protection. Thus if the mortgagor in possession commits waste, the mortgagee would be entitled to sue for the mortgage money while still preserving his mortgage rights. He would not however be able to sell the mortgaged property in execution of the decree under sec. 68 by reason of Order 34, rule 14. But if there were a personal covenant in the mortgage which implied a right of sale, it would seem that the mortgagee might sue both under sec. 68 and under sec. 67 to recover the mortgage money and to realize the security. This was so decided by the Privy Council in the case of a simple mortgage usufructuary in *Narsingh Partab* v. *Mohammad Yaqub* (w).

In cases under clause (d) the mortgage is usufructuary and there is no question of realizing the security, for a usufructuary mortgagee is not entitled to a decree either for foreclosure or for sale. He would sue on title to recover possession (x), and in such a suit no question as to the amount due on the mortgage would arise (y). But he would also have a right to sue for the mortgage money under sec. 68 (d). This right is supplemental so that he can file a suit in the alternative for recovery of possession or for the mortgage money (z). If the decree were for the mortgage money, he could not bring the mortgaged property to sale (a) except in execution of the decree for costs, for that part of the decree would not be under the mortgage and Order 34, rule 14, would not be applicable to it (b).

Abandon his security.—These words refer to the whole of the security. An abandonment of part of the security would be insufficient; for in that case the mortgage as to the remainder would subsist and Order 34, rule 14, would be a bar to its sale. Again a release of part of the security would be inadequate relief to the mortgagor, for its effect would only be to increase the burden on the rest of the property. On the other hand if part of the security has ceased to exist a release of the remainder would be sufficient. This was recognized in a Calcutta case (c) under Order 34, rule 6.

Power of sale when valid.

69. (1) *Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866,* a mortgagee, or any person acting on his behalf, *shall, subject to the provisions of this section, have power* to sell or concur in selling the mortgaged

(u) *Durga Charan* v. *Ambica Charan* (1927) 54 Cal. 424, 429-430, 101 I.C. 130, ('27) A.C. 393; *Sarajbala* v. *Kamini Kumar* (1926) 43 Cal. L.J. 142, 94 I.C. 811, ('26) A.C. 765.

(v) *Chedi Lal* v. *Saadat-un-nissa* (1917) 39 All. 36, 36 I.C. 907; *Ganesh Singh* v. *Debi Singh* (1910) 32 All. 377, 5 I.C. 419; *Tansukh Rai* v. *Sri Gopal* (1921) 43 All. 677, 63 I.C. 445, ('21) A.A. 131; *Suraj Narain* v. *Jagbali Shukul* (1920) 42 All. 566, 57 I.C. 14; *Gomathi Ammal* v. *Alagappa* (1921) 41 Mad. L.J. 160, 62 I.C. 756, ('21) A.M. 477.

(w) (1929) 4 Luck. 363, 56 I.A. 299, 116 I.C. 414, ('29) A.PC. 139.

(x) *Kalka Singh* v. *Himayat Ally* (1907) 10 O.C. 218; *Gauri Singh* v. *Bechu Singh* (1932) All. L.J. 1092, 142 I.C. 779, ('33) A.A. 97 distinguishing 56 I.A. 299, *supra*.

(y) *Fazal Din* v. *Milka Singh* (1933) 145 I.C. 182, ('33) A.I. 193.

(z) *Linga Reddi* v. *Sama Rau* (1891) 17 Mad. 469; *Arunachalam Chetti* v. *Ayyavayyan* (1898) 21 Mad. 476.

(a) *Madho Prasad* v. *Debi Dial* (1891) All. W.N. 168; *Kadma* v. *Muhammad Ali* (1919) 41 All. 399, 50 I.C. 134.

(b) *Haribans Rai* v. *Sri Niwas* (1918) 35 All. 518, 20 I.C. 896.

(c) *Chand Mall* v. *Ban Behari* (1924) 50 Cal. 718, 74 I.C. 102, ('24) A.C. 209.

property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Provincial Government in the official Gazette;

(b) where *a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and* the mortgagee is the Crown;

(c) where *a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and* the mortgaged property or any part thereof *was, on the date of the execution of the mortgage-deed*, situate within the towns of Calcutta, Madras, Bombay or in any other town or *area* which the Provincial Government may, by notification in the official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until—

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

S. 69 (4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(5) *Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.*

Amendments.—The section has been remodelled by the Amending Act 20 of 1929. The old section contained a final paragraph saving the provisions of secs. 6 to 19 of the Trustees' and Mortgagees' Powers Act, 1866, in their applicability to mortgages to which English law was applicable, *i.e.*, to English mortgages to which the parties were neither Hindus, Mahomedans, Buddhists nor members of a notified sect. This paragraph has been omitted and the first paragraph has been altered so as to exclude the applicability of that Act; and at the same time to imply in English mortgages between the same parties the same power of sale as that Act implied. In clauses (b) and (c) there are consequential amendments showing that in the mortgages there referred to, the power of sale must, as before, be express. The words "on the date of the execution of the mortgage deed" and "area" have been inserted in clause (c) to make it more explicit.

Amendments whether retrospective.—S. 63 of the Amending Act 20 of 1929 expressly enacts that the amendments made in this section shall not have retrospective effect.

Trustees' and Mortgagees' Powers Act, 1866.—As regards English mortgages, there were two enactments runing side by side after the Transfer of Property Act, 1882, one the Trustees' and Mortgagees' Powers Act, 1866, and the other sec. 69 of the Transfer of Property Act. The old section 69 applied to English mortgages in which the power of sale was expressed. The Act of 1866 applied to English mortgages in which the power of sale was implied. The procedure under the Act of 1866 was different and in some respects defective, for under that Act, if the interest was payable half-yearly, the power of sale could not be exercised till eighteen months after the date of the security. Further, there was no provision in that Act for the protection of the purchaser in the case of an improper exercise of the power after notice had been given. The effect of the amendment is to supersede the Act of 1866 as regards mortgages executed after the amendment (*d*) and the scheme of the present section is to imply a power of sale in English mortgages in which the parties are not Hindus, Mahomedans, Buddhists or members of a notified class and whether the power of sale is expressed or implied the procedure for its enforcement is under the section.

(*d*) *Cohen* v. *Baidyanath* (1936) 40 C.W.N. 1270, (1938) A.C. 507.

Expressly conferred.—The power of sale in cls. (b) and (c) must be expressed. A provision in a mortgage deed that the mortgagee should "have all the rights, powers, remedies and privileges conferred upon a mortgagee by Act 4 of 1882" does not confer an express power of sale under this section (*e*).

Power of sale without intervention of the Court.—The power of sale referred to in this section is a power of sale without the intervention of the Court and is distinct from the power of a simple mortgagee to cause the mortgaged property to be sold, *i.e.*, under sec. 67, by decree of the Court (*f*). It refers to a clause expressly included in a mortgage (*g*). Before the Act it was a moot point whether a mortgagee could exercise a power of sale without the intervention of the Court. Such a power is in England incident to all mortgages by deed, and was usually inserted in India when the parties were English; but it was not suited to social conditions in the mofussil. A case which reached the Privy Council was decided on the ground that the power of sale given for default of payment of interest was void as a penalty (*h*). The decisions in the Indian High Courts were inconsistent. Calcutta in some early cases (*i*) treated it as invalid and opposed to the spirit of the old Regulations, but afterwards seemed to incline in its favour (*j*). Melvill, J., in a Bombay case (*k*) condemned the impolicy of placing such a weapon in the hands of mofussil money-lenders; but in a later case the same Judge treated the power as valid (*l*) because the parties were resident in Bombay, carrying on their business through Bombay solicitors and the instrument of mortgage was a regular and formal deed in English form showing that they had intended to contract with reference to English law. The Legislature acting on the opinion expressed by Melvill, J., in the earlier case has placed strict limitation on the exercise of the power of sale without the intervention of the Court. But these restrictions do not apply in parts of India to which the Act has not been applied and the Judicial Committee in *Kanhaya Lal* v. *National Bank of India* (*m*) upheld a power of sale in a mortgage executed in the Punjab.

The power of sale cannot be exercised except in three cases: (a) when the mortgage is an English mortgage and the parties are not Hindus, Mohomedans, Buddhists or members of a notified class; or (b) when the mortgagee is the Secretary of State for India and the deed confers an express power of sale; or (c) when the mortgaged property is situate in one of the towns specified and the deed contains an express power of sale. The District of Mahim, within the local limits of the original jurisdiction of the High Court of Bombay, has been held to be within the town of Bombay for the purposes of this section (*n*). The towns of Bandra, Kurla and Ghat Koper-Kirol in the Bombay Suburban District have been notified under clause (c) in the *Gazette of India* (*o*). The situation of the property is immaterial in cases (a) and (b). A power of sale without the intervention of the Court does not affect the mortgagee's ordinary right of realization by suit (*p*).

Who may exercise the power.— The statutory power in England is exercisable by the person for the time being entitled to the mortgage money (*q*). The present

(*e*) *Mataprasad Upadhya* v. *Kunnon Devi* (1928) 6 Rang. 134, 135, 110 I.C. 698, ('28) A.R. 128.

(*f*) *Kishan Lal* v. *Ganga Ram* (1890) 13 All. 28.

(*g*) *Mulraj* v. *Nanumal* (1942) A.B. 46, (1942) Bom. 83, 43 Bom. L.R. 890, 198 I.C. 646.

(*h*) *Vencatavarada* v. *Venkata* (1875) 23 W.R. 91 P.C.

(*i*) *Bhowanee Churn* v. *Jykishen* (1847) S.D.A. 354; *Doucett* v. *Wise* (1865) 2 Ind. Jur. (N.S.) 28.

(*j*) *Bahnoomutty* v. *Prem Chand* (1870) 23 W.R. 96.

(*k*) *Keshavrao* v. *Bhavanji* (1871) 8 Bom. H.C. 142, 145 A.C.J.

(*l*) *Jagjivan* v. *Shridhar* (1878) 2 Bom. 252; *Pitamber* v. *Vanmali* (1878) 2 Bom. 1 (mortgage in English form and the mortgagee a London Company); cf. *Bhola Nath* v. *Ananda Pershad* (1856) 1 Boulnois 97.

(*m*) (1923) 4 Lah. 284, 50 I.A. 162, 171, 75 I.C. 7, ('23) A.PC. 114.

(*n*) *Trimbak Gangadhar* v. *Bhagwandas* (1899) 23 Bom. 348.

(*o*) Gazette of India, 1924, Part I, p. 1064.

(*p*) *Goburdhun Bysack* v. *Sonatun* (1874) 23 W.R. 84.

(*q*) Conveyancing Act, 1881, s. 21 (4); Law of Property Act, 1925, s. 106 (1).

S. 69 section only refers to the mortgagee, but this includes the assignee of the mortgagee—see note to sec. 59A. In a Madras case (r) the mortgage deed provided for the exercise of the power of sale by the mortgagee or his assignee and it was held that it could be exercised by a sub-mortgagee of the assignee. Such power can be exercised by the second mortgagee, even if the first mortgagee had not been given it (s).

The words "any person acting on his behalf" show that the mortgage deed may provide for the exercise of the power of sale by an agent of the mortgagee. In an English case it was held that an agent expressly authorised by the mortgagee to exercise the power of sale may do so, but not if the authority is only a general authority to sell property and receive money (t). A power of sale to two joint mortgagees may be exercised by the survivor of them (u). If the mortgagees are partners the power of sale must be exercised by all unless otherwise expressed in the mortgage (v). The words "sell or concur in selling" refer to such a case.

What may be sold.—The section says the mortgaged property or any part thereof may be sold. In England a mortgagee is not allowed to sell fixtures separately from the land (w) and these cases would probably be followed in India.

Conditions of exercise of power.—These are specified in sub-section (2). The said conditions are imperative and cannot be varied even by agreement (x). The power arises when default is made in the payment of the mortgage money either of the principal or part of the principal or of interest amounting to at least Rs. 500. If no time is fixed for payment there can be no default till demand is made (y). But the power is not exercisable till after three months' notice in writing, if the default is in payment of the principal (z). No notice is necessary when default is made in the payment of interest. It is sufficient that interest amounting to at least Rs. 500 has been due for three months; and in such a case the power may be exercised before the expiry of the period allowed for redemption (a). These provisions as to notice are taken from sec. 20 of the Conveyancing Act, 1881, now sec. 103 of the Law of Property Act, 1925. The proviso as to interest is designed to secure punctual payment during the term of the mortgage; and it has the effect of overruling the Privy Council decision that a power of sale in default of payment of interest is invalid as a penalty (b). If the mortgagee has given three months' notice for default of principal and interest he cannot sell for arrears of interest before the expiry of that period (c); and if the power of sale in the mortgage deed is limited to default in payment of principal the mortgagee cannot sell for default in the payment of interest (d). As to principal a provision as to notice is necessary, for a power of sale without notice would be oppressive and enable the mortgagee at any time to extinguish the equity of redemption (e). The period of three months fixed by the Act cannot be curtailed by the terms of the deed. A stipulation for a period of 15 days was held in a Madras case (f) to be invalid and the sale in accordance therewith afforded grounds for damages. A mortgagee who has wrongly exercised his power of sale has no right of personal recovery of the balance of the

(r) *Ramakrishna* v. *Official Assignee* (1922) 45 Mad. 774, 69 I.C. 407, ('22) A.M. 390.
(s) *Paramanand* v. *Nanulal* (1942) A.M. 232.
(t) *Re Dowson* v. *Jenkins Contract* (1904) 2 Ch. 219 C.A.
(u) *Hind* v. *Poole* (1885) 1 K. & J. 383, 3 Eq. Rep. 449.
(v) *Warr* v. *Jones* (1876) 24 W.R. 695.
(w) *Re Brooke, Brooke* v. *Brooke* (1894) 2 Ch. 600; *Re Yates, Batcheldor* v. *Yates* (1888) 38 Ch. D. 112 C.A.; *Southport and West Lancashire Banking Co.* v. *Thompson* (1887) 37 Ch. D. 64 C.A.
(x) *Babamiya* v. *Jehangir* (1941) A.B. 339.
(y) *Purasawalkam* v. *Kuddus* (1926) 94 I.C. 860, ('26) A.M. 841.
(z) *Kamalambal* v. *M. Purushotam Naidu* (1934) 67 Mad. L.J. 499, 152 I.C. 437, ('34) A.M. 644.
(a) *A.C. Kundu* v. *Babu H. Rukmanand* (1918) 43 I.C. 921.
(b) *Vencatavarada* v. *Venkata* (1875) 23 W. R. 91 P.C.
(c) *Doolabhdas* v. *Chhabildas* (1899) 1 Bom. L. R. 273.
(d) *Jerup Teja & Co.* v. *Peerbhoy* (1921) 23 Bom. L. R. 1241, 64 I.C. 634, ('21) A.B. 421.
(e) *Miller* v. *Cook* (1870) L. R. 10 Eq. 641.
(f) *Madras Deposit & Benefit Society* v. *Passanha* (1888) 11 Mad. 201.

mortgage money (*g*). Notice must be served on the mortgagor or if there are several mortgagors notice on one is sufficient. This is also the case in sec. 20 (1) of the Conveyancing Act, 1881, and sec. 103 (i) of the Law of Property Act, 1925. If the mortgagor has transferred his interest, either to a purchaser or to a subsequent mortgagee, and the mortgagee is aware of it, he should give notice to the transferee; but not if the transfer has taken place after the mortgagee has already given notice to the mortgagor (*h*). A long delay in selling after the expiry of the period of the notice does not make a fresh notice necessary (*i*). No form of notice is prescribed. It is sufficient that the notice gives the mortgagor the prescribed period of warning (*j*). Service of notice would be in accordance with section 102.

Instalments.—If the mortgage money is payable by instalments, the power of sale is exercisable when an instalment of the mortgage money has become due (*k*).

Restraint on exercise of the power.—An injunction will not issue restraining the mortgagee from exercising his power of sale because the amount is in dispute (*l*). The law in England is that the mortgagee cannot be restrained from exercising his power of sale by the mortgagor filing a suit for redemption (*m*). But he will be restrained if the mortgagor pays the amount claimed into Court (*n*), or if the mortgagee denies the title of a puisne encumbrancer who has offered to redeem (*o*). The same rule was adopted by the Bombay High Court in *Jagijivan* v. *Shridhar* (*p*), where the Court said that "the owner of the equity of redemption can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage." An injunction was refused in *Muncherji* v. *Noor Mahomedbhoy* (*q*), where the mortgagor had filed a suit for redemption and the mortgage deed contained the clause usually found in English mortgages that the mortgagor's remedy for any impropriety or irregularity should be in damages, and the Court cited *Prichard* v. *Wilson* (*r*). These cases were not decided under the Transfer of Property Act. A Madras case (*s*), decided under the Act, holds that a power of sale is not subject to the rule of *lis pendens* enacted in sec. 52. The Court said that the mortgagor who has given an express power of sale cannot by starting a suit—perhaps a perfectly hopeless suit—for redemption derogate from that which he has in express terms conferred upon the mortgagee by the instrument, namely, a power of sale, and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties. Nor can the mortgagor defeat the power of sale by setting up a prior mortgage which he has paid off as a shield against the puisne mortgagee exercising the power (*t*). A mortgagor, however, may obtain an injunction to restrain a sale if the mortgagee is acting in a fraudulent and improper manner, contrary to the terms of the mortgage deed (*u*).

(*g*) *Puresawalkam* v. *Kuddas* (1926) 94 I. C. 860, ('26) A.M. 841.

(*h*) *Muncherji Furdoonji* v. *Noor Mahomed Bhoy* (1893) 17 Bom. 711; *Hoole* v. *Smith* (1881) 17 Ch. D. 434.

(*i*) *Muncherji* v. *Noor Mahomed Bhoy*, *supra*.

(*j*) *Metters* v. *Brown* (1863) 33 L. J. Ch. 97.

(*k*) *Payne* v. *Cardiff Rural Council* (1932) 1 K. B. 241.

(*l*) *Gill* v. *Newton* (1866) 14 W.R.C.A. (Eng.) 490.

(*m*) *Adams* v. *Scott* (1859) 7 W. R. (Eng.) 213; *Prichard* v. *Wilson* (1864) 10 Jur. (N.S.) 330; *Babamiya* v. *Jehangir* (1941) A.B. 339.

(*n*) *Hill* v. *Kirwood* (1880) 28 W. R. (Eng.) 358 C.A.; *Hickson* v. *Darlow* (1883) 23 Ch. D. 690 C. A.; *Macleod* v. *Jones* (1883) 24 Ch. D. 289 C. A.; *Mulraj* v. *Nannumal* (1942) A.B. 46.

(*o*) *Rhodes* v. *Buckland* (1852) 16 Beav. 212.

(*p*) (1878) 2 Bom. 252, 285.

(*q*) (1893) 17 Bom. 711.

(*r*) (1864) 10 Jur. (N. S.) 330.

(*s*) *Ramakrishna* v. *Official Assignee* (1922) 45 Mad. 774, 69 I.C. 407, ('22) A.M. 390.

(*t*) *Manjappa* v. *Krishnayya* (1905) 29 Mad. 113.

(*u*) *Jerup Teja* v. *Peerbhoy* (1921) 23 Bom. L.R. 124, 64 I. C. 634, ('21) A. B. 421; *cf.* *Jenkins* v. *Jones* (1860) 2 Giff. 99 (refusing to accept mortgage money); *Whitworth* v. *Rhodes* (1850) 20 L. J. Ch. 1105 (making an unauthorised demand); *Babamiya* v. *Jehangir* (1941) A.B. 339.

S. 69

Exercise of power.—The mortgagee was described by Lord Eldon as a trustee for the mortgagor of the power of sale (*v*); but this is not correct unless it refers to the disposal of the surplus sale proceeds. In *Kennedy* v. *De Trafford* (*w*) Lindley, L.J., said—"A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper or legal, for him either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor; that is all." He does not act as the agent of the mortgagor. He exercises his right under a totally superior claim. But a mere contract of sale does not extinguish the right of redemption (*x*). The Court will not interfere if he exercises the power bona fide for the purpose of realizing the security and takes reasonable precautions to secure a proper price (*y*). The mortgagee may sell by private treaty or by public auction and there is no need to put up the property for sale by public auction first (*z*). He may enter into a conditional contract to sell on the power becoming exercisable and can carry such contract into effect provided the price is then proper (*a*). But if the power is to sell by public auction, a sale by private treaty is invalid (*b*). If the mortgagee sells by public auction, he must give reasonable publicity to the sale and must not impose depreciatory conditions that are likely to deter intending purchasers (*c*). A sale will not be set aside on the ground of undervalue only (*d*), unless the undervalue is itself evidence of fraud (*e*). If the undervalue is due to the negligence on the part of the mortgagee, he is liable for the deficit on taking accounts (*f*). A promise by a mortgagee, unsupported by consideration, not to exercise his power of sale for a few days does not fall within sec. 63 of the Indian Contract Act, and is therefore not a binding waiver of the right (*g*).

Who may purchase.—The mortgagee may not buy the property either himself or with others or by an agent—for a man cannot sell to himself (*h*). So a sale by a mortgagee building society to its secretary (*i*) or other officer concerned in the conduct of the sale (*j*) is void. Such a transaction is not a valid exercise of the power of sale and does not prevent the mortgagor from redeeming (*k*), unless he has assented to the purchase (*l*). But a sale by a mortgagee to a company of which he is a shareholder is not necessarily invalid (*m*). And a puisne mortgagee may purchase, for heis in the same position as a stranger (*n*).

(*v*) *Downes* v. *Grazebrook* (1817) 3 Mer. 200.

(*w*) (1896) 1 Ch. 762, 772; *Chabildas* v. *Dayal* (1903) 5 Bom. L. R. 247 on app. 6 Bom. L. R. 557.

(*x*) *Abraham Ezra* v. *Abdul Latif* (1944) A.B. 156.

(*y*) *Jenkins* v. *Jones*, *supra*; *Farrar* v. *Farrars* (1888) 40 Ch.D. 395 C.A.

(*z*) *Davey* v. *Durrant*, *Smith* v. *Durrant* (1857) 1 DeG. & J. 535, 560.

(*a*) *Farrar* v. *Farrars*, *supra*.

(*b*) *Brouard* v. *Dumaresque* (1841) 3 Moo. P.C.C. 457.

(*c*) *Chabildas Lalloobhai* v. *Dayal Mowji* (1907) 31 Bom. 566, 34 I. A. 179.

(*d*) *Bettyes* v. *Maynard* (1883) 31 W. R. (Eng.) 461 C. A.

(*e*) *Warner* v. *Jacob* (1882) :0 Ch. D. 220, 224; *Haddington Island Quarry Co.* v. *Huson* (1911) A. C. 722 P. C; *Pichai Modeen Rowther* v. *Chaturbhuj Das Kushal Das & Sons* (1933) 65 Mad. L.J. 491, 145 I.C. 1023, ('33) A.M. 736.

(*f*) *Wolff* v. *Vanderzee* (1869) 17 W. R. 547; *National Bank of Australia* v. *United Hand in Hand Co.* (1879) 4 A.C. 391.

(*g*) *Trimbak Gangadhar* v. *Bhagwandas* (1899) 23 Bom. 348.

(*h*) *National Bank of Australia* v. *United Hand in Hand Co.* (1879) 4 A.C. 391; *Downes* v. *Grazebrook*, *supra*; *Henderson* v. *Astwood* (1894) A.C. 150 P.C.; *Vallabhdas* v. *Pranshankar* (1928) 30 Bom. L.R.; 1519, 113 I. C. 313, ('29) A. B. 24; *Re Bloyes Trust* (1849) 1 Mac. & G. 488, 494; *E. B. Society* v. *Abarupammal* (1943) A.M. 301, (1943) 1 M. & J. 92.

(*i*) *Martinson* v. *Clowes* (1882) 21 Ch. D. 857, 860.

(*j*) *Hodson* v. *Deans* (1903) 2 Ch. 647.

(*k*) *Hodson* v. *Deans*, *supra*.

(*l*) *Purmanandas Jiwandas* v. *Jamnabai* (1886) 10 Bom. 49.

(*m*) *Farrar* v. *Farrars* (1888) 40 Ch. D. 395 C.A.

(*n*) *Shaw* v. *Bunny* (1865) 2 DeG. J. & Sm. 468 C. A.; *Kirkwood* v. *Thompson* (1865) 2 DeG. J. & Sm. 613, 618; *Parkinson* v. *Hanbury* (1860) 1 Drew, & Sm. 143 affirmed (1865) 2 DeG. J. & Sm. 450, L. R. 2 H. L. 1.

Effect of sale.—The Privy Council in *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan* (o) said: "The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus [sale] proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger passes into his hands free of all the incumbrances." S. 69

The purchaser does not derive title under or through the mortgagee but acquires a larger estate free from incumbrances (p). If the mortgagor continues in possession without the permission of the purchaser, such possession is adverse (q). After the sale the mortgagee satisfies his own charge and then holds the surplus sale proceeds as trustee. See note *infra*, "Application of sale proceeds."

Protection of purchaser.—The third sub-section protecting the title of purchasers is taken almost *verbatim* from sec. 21 (2) of the Conveyancing Act, 1881, now sec. 104 (2) of the Law of Property Act, 1925. No irregularity or impropriety in the exercise of the power of sale affects the title of an innocent purchaser—and it has been held that the purchaser gets a good title even though the mortgage had been paid off at the time of the sale (r). This case seems covered by the words "professed exercise of such a power" which include not only a power irregularly exercised, but a want of power; and the Madras High Court has said that nothing could be clearer than the terms of the proviso which express an intent to protect the purchaser and to confine the remedy of the mortgagor to a suit for damages (s). But the expression "professed exercise of a power" does not include a case where there is no express power of sale without the intervention of the Court in the mortgage (t). The purchaser is under no duty to make inquiries, but if he has notice of any irregularity or impropriety in the exercise of the power of sale he is not protected, for he then becomes a party to the transaction impeached (u). So the purchaser is not protected if he knows that notice had not or could not have been given (v); but he is protected if he is not aware of the irregularity in the notice (w); or if want of notice had been waived by the mortgagor (x).

Remedy of the mortgagor.—Whatever irregularity may have been committed in the exercise of the power of sale the mortgagor's only remedy, in the absence of fraud, is in damages against the mortgagee (y). So when the mortgagee sold not only for money due under an English mortgage but also for money due under a subsequent equitable mortgage, the sale was valid and the mortgagor's only remedy was in damages against the mortgagee (z). But a sale will be set aside on the ground of fraud, though not for mere inadequacy of price (a). The mortgagor may also obtain an injunction to stay the sale, by giving *prima facie* evidence that it is being conducted in a fraudulent or improper manner or otherwise by paying the whole amount due into Court (b).

(o) (1879) 6 I.A. 145, 160, 5 Cal. 198, 211; *Purmanandas Jiwandas* v. *Jamnabai*,

(p) *Purmanandas Jiwandas* v. *Jamnabai*, *supra*; *Chabildas Lallubhai* v. *Mowji Dayal* (1902) 26 Bom. 82.

(q) *Chabildas Lallubhai* v. *Mowji Dayal*, *supra*.

(r) *Dicker* v. *Augerstein* (1876) 3 Ch.D. 600.

(s) *Madras Deposit, etc.* v. *Passanha* (1888) 11 Mad. 201.

(t) *Mataprasad Upadhya* v. *Kunnon Devi* (1928) 6 Rang. 134, 110 I.C. 698, ('28) A.R. 128.

(u) *Jenkins* v. *Jones* (1860) 2 Giff. 99. See also *Chabildas Lalloobhai* v. *Dayal Mowji* (1907) 31 Bom. 566, 34 I. A. 179; *Bailey* v. *Barnes* (1894) 1 Ch. 25 C.A.

(v) *Selwyn* v. *Graft* (1888) 38 Ch.D. 273 C.A.; *Parkinson* v. *Hanbury*, *supra*.

(w) *Madras Deposit, etc.* v. *Passanha*, *supra*.

(x) *Re Thompson* v. *Holt* (1890) 44 Ch.D. 472.

(y) *Govind Swami Naickar* v. *Pukhraj* (1940) A.M. 903.

(z) *Ramakrishna* v. *Official Assignee* (1922) 45 Mad. 774, 69 I.C. 407, ('22) A.M. 399.

(a) *Warner* v. *Jacob* (1882) 20 Ch.D. *Haddington Island Quarry Co.* v. (1911) A.C. 722.

(b) *Hill* v. *Kirwood* (1880) 28 W.R. (Eng.) 358; *Hickson* v. *Darlow* (1883) 23 Ch.D. 690; *Macleod* v. *Jones* (1883) 24 Ch.D. 289; *Jagjivan* v. *Shridhar* (1878) 2 Bom. 252.

Ss. 69, 69A

Application of sale proceeds.—The fourth sub-section dealing with the application of sale proceeds is identical with sec. 21 (3) of the Conveyancing Act, 1881, now sec. 105 of the Law of Property Act, 1925, but for the addition of the words "in the absence of a contract to the contrary." When the equity of redemption is extinguished by the sale, the mortgagee exercising the power of sale becomes a trustee of the surplus sale proceeds after discharging previous incumbrances, if any, to which the sale is subject. Such incumbrances may be discharged as indicated in sec. 57, and the balance is to be applied in payment of the costs and expenses of the sale, then in discharge of the mortgage money and the residue, if any, in payment to the persons entitled to the mortgaged property, *i.e.*, subsequent incumbrancers, and finally to the mortgagor. As to such residue the mortgagee is trustee for the mortgagor (*c*). The mortgagee is charged interest on this residue from the date of sale to date of payment to the persons interested (*d*). If there are subsequent incumbrancers they must be paid before the mortgagor, and the mortgagee, if he has notice of these subsequent incumbrances, is liable to them if he pays the mortgagor (*e*).

Not retrospective.—Sub-section (5) provides that the section is not retrospective and does not affect powers exercised before the first day of July 1882, when the Transfer of Property Act, 1882, came into force. A similar provision is enacted in sec. 2 (c) of the Act. Cases arising before the Act have been referred to in the note "Power of sale without intervention of the Court."

Appointment of receiver.

69A. (1) *A mortgagee having the right to exercise a power of sale under section* 69 *shall, subject to the provisions of sub-section* (2), *be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.*

(2) *Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.*

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(*c*) *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali* (1880) 5 Cal. 198, 6 I.A. 145; *Picha Vadhiyar* v. *Secretary of State* (1917) 40 Mad. 767, 38 I.C. 986.

(*d*) *Haji Abdul Rahman* v. *Haji Noor Mahomed* (1892) 16 Bom. 141.

(*e*) *West London Commercial Bank* v. *Reliance Permanent Building Society* (1885) 29 Ch.D. 954.

(3) *A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or default, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.* S. 69A

(4) *The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.*

(5) *A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.*

(6) *The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent. on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent. on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.*

(7) *The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.*

(8) *Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:—*

(i) *in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;*

(ii) *in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;*

S. 69A (iii) *in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;*

(iv) *in payment of the interest falling due under the mortgage;*

(v) *in or towards discharge of the principal money, if so directed in writing by the mortgagee;*

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) *The provisions of sub-section* (1) *apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections* (3) *to* (8) *inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.*

(10) *Application may be made, without the institution of a suit, to the Court for its opinion, advise or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.*

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) *In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.*

New Section.—This section is new and was inserted by the Amending Act 20 of 1929.

Receiver.—A mortgagee in possession is responsible for prudent management and is liable to be called upon to account on the footing of wilful default (*f*). To avoid this liability and at the same time to preserve the advantages of possession, the practice grew up in England at first to provide for the appointment of a receiver by the mortgagor, and then for the deed to provide for the appointment of a receiver by the mortgagee on behalf

(*f*) *Mayer* v. *Murray* (1878) 8 Ch. D. 424, see s. 76 (b).

of the mortgagor, so that the receiver was the agent of the mortgagor (*g*). This practice became so prevalent that it was recognised in Lord Cranworth's Act (*h*) which implied in the mortgage a power to the mortgagee to appoint a receiver exercisable in the same events as the power of sale. The power is similarly implied in the Conveyancing Act, 1881 (*i*), and the Law of Property Act, 1925 (*j*), but it is more extensive, for while the receiver in Lord Cranworth's Act is receiver of the rents and profits, in the later Acts he is receiver of the income generally.

The Trustees' and Mortgagees' Powers Act, 1866, in sec. 6 reproduced the provisions of Lord Cranworth's Act as to the implied power to appoint a receiver of the rents and profits. But as the Act of 1866 in its application to mortgages executed after the amendment of the Transfer of Property Act is virtually repealed, provision has been made in this section for the power of the mortgagee to appoint a receiver. The power is, however, more extensive than that in the Trustees' and Mortgagees' Powers Act, 1866, for—

(1) the receiver is of the income generally and not only of rents and profits.

(2) the power is implied not only in English mortgages, but in the mortgages referred to in sec. 69 (1) (b) and (c) where there is an express power of sale.

With some slight variations, which will be noticed, the section closely follows sec. 109 of the Law of Property Act, 1925.

Exercise of the power.—The mortgagee cannot appoint a receiver until the power of sale is exercisable under sec. 69 (2). In case of default of payment of principal the mortgagee would therefore have to wait until three months after service of notice. There is no such restriction as to notice in Lord Cranworth's Act nor in the Trustees' and Mortgagees' Powers Act, 1866. The power conferred by this section may be exercised even after the mortgagee has gone into possession (*k*). A receiver is not generally appointed by the Court under such a clause in the mortgage decree after the final decree has been made (*l*).

Who may be appointed.—Under sub-section (2) the person, if any, named in the mortgage deed must be appointed, and failing that, the appointment must be made by the consent of the mortgagor and the mortgagee. In either case the appointment must be made in writing signed by the mortgagee. But if the parties do not agree the mortgagee has liberty to apply to the Court in a summary proceeding to make the appointment. A receiver can be removed from office by the consent of the mortgagor and mortgagee expressed in writing and signed by both, or failing such consent, by the Court on application by either party. The provision for an application to the Court either for the appointment or the removal of the receiver is novel. Under the Law of Property Act, 1925, the mortgagee is entitled, subject to the provisions of the deed, to appoint such person as he thinks fit. Under Lord Cranworth's Act and the Trustees' and Mortgagees' Powers Act, 1866, the mortgagee must appoint the person named in the deed, and if no such person is named, he must require the mortgagor to appoint, and he may make the appointment only on the latter's default.

Position of receiver.—As in the English Statutes and in the Trustees' and Mortgagees' Powers Act, 1866, the receiver is by clause (3), deemed to be the agent of the mortgagor and the mortgagor is solely responsible for his acts and defaults, unless the mortgage deed otherwise provides (*m*). But the receiver is not accountable to the

(*g*) *Gaskell* v. *Gosling* (1896) 1 Q. B. 669, 672 C.A.

(*h*) Trustees' and Mortgagees' Act, 1860 (23 & 24 Vict., c. 145), ss. 11, 17, 20.

(*i*) 44 & 45 Vict., c. 41, s. 19 (1) (iii).

(*j*) 15 Geo. V., c. 20, s. 101 (1) (iii).

(*k*) *Refuge* Co. v. (1933) 1 Ch. 687.

(*l*) *In re Sm. Ramala Bose* (1936) A.C. 98, 42 C.W.N. 256, 175 I.C. 905.

(*m*) *Mati Lal* v. *The Eastern Mortgage and Agency Co.* (1920) 25 Cal. W. N. 305, 61 I.C. 456, ('21) A.P.C. 118.

S. 69A

mortgagor but to the mortgagee (*n*). The agency may be modified by the terms of the deed (*o*). Under the Act the mortgagee has no liability for the receiver, and this is the advantage the mortgagee gains by appointing a receiver instead of taking possession (*p*). Payment by the receiver of part of the debt saves the bar of limitation (*q*).

Power as to income.—The receiver is appointed of the income of the mortgaged property and under sub-section (4) he has full powers of recovery in the name of either the mortgagor or the mortgagee and to give effectual receipts. Under sub-section (5) a person paying money to him is not concerned to inquire into the validity of this appointment. A receiver appointed by debenture holders is entitled to possession as against the liquidator (*r*).

Remuneration.—The rate of remuneration is fixed in sub-section (6). Unless a lower rate is specified in the deed, it is five per cent. on the gross collections. But the Court may allow a higher rate. This is the same as in sec. 109 (6) of the Law of Property Act, 1925. The Trustees' and Mortgagees' Powers Act, 1866, also provided for five per cent., but without a power in the Court to increase the rate. This remuneration covers all costs, charges and expenses incurred by him as receiver.

Powers as to application of income.—Under sub-sections (7) and (8) the receiver has power to insure the property against fire, and to execute necessary and proper repairs but only when directed to do so in writing by the mortgagee. Repairs done without written authority by a receiver cannot be included in the mortgagee's account (*s*). Any insurance money that the receiver may receive he must apply in accordance with sec. 76 (f) either in reinstating the property or in reduction of the mortgage debt. Other moneys received he must apply as directed in sub-section (8). These two sub-sections are copies of sub-sections (7) and (8) of sec. 109 of the Law of Property Act, 1925. In the Trustees' and Mortgagees' Powers Act, 1866, there was no provision for the receiver spending money on repairs.

Contract to the contrary.—Under sub-section (9) the power to appoint a receiver and the exercise of powers by the receiver are subject to the terms of the deed of mortgage. The deed may either restrict or extend these powers and the powers so restricted or extended operate as statutory powers under the Act.

Right to apply.—The provisions of sub-section (10) are new. They give the parties the same right to apply for directions on present questions of management or administration as a trustee has under sec. 34 of the Indian Trusts Act, 1882. The receiver has no doubt a right to apply under this section.

The Court.—In cases governed by the Code of Civil Procedure the Court having jurisdiction in a suit to enforce the mortgage is the Court within whose limits the mortgaged property or any portion of the mortgaged property is situate—sec. 17, Code of Civil Procedure, 1908. As to the High Courts of Calcutta, Madras and Bombay, see cl. 12 of the Letters Patent of those Courts.

Receiver after suit filed.—In England the power of the Court to appoint a receiver after the filing of a suit was originally limited to the cases of equitable mortgagees

(*n*) *Cohen* v. *Bindyanath* (1938) A.C. 507, 177 I.C. 327, 40 C.W.N. 1270.

(*o*) *Richards* v. *Kidderminster Overseers, Richards* v. *Kidderminster Corporation* (1896) 2 Ch. 212, 220.

(*p*) *Mason* v. *Westoby* (1886) 32 Ch. D. 206.

(*q*) *Re Hale, Lilley* v. *Foad* (1899) 2 Ch. 107 C. A.

(*r*) *Re Henry Pound, Son and Hutchins* (1889) 42 Ch. D. 402 C. A.; *Re Joshua Stubbs Ltd., Barney* v. *Joshua Stubbs* (1891) 1 Ch. 475 C. A.

(*s*) *White* v. *Metcalf* (1903) 2 Ch. 567.

who were not entitled to take possession. But since the Judicature Act of 1873 the Court can appoint a receiver in the case of a legal mortgage (*t*). Under Order 40, rule 1, of the Code of Civil Procedure the Court may appoint a receiver if it appears just and convenient. The Court has power under that rule to appoint a receiver in the case of an English mortgage if the property is in jeopardy (*u*), or insufficient to pay the incumbrances (*v*), or if the interest is in arrears (*w*). The same has been held as to a mortgage by deposit of title deeds (*x*). A simple mortgagee is entitled to obtain the appointment of a receiver if the circumstances of the case justify it, and is not disentitled merely because the personal remedy does not subsist (*y*). But a simple mortgagee has no charge on the rents and profits in the hands of the receiver so as to have preference over the Crown debts (*z*). A receiver appointed in a mortgagee's suit is entitled to apply to the Court for direction as to the management of the mortgaged property, *e.g.*, as to its insurance. But the Court will not give directions on any collateral matter such as an agreement by an insurance company to pay the mortgagor a commission (*a*). A receiver, appointed under O. 40, r. 1, is an officer of the Court, and holds the property for the benefit of all parties, and is not the agent of the mortgagor. His appointment is *prima facie* for the benefit of the mortgagee, and if the mortgagor becomes insolvent, the Official Assignee cannot claim the profits in the hands of the receiver in preference to the mortgagee (*b*); nor can the receiver be removed by the Insolvency Court (*c*). Again if after the appointment of a receiver the mortgagor's interest is attached and sold in execution of a money decree, the purchaser is not entitled to the income of the property realized by the receiver before the sale (*d*). If a mortgagee's receiver of the income appointed under this section *before* suit is also appointed receiver of the property by the Court, he becomes an officer of the Court and ceases to be the agent of the mortgagor (*e*).

Accession to mortgaged property.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations.

(a) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, *B* is entitled to the increase.

(*t*) *Pratchett* v. *Drew* (1924) 1 Ch. 280; *Jaikissondas Gangadas* v. *Zenabai* (1890) 14 Bom. 431; *Ghanashyam* v. *Gobinda* (1902) 7 Cal. W. N. 452; *Rameshwar Singh* v. *Chuni Lal* (1920) 47 Cal. 418, 56 I.C. 839.

(*u*) *Ghanashyam* v. *Gobinda*, *supra*; *Weatherall* v. *Eastern Mortgagee Agency Co.* (1911) 13 Cal. L. J. 495, 9 I.C. 985.

(*v*) *Rameshwar Singh* v. *Chuni Lal*, *supra*; *Khubsurat Kuer* v. *Saroda* (1911) 16 Cal. W. N. 126, 12 I.C. 165.

(*w*) *Khubsurat Kuer* v. *Saroda*, *supra*.

(*x*) *Ram Kumar* v. *Chartered Bank* (1925) 41 Cal. L. J. 203, 87 I. C. 375, ('25) A. C. 664.

(*y*) *Paramasivan* v. *Ramasami* (1933) 56 Mad. 915, 66 Mad. L.J. 222, 145 I.C. 449, ('33) A. M. 570; reversing on app. 143 I.C. 650, ('33) A.M. 447 and dissenting from *Nrisingha Charan Nandy* v. *Rajniti Prasad Singh* (1932) 13 Pat. L. J. 525, 142 I.C. 300, ('32) A.P. 360; *Rameshwar Singh* v. *Chuni Lal Shaha* (1920) 47 Cal. 418, 56 I.C. 839; *Ma Hnin Yick* v. *K. A. R. K. Firm* (1938) 183 I.C. 723, (1939) A.R. 321 (F.B.); *Damodar* v. *Radhabai* (1939) A.B. 54, (1939) Bom. 82, 40 Bom. L.R. 1266, 179 I.C. 821.

(*z*) *Sambasiva Chettiar* v. *Secretary of State* (1940) A.M. 708, (1940) 1 M.L.J. 429, 51 M.L.W. 740.

(*a*) *J. C. Galstaun* v. *Prudential Insurance Co.* (1932) 54 Cal. L. J. 566, 137 I. C. 523, ('32) A.C. 366.

(*b*) *Rameshwar Singh* v. *Chuni Lal*, *supra*; *Maharaja of Pithapuram* v. *Gokuldoss* (1931) 54 Mad. 565, 138 I.C. 504, ('31) A.M. 626; *Official Assignee* v. *Punjab National Bank* (1932) 26 S.L.R. 61, 137 I.C. 338, ('32) A.S. 82; *In re. Imperial Bank of India* (1940) A.C. 429, (1940) 1 Cal. 197, 191 I.C. 557.

(*c*) *Nrishinha Kumar Sinha* v. *Deb Prosanna Mukherji* (1935) 62 Cal. 483, 39 Cal. W.N. 384, 157 I.C. 140, ('35) A. C. 460.

(*d*) *Ponnu Chettiar* v. *Sambasiva Ayyar* (1933) 56 Mad. 546, 64 Mad. L. J. 662, 141 I.C. 372, ('33) A.M. 293.

(*e*) *Hand* v. *Blow* (1901) 2 Ch. 721, 732 C.A.

S. 70

(b) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security *B* is entitled to the house as well as the plot.

Accessions.—Sec. 70 refers to the mortgagee's right to accessions to the mortgaged property and is therefore the converse of sec. 63 which deals with the mortgagor's rights to accessions. As regards natural accessions it is the corollary to sec. 63, for such accessions are incorporated in the mortgaged property, form part of the mortgagee's security, and revert to the mortgagor on redemption (*f*). As regards acquired accessions, the mortgagor is not always bound to incur the expense of redeeming them, if they have been acquired by the mortgagee—sec. 63. But no such distinction is necessary in regard to the mortgagee's rights, for the mortgagee is entitled to treat acquired accessions as part of his security and to enforce his lien upon them, if they have been acquired by the mortgagor, and *a fortiori* if they have been acquired by himself. Thus, if the mortgagor builds on the property mortgaged, the buildings form part of the mortgagee's security (*g*). So also land formed by alluvion or deluvion (*h*). Machinery fixed by bolts and nuts to the concrete floor of a building is an accession to which the mortgagee is entitled (*i*). So also an electric installation set up by the mortgagor in a mortgaged factory (*j*). But this would be a question of fact in each case (*k*). In *Nannu Mal* v. *Ram Chander* (*l*) the auction purchasers at a prior mortgagee's sale removed a shed and built a small house on the land mortgaged. A puisne mortgagee who had not been made a party sued to enforce his mortgage, and was entitled to have the house sold as an accession to the property mortgaged. So also, if the mortgagee buys Government trees standing on the mortgaged land they form part of his security (*m*). If, after the mortgage, the mortgagor sells a plot of the land mortgaged to the mortgagee and then buys it back, the plot is again subject to the mortgage (*n*). The section is not limited to physical accretions or additions, for an increase of interest or enlargement of the estate is also an accession. So when the mortgagor of a *chuck* acquires the shikmi interest in the *chuck* that interest is an accession to the security and passes with it to the purchaser at a sale in execution of the mortgage decree (*o*). If a puisne mortgagee acquires an occupancy right by surrender from the mortgagor, such right is in an accession to the mortgaged property and enures for the benefit of the mortgagee (*p*). If land which is khudkast when mortgaged is settled as sir land the accrual of sir rights is an accession to which the mortgagee is entitled; but after foreclosure the mortgagor is entitled, under sec. 49 of the Central Provisions Tenancy Act, 1920, to remain in possession as an occupancy tenant (*q*). And if the mortgagor discharges a prior encumbrance existing at the date of the mortgage the increase in value of the estate is for the benefit of the mortgagee (*r*). Again, when a mortgagee who has mortgaged his rights to a sub-mortgagee acquires the equity of redemption such acquisition enures for the benefit of the sub-mortgagee (*s*). In a Madras case (*t*) the mortgage decree was against a Mahomedan lady and her eldest son. Subsequently their shares were increased by the death of another son who was

(*f*) *Ganpatji* v. *Saadat Ali* (1880) 2 All. 787.

(*g*) *Krishna Gopal* v. *Miller* (1902) 29 Cal. 803; *Macleod* v. *Kissan* (1906) 30 Bom. 250, 262, citing *Southport and West Lancashire Banking Co.* v. *Thompson* (1887) 37 Ch. D. 64; *Amar Singh* v. *Bhagwan Das* (1933) 14 Lah. 749, ('33) A.L. 771.

(*h*) *Saila Bala* v. *Swerna Moyee* (1939) A.C. 275.

(*i*) *P. M. P. M. Chettyar Firm* v. *Siemens Ltd.* (1938) 11 Rang. 322, 147 I.C. 283, ('33) A.R. 195; *Reynolds* v. *Ashby* (1904) A.C. 466.

(*j*) *Punjab and Sind Bank* v. *Kishen Singh* ('35) A. L. 350, 16 Lah. 881.

Satyanarayan Murthy v. *Gangayya* (1939) A.M. 681, (1939) 1 M.L.J. 692, 49 M.L.W. 578, (1939) M.W.N. 383.

(1931) 53 All. 334, 132 I.C. 401, ('31) A.A. 277 F.B.

(*m*) *Bakshiram Gangaram* v. *Darku* (1873) 10 Bom. H.C. 369 A.C.J.

(*n*) *Deolie Chand* v. *Nirban Singh* (1879) 5 Cal. 253.

(*o*) *Surja Narain* v. *Nanda Lal* (1906) 33 Cal. 1212.

(*p*) *Bhagwantrao* v. *Subkaran* (1929) 127 I.C. 349, ('29) A.N. 225.

(*q*) *Rajeshwar* v. *Mt. Rukhna* (1933) 142 I.C. 603, ('33) A.N. 104.

(*r*) *Shyama Churn* v. *Ananda Chandra* (1898) 3 Cal. W.N. 323.

(*s*) *Ajudhia Prasad* v. *Man Singh* (1903) 25 All. 46.

(*t*) *Ajijuddin* v. *Sheik Budan* (1895) 18 Mad. 492.

not a party to the suit and against whom no decree had been made. Yet the increased shares were held liable to be sold under the decree. In a Calcutta case (*u*) three coparceners mortgaged family property in which an aunt had a share. After the suit was instituted the aunt died, and Rankin, C.J., held that the increased share was liable to the mortgage not only under sec. 43, but on the principle of sec. 70 that any enlargement of the mortgagor's interest generally enures for the benefit of the mortgagee.

The rule in English law is the same, for every addition made by the mortgagor is taken to be an accretion for the benefit of the mortgagee (*v*). A puisne mortgagee is entitled to the benefit of the accession when the mortgagor's interest is enlarged by the redemption of a prior mortgage.

It matters not whether the mortgagor or the mortgagee is in possession. But of course if the mortgagee in possession encroaches upon other land of the mortgagor, that other land is not an accession (*w*). A clearance of adjoining waste land by the mortgagor is not an accession within the meaning of this section (*x*). A fresh grant of adjoining land to the mortgagor is not necessarily an accession (*y*).

For the purposes of security.—Under this section a mortgagee is entitled to the benefit of accession for the purpose of security only. The section has no application to the case of a mortgagee who purchases a share of the equity of redemption and sues to enforce the mortgage (*z*).

Accession after extinction of the mortgage.—An accession made after the extinction of the mortgage is not within the section. An accession made by the mortgagor *after the property has been sold* in execution of the mortgagee's decree does not pass to the mortgagee or to the purchaser at the Court sale (*a*). In a Patna case (*b*) the mortgagee obtained a decree for sale against a mortgagor who had a mokarrari right. *Before sale* the mortgagor acquired the Brahmottar right. The Court held that this could not be sold under the decree. It is submitted that the mortgage had not been extinguished by the decree, and the interest was liable to be sold as an accession (*c*). An accession acquired *after decree* was sold in a Madras case already cited (*d*).

Contract to the contrary.—The rule in this section is said to be a rule of equity (*e*). It is not applicable if the terms of the mortgage exclude the accretion. A Bombay case (*f*) is probably an illustration of an implied contract to the contrary. A deshgat watandar mortgaged his watan lands which were inalienable beyond his lifetime. The estate was subsequently enlarged to absolute ownership by the abolition of the deshgat watans. The Court held that the heir of the mortgagor was not bound by the mortgage. The section was not referred to, but it would seem that the right to the accretion was subject to an implied contract to the contrary as the mortgagee well understood that his security was only a life estate. A converse instance was that of an older Bombay case (*g*) where the inam was resumed but the mortgage lien on the proprietary interest continued, as the effect of the redemption was only to make the land again liable to nent.

(*u*) *Behary Lal* v. *Indra Narayan* (1927) 31 Cal. W.N. 985, 104 I.C. 206, ('27) A.C. 665.

(*v*) *Re: Kitchen, Ex parte Punnett* (1880) 16 Ch. D. 226, 236 C.A.; cf. *Rajah Kishendatt* v. *Rajah Mumtaz Ali* (1879) 5 Cal. 198, 210, 6 I.A. 145, citing *Doe d. Gibbons* v. *Pott* (1781) 2 Doug. K.B. 710.

(*w*) *Mala Singh* v. *Budh Singh* (1915) 25 I.C. 616.

(*x*) *Tay Gyi* v. *Maung Yan* (1933) 146 I.C. 674, ('33) A.R. 81.

(*y*) *Kodi Sankara* v. *Moidin* (1918) 35 Mad. L.J. 120, 49 I.C. 147.

(*z*) *Arunagiri* v. *Radha Krishna* (1942) A.M. 44.

(*a*) *Sivananjiah* v. *Sithay Goduar* (1921) 41 Mad. L.J. 490, 70 I.C. 367, ('21) A.M. 627.

(*b*) *Haradhan* v. *Hargobind* (1921) 6 Pat. L.J. 347, 63 I.C. 552, ('21) A.P. 158.

(*c*) *Sripad* v. *Kashibai* (1945) A.B. 248.

(*d*) *Ajijuddin* v. *Sheik Budan* (1895) 18 Mad. 492.

(*e*) *Bhupendra Nath Basu* v. *Musst. Wajihunnissa* (1917) 2 Pat. L.J. 298, 306, 39 I.C. 564.

(*f*) *Gangabai* v. *Basvant* (1910) 34 Bom. 175, 5 I.C. 806.

(*g*) *Vishnu* v. *Tatia* (1863) 1 Bom. H.C. 22.

Ss. 71, 72

Renewal of mortgaged lease.

71. When the mortgaged property is a lease, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Amendment.—The original section referred to a lease for a term of years. The words "for a term of years" have been omitted by the amending Act 20 of 1929 as superfluous.

Renewal of lease.—Sec. 71 is the corollary to sec. 64, for just as the mortgagor has on redemption a right to a renewed lease obtained by the mortgagee, so the mortgagee is entitled to a renewed lease obtained by the mortgagor, as it is an increment to his security. This is on the principle of *Rakestraw* v. *Brewer* (*h*) that the new lease is treated as engrafted on the stock of the old lease and forming part of the mortgage security. This principle is not based on the doctrine of quasi trusts; but there is a similar provision in illustration (a) to sec. 90 of the Indian Trusts Act that when a tenant for life of leasehold property renews the lease in his own name or for his own benefit, he holds the renewed lease for the benefit of all those interested in the old lease. So if a tenant mortgagor allows his landlord to obtain a collusive decree for rent and to purchase the holding, the property in the hands of the landlord is subject to the mortgage (*i*). The deposit of a deed of lease of which the term has expired operates as a mortgage by deposit of title deeds when the term is renewed (*j*).

Rights of mortgagee in possession.

72. *A mortgagee* may spend such money as is necessary—

(a) * * *

(b) for *the preservation of the mortgaged property* from destruction, forfeiture or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and,

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent. per annum: *Provided that the expenditure of money by the mortgagee under clause* (b) *or clause* (c) *shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.*

(*h*) (1729) 2 P. Wms. 511 (see note on this case under sec. 63); *Leigh* v. *Burnett* (1885) 29 Ch. D. 231.

(*i*) *Ram Saran Das* v. *Ram Pergash Das* (1905) 32 Cal. 283.

(*j*) *Villa* v. *Petley* (1934) 148 I.C. 721, ('34) A.R. 51.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be *added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent. per annum.* But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction, to reinstate the property insured. S. 72

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Amendments.—The following amendments have been made by the Amending Act 20 of 1929. The first paragraph of the section was:—

> "When during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary."

This has been altered so as to include all mortgagees, for clauses (b), (c), (d) and (e) apply whether the mortgagee is in possession or not.

Clause (a) of the old section was:—

> "For the due management of the property and the collection of the rents and profits thereof."

This has been omitted as it does not apply if the mortgagee is not in possession and provision has been made in section 76 (h) allowing credit to the mortgagee for expenses properly incurred in the management of the property and the collection of the rents and profits.

The proviso in regard to expenditure incurred under clauses (b) and (c) is new.

Other changes in the section are merely verbal.

Rights of mortgagee—The scope of this section has been considerably enlarged. It was formerly limited to the rights of the mortgagee in possession. This was an unnecessary limitation, for the rights under all the clauses, except old clause (a) which was only appropriate to a mortgagee in possession, apply to all mortgages. It also led to the erroneous impression that these rights were not possessed by mortgagees who were not in possession. A striking illustration of this is the Madras case of *Perianna* v. *Marudainayagam* (k). The mortgagee under a usufructuary mortgage had not been given possession. The mortgaged property was subject to a prior lien by a decree of Court. The decree holder brought the property to sale and the mortgagee paid the amount into Court and saved the property. The Madras High Court held in the first place, that as he had not been given possession he was not a usufructuary mortgagee.

(k) (1899) 22 Mad. 382.

S. 72

This is no longer so under the amended definition of a usufructuary mortgagee in sec. 58. The Court then held that as he was not a usufructuary mortgagee, he had no charge on the property, for the amount he paid, either under sec. 68 or sec. 72. In other cases, however, it was held that, in spite of its imperfect wording, the old section did not exclude mortgagees who were not in possession (*l*).

The section represents to a large extent the English rule that the mortgagee is entitled to be indemnified against all expense, so long as he acts reasonably as a mortgagee and is allowed all proper "costs, charges and expenses" incurred by him in relation to the mortgage security. The principle is laid down in a passage in *Dryden* v. *Frost* (*m*) which is the *locus classicus* on the subject (*n*). Lord Cottenham there says: "This Court, in setting the account between a mortgagor and mortgagee, will give to the latter all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity." In *Detillin* v. *Gale* (*o*) Lord Eldon says that he ought to be indemnified to the extent that he acts reasonably as a mortgagee, which must mean reasonably with reference to such rights as his mortgage title gives him.

The costs must be costs which the mortgagee has incurred as mortgagee. Such costs form part of the entire decretal amount (*p*), and are the costs, charges and expenses referred to in Order 34, rule 2 (1) (a) (iii), of the Code of Civil Procedure. Costs incurred by the mortgagee after proper tender of the mortgage money have been disallowed (*q*). Under the English law the costs of negotiating the loan and preparing the mortgage are costs leading up to the mortgage and not costs incurred *qua* mortgagee. Hence, though the mortgagor may be personally liable for these costs, they cannot be added to the security and recovered as costs, charges and expenses (*r*). This would also be the law under sec. 72 which refers to money spent by a mortgagee as mortgagee. But when an equitable mortgage contained an agreement by the mortgagors to give a legal mortgage when required, it was held in an English case that the costs of the legal mortgage can be recovered as costs, charges and expenses, being costs of perfecting the security of the mortgagee (*s*). Such costs would also be added to the mortgage under sec. 72 (d). Again liability under this section cannot be enforced after the mortgage has been surrendered. If the mortgagee accepts money paid into Court by the mortgagor under sec. 83 and gives up possession, he cannot bring the property to sale in order to recover expenses (*t*). But the mortgagee continues to be a mortgagee after the suit and until a final decree for foreclosure is passed, or a sale under a decree for sale is confirmed, and it is submitted that a mortgagee can incur necessary expenses under this section after suit and until final decree for foreclosure or confirmation of sale.

The English rule, however, includes costs incurred by the mortgagee in regard to the mortgage debt. Thus the costs of recovering the debt from a surety who had only given a promissory note (*u*) were allowed in England. This would not be allowed under sec. 72 which is limited to costs in relation to the mortgage security.

(*l*) *Upendra Chandra* v. *Tara Prosanna* (1903) 30 Cal. 794, 800, followed in *Rakhohari Chattaraj* v. *Bipra Das* (1904) 31 Cal. 975 and *Nadershaw* v. *Shirinbai* (1923) 25 Bom. L.R. 839, 843, 87 I.C. 129, ('24) A.B. 264.

(*m*) (1838) 3 My. & Cr. 670, 675.

(*n*) Per Farwell, J., in *Wales* v. *Carr* (1902) 1 Ch. 860, 868.

(*o*) (1802) 7 Ves. 583.

(*p*) *Maharaj Bahadur Singh* v. *Basiruddin* (1925) 41 Cal. L.J. 607, 93 I.C. 364, ('25) A.C. 1135.

(*q*) *Dhondo* v. *Balkrishna* (1884) 8 Bom. 190.

(*r*) *Wales* v. *Carr* (1902) 1 Ch. 860; see also *In re Smith's Mortgage, Harrison* v. *Edwards* (1931) 2 Ch. 168.

(*s*) *National Provincial Bank of England* v. *Games* (1886) 31 Ch. D. 582.

(*t*) *Anandi Ram* v. *Dur Najaf Ali* (1891) 13 All. 195.

(*u*) *National Provincial Bank* v. *Games* (1886) 31 Ch. D. 582.

Again the English rule negatives the remedy by personal suit against the mortgagor to enforce the mortgagee's claim for expenses, for it does not rest on an implied contract by the mortgagor and can only be enforced as a condition of redemption (*v*). Sec. 72 gives the mortgagee the right to add the amount spent to the mortgage money; but it seems that this does not exclude the mortgagee's remedy under sec. 69 of the Indian Contract Act (*w*).

Illustration.

A mortgaged his interest in a patni taluk to *B*. *A* then sold his interest to *C* who got his name registered in the zemindar's books in place of *A*. The zemindar threatened to sell the taluk for arrears of rent and *B* paid the rent to save his interest in the taluk. It was held that *B* was entitled to recover the amount paid from *C* under sec. 69 of the Contract Act: *Umesh Chandra* v. *Khulna Loan Co.* (1907) 34 Cal. 92.

Such money as is necessary.—The question what expenditure is necessary is one of fact to be decided with regard to the circumstances of each case (*x*). The proviso to the section enacts that no expenditure under clauses (b) and (c) is necessary unless the mortgagor has failed to take steps.

Clause (b): Preservation from destruction, forfeiture or sale.—The words "destruction, foreiture or sale" also occur in sec. 63. The word "destruction" in a physical sense seems appropriate only when the mortgagee is in possession; and expenditure on necessary repairs is covered by sec. 76 (d) and on improvements by sec. 63A; see notes under those sections. Under sec. 76 (d) the mortgagee in possession is bound to make such necessary repairs as he can pay for out of the rent and profits. But as he is entitled to preserve his security, this section as well as sec. 63 gives him the right on the mortgagor's default to incur such expenditure out of his own pocket and to add the amount so spent to the mortgage money. In the undernoted cases (*y*) the issue was raised whether the expenditure was necessarily incurred for the preservation of the property; and in an Allahabad case (*z*) the cost of constructing a new upper storey when rebuilding a portion of a house that had fallen down, was disallowed.

But there is also a destruction of the security in the abstract sense when the mortgaged property is forfeited or sold; and while sec. 76 (c) makes it incumbent on the mortgagee in possession to pay out of the income of the property public charges and arrears of rent, default of payment of which would involve forfeiture or sale, under this section he has the right to make such payments himself if the mortgagor makes default, and to add the amount to the mortgage money (*a*). It has therefore been said that the permission granted by sec. 72 (b) is subject to the obligation imposed by sec. 76 (c), in other words, the mortgagee may add the amount to the mortgage money when it cannot be

(*v*) *Re Sneyd, Ex parte Fewings* (1883) 25 Ch. D. 338, 352 C.A.; *Nadershaw* v. *Shirinibai* (1923) 25 Bom. L.R. 839, 87 I.C. 129, ('24) A.B. 284.

(*w*) *Umesh Chandra* v. *Khulna Loan Co.* (1907) 34 Cal. 92; *Venkitaswami* v. *Muthuswamy* (1918) 34 Mad. L.J. 177, 45 I.C. 949; dissenting from *Bavanna* v. *Balagurivi* (1899) 9 Mad. L.J. 177; *Parsotam* v. *Jaifit* (1890) All. W.N. 90; cf. *Nikka* v. *Gardner* (1879) 2 All. 193; *A. Murray* v. *M.S. M. Firm* (1935) 161 I.C. 626, (1936) A.R. 47.

(*x*) *Kader Moideen* v. *Nepean* (1899) 26 Cal. 1, 25 I.A. 241; *Jagannath* v. *Jagjiwan* (1925) 28 O.C. 221, 87 I.C. 829, ('25) A.O. 429.

(*y*) *Arunachella Chetti* v. *Sithayi* (1896) 19 Mad. 327; *Surajmal* v. *Chunderbhan* (1930) A.L. 129, 41 P.L.R. 80.

(*z*) *Rupan Singh* v. *Champa Lal* (1915) 37 All. 81, 26 I.C. 521.

(*a*) *Girdhar Lal* v. *Bhola Nath* (1888) 10 All. 611; *Anandi Ram* v. *Dur Najaf Ali* (1891) 13 All. 195; *Lachman Singh* v. *Salig Ram* (1886) 8 All. 384; *Kamaya* v. *Devapa* (1898) 22 Bom. 440; *Nilawa* v. *Krishnappa* (1906) 8 Bom. L.R. 350; *Rajkumar Lal* v. *Jaikaran Das* (1920) 5 Pat. L.J. 243, 57 I.C. 653; *Upendra Chandra* v. *Tara Prosanna* (1903) 30 Cal. 794; *Rakhohari* v. *Bipra Das* (1904) 31 Cal. 975; *Ma Pwa Kin* v. *K. P. S. A. R. P. Firm* (1918) 43 I.C. 190; *Ambica Charan* v. *Ramgati* (1912) 14 I.C. 718; *Manohar Das* v. *Hazarimull* (1931) 35 Cal. W. N. 1040, 58 I.A. 341, 134 I.C. 645, ('31) A.P.C. 236; *Hardwar Bhagat* v. *Sita Ram* (1934) All. L.J. 637, 150 I.C. 979, ('34) A.A. 868.

S. 72 (c), (d)

paid out of the income and he has to pay it out of his pocket (*b*). The word "sale" is *ejusdem generis* with destruction or forfeiture. It must therefore be a sale which threatens to extinguish the security. A sale of an equity of redemption would not be within the section and the mortgagee could not recover the amount paid to stay a sale, subsequent to the mortgage, in execution of a money decree (*c*), or a sale for recovery of cesses for which the mortgage right could not be sold (*d*). But in a case where a prior mortgagee deposited money under O. 21, r. 89, to set aside a sale made at the instance of a puisne mortgagee, he was allowed to add the amount to the mortgage money as the sale proclamation purported to sell not merely the equity of redemption but the whole property (*e*).

Illustration.

A sued to set aside a sale of property which his mother had sold as his guardian. A decree was made that *A* should pay a part of the price to the purchaser within six months and recover possession of the property, in default the suit to be dismissed. Before the decree *A* had mortgaged the property to *B*. As *A* failed to make the payment, *B*, four days before the expiry of the time limited, paid the requisite sum into Court. This he was entitled to do for the protection of his security: *Mahomed Rahimtulla* v. *Esmail Allarakhia* (1924) 48 Bom. 404, 51 I.A. 236, 80 I.C. 411, ('24) A. PC. 133.

There is, however, no necessity for the mortgagee, who is out of possession, to make the payment of land revenue without calling upon the mortgagor to pay the same, but he can claim to recover the amount paid only by virtue of sec. 69 of the Indian Contract Act (*f*).

Several local revenue and municipal Acts give the mortgagee, whether in possession or not, a right to save his security by payment of arrears of assessment and to add the amount so paid to the mortgage money.

Clause (c): Supporting the mortgagor's title.—The mortgagee is entitled to costs of litigation incurred in defending the mortgagor's title to the property (*g*). A similar duty is imposed upon the mortgagor under sec. 65 (b). The mortgagee's right therefore arises when the mortgagor neglects to take proper and timely steps on his behalf. The mortgagee is entitled to add to his security the costs of proceedings in which he is properly made a party, in respect of his incumbrance (*h*). In a Bombay case (*i*) the mortgagee was allowed costs incurred by him in a suit filed by a person who alleged he was a prior incumbrancer and had joined him as a party. When the mortgagee's title was attacked by tenants setting up the title of a stranger and carrying of the crops, the mortgagee was entitled to recover the costs of civil and criminal proceedings taken against them (*j*).

Clause (d): Defending mortgagee's title against the mortgagor.—The mortgagee is entitled to costs of a suit to enforce the mortgage (*k*). If a suit is brought by a mortgagee against the mortgagor and a puisne mortgagee, the costs of the suit will be added to the mortgage debt and will form part of the sum for which the final decree for sale is passed. The puisne mortgagee is impleaded because in a mortgage suit it is

(*b*) *Farzand Ali* v. *Mirza Saddiq* (1919) 22 O.C. 270, 54 I.C. 264.

(*c*) *Ram Prasad* v. *Salikram* (1882) All. W.N. 210; *Sheo Dulare* v. *Mst. Batasha* (1913) 16 O.C. 48, 19 I.C. 744.

(*d*) *Syed Ibrahim* v. *Arumugathayee* (1915) 38 Mad. 18, 16 I.C. 877; *Upendra Chandra* v. *Tara Posanna, supra*; *Rajendra Prasad* v. *Bahuria* (1916) 1 Pat. L.J. 589, 38 I.C. 32; *Hardeo Bakhsh* v. *Deputy Commissioner* (1926) 1 Luck. 367, 98 I.C. 542, ('26) A.O. 281; *Gya Prasad* v. *Gur Dayal* (1919) 22 O.C. 82, 51 I.C. 549.

(*e*) *Jagannath* v. *Jagjiwan* (1925) 28 O.C. 221, 87 I.C. 829, ('25) A.O. 429.

(*f*) *Dalsing* v. *Sunder Kunwar* (1944) A.O. 208.

(*g*) *Godfrey* v. *Watson* (1747) 3 Atk. 517, 518; *Sandon* v. *Hooper* (1843) 6 Beav. 246; *Damodar* v. *Vamurav* (1885) 9 Bom. 435, 437; *Pokree Saheb* v. *Pokree Beary* (1898) 21 Mad. 32.

(*h*) Ashburner on Mortgagees Ind, Ed., p. 383.

(*i*) *Nadershaw* v. *Shirinbai* (1923) 25 Bom. L.R. 839, 87 I.C. 129, ('24) A.B. 264.

(*j*) *Venkitaswami* v. *Muthuswamy* (1918) 34 Mad. L.J. 177, 45 I.C. 949.

(*k*) *Dattaram* v. *Vinayak* (1904) 28 Bom. 181.

incumbent to make parties all persons who are entitled to redeem, and so normally the puisne mortgagee is not ordered to pay the costs of the suit (*l*). He is also entitled to costs of defending an unsuccessful action for redemption by the mortgagor (*m*) or of prosecuting a suit against the mortgagor for establishing his title as a mortgagee (*n*) or of a suit for possession or, in case of a usufructuary mortgagee, of a suit against tenants for the arrears of rent (*o*). The general rule that a mortgagee is entitled to add the costs, charges and expenses of defending his title to his security applies notwithstanding that the mortgagor has obtained leave to sue as a poor person (*p*). Such costs are added to the security, and the mortgagor is not made personally liable unless his conduct has led to such costs being incurred (*q*). If the decree is ambiguous it will not be construed as imposing a personal liability on the mortgagor (*r*). But the mortgagee is not entitled to costs of defending his title against a stranger. In *Parker* v. *Watkins* (*s*) Wood, V.C., said:—"If some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption, unless they can be shewn to have concurred in or assisted the litigation."

Clause (e): Renewal of leases.—The mortgagor is under no liability to renew leases; see commentary on sec. 65 (d). But the mortgagee may do so in order to maintain his security, and if he pays a fine for the renewal he can add the amount to the mortgage money. This is also the law in England (*t*) where renewed leases are more common than they are in India. In *Nelson* v. *Hannam* (*u*) the mortgagee of a leasehold who had also obtained an assignment of the lessee's option to purchase the freehold reversion and had purchased the reversion took out a summons for foreclosure and obtained a preliminary order. The mortgagors then took out a summons for a declaration that on payment of the mortgage money and of the purchase price of the freehold reversion they were entitled to have the conveyance to them of the freehold reversion. The mortgagees opposed the summons but it was held that the case was analogous to that where the mortgagee renewed a renewable leasehold mortgaged to him and that, therefore, the mortgages were entitled on redemption of the mortgage to have the freehold reversion transferred to them subject to payment of the purchase price and the costs.

Contract to the contrary.—The rights of a mortgagee under this section are subject to a contract to the contrary. So when the mortgagee has undertaken to incur all the expenses necessary for the recovery of the property he is not entitled to costs of litigation in which he is obliged to contest the claim of a rival jenmi (*v*).

Add such money to the principal.—As already stated these words do not exclude the personal right of suit under sec. 69 of the Contract Act (*w*); though if a personal decree

(*l*) *R. M. A. R. M. Chettyar Firm* v. *V. S. P. R. M. Chettyar Firm* (1932) 10 Rang. 308, 139 I.C. 185, ('32) A.R. 153.

(*m*) *Ramsden* v. *Langley* (1706) 2 Vern. 536; *Samuel* v. *Jones* (1862) 7 L.T. 760; *Re Wallis, Ex parte Lickorish* (1890) 25 Q.B.D. 176 C.A.; *Varadarajulu Chetty* v. *Dhanalakshmi* (1914) 16 Mad. L.T. 365, 26 I.C. 184.

(*n*) *Minakshi Ayyar* v. *Janaki* (1942) A.M. 592.

(*o*) *Raja Sir Mahmud* v. *Hakim Saiyadali* (1941) A.O. 498.

(*p*) *In re Leighton's Conveyance* (1937) 1 Ch. 149.

(*q*) *Liverpool Marine Credit Co.* v. *Wilson* (1872) 7 Ch. App. 507, 512; *Guardian Assurance Co.* v. *Avonmore (Lord)* (1873) 7 I.R. Eq. 496; *Sheo Darshan* v. *Beni Chaudhri* (1926) 48 All. 425, 94 I.C. 872, ('26) A.A. 424; Ghose Vol. I, p. 619.

(*r*) *Maqbul Fatima* v. *Lalta Prasad* (1898) 20 All. 523; *Mohanya* v. *Ram Bahadur* (1912) 16 Cal. W.N. 731, 15 I.C. 28; *Dambar Singh* v. *Kalyan Singh* (1917) 40 All. 109, 43 I.C. 557; *Amina Bibi* v. *Ram Shankar* (1919) 41 All. 473, 50 I.C. 730; *Sheo Darshan Singh* v. *Beni Chaudhri* (1926) 48 All. 425, 94 I.C. 872, ('26) A.A. 424.

(*s*) (1859) John. 133, 137.

(*t*) *Manlove* v. *Bale and Bruton* (1688) 2 Vern. 84; *Lacon* v. *Mertins* (1743) 3 Atk. 1, 4.

(*u*) (1943) 1 Ch. 59.

(*v*) *Thekkamannengath* v. *Kakkasseri* (1915) 28 Mad. L.J. 184, 194, 27 I.C. 989.

(*w*) *Umesh Chandra* v. *Khulna Loan Co.* (1907) 34 Cal. 92; *Venkitaswami* v. *Muthuswamy* (1918) 34 Mad. L.J. 177, 45 I.C. 949; *Parsotam* v. *Jaijit* (1890) All. W.N. 90; cf. *Nikka* v. *Gardner* (1879) 2 All. 193; *A. Murray* v. *M.S.M. Firm* (1936) 161 I.C. 626 (1936) A.R. 47.

S. 72

has been obtained the amount cannot be tacked to the mortgage (*x*). A usufructuary mortgagee tacking sums expended under this section to the mortgage retains possession until the whole amount is discharged out of the usufruct (*y*). In a Patna case (*z*) a usufructuary mortgagee set up an adverse title under a fraudulent conveyance, and made payments of rents due by the mortgagor as owner after his invalid purchase, but when the alleged sale to him was set aside he was not deprived of his statutory right as regards rents under this section.

Interest.—Interest is allowed on expenditure under this section. It should be simple not compound (*a*). In a Bombay case before the Act interest at 6 per cent. was allowed (*b*). Under the section interest is at the rate specified in the mortgage (*c*), or, if no such rate is fixed, interest is at the rate of nine per cent.

Proviso.—The proviso is new and did not occur in the old section. The mortgagor is owner of the property and it is primarily his duty to preserve it and to protect his title. It is only on his default to take proper and timely steps in this behalf that the mortgagee is entitled to spend money under clauses (b) and (c).

Insurance.—If the mortgagor has not insured against fire, the mortgagee is authorized to insure and to add the premium to the mortgaged debt. The clause as to insurance in the old section was taken from sec. 19 (1) (ii) of the Conveyancing Act, 1881, now sec. 101 (1) (ii) of the Law of Property Act, 1925, and contained a phrase used in the English Act that premiums paid would be "a *charge* on the mortgaged property." This expression has been altered, and the words now used are "shall be *added to* the principal money," so as to make it clear that insurance premium stands on the same footing as other costs, charges and expenses.

If the mortgagee is in possession he must under sec. 76 (f) apply the money if the mortgagor so directs in reinstating the property or in reduction of the mortgage debt. If the mortgagor has insured, the insurance money belongs to the mortgagor, and the mortgagee may under sec. 49 require him to apply the money in reinstating the property. And he can do so even against a creditor of the mortgagor who has attached the insurance money (*d*).

The mortgagee's authority to insure is, however, subject to a contract to the contrary. There may be a stipulation in the mortgage that insurance is not necessary; or the mortgagor may covenant that in case of fire the mortgagee should rebuild the house at his expense (*e*). By a mortgage deed of March 1936 the mortgagors covenanted to keep the premises insured against loss or damage by missiles or projectiles from or fired at aircraft and it was further provided that, should they fail to do so, the mortgagees might insure the premises at the expense of the mortgagors and it was further provided that the power of sale of the mortgagees would immediately become exercisable if the mortgagors broke any covenant. Both parties were unaware that the policy of insurance obtained in respect of the premises and sent to the mortgagee's solicitors did not comply with the covenant though it would then have been possible to obtain a policy in accordance with the covenant. From October 1936, however, such a policy was unobtainable. In January 1939 the mortgagees became aware of the defect in the insurance and gave notice that unless the mortgage-money was paid off they would exercise their power of sale. It was held that there had been a breach of the covenant, since there was no implied term in the

(*x*) *Imdad Hasan* v. *Badri Prasad* (1898) 20 All. 401.

(*y*) *Abdul Qayyum* v. *Sadruddin* (1905) 27 All. 403; *Mohamed* v. *Sheodarshan* (1907) 4 All. L.J. 176.

(*z*) *Foodani Sah* v. *Ashar Hussain* (1931) 10 Pat. 210, 131 I.C. 814, ('31) A.P. 325.

(*a*) *Kishori Mohun* v. *Gunga Bahu* (1896) 23 Cal. 228, 22 I.A. 183, 192.

(*b*) *Kamaya* v. *Devapa* (1898) 22 Bom. 440, 446.

(*c*) *Mst. Kanis Fizza* v. *Datadin* (1925) 90 I.C. 184, ('25) A.O. 678.

(*d*) *Sinnot* v. *Bowden* (1912) 2 Ch. 414.

(*e*) *Sakharamshet* v. *Amtha* (1890) 14 Bom. 28.

contract that if it became impossible to obtain a policy in accordance with it neither party should be entitled to rely on a failure to comply with it. It was further held that the mortgagees were not estopped from setting up their claim (*f*).

Right to proceeds of revenue sale or compensation on acquisition.

73. (1) *Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charges and deductions directed by law.*

(2) *Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act*, 1894, *or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.*

(3) *Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.*

The old section.—The section has been substituted by Act 20 of 1929. The old section was as follows :—

"Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, (if any) of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part."

The old section was limited to a case of sale for arrears of revenue or rent, and gave the mortgagee a "charge" on the surplus sale proceeds. The present section extends to cases of sale for arrears of other charges of a public nature, and of acquisition under the Land Acquisition Act, 1894. It avoids the use of the word "charge," and instead of giving the mortgagee a charge on the surplus sale proceeds it enables him to claim payment out of them. This claim he can enforce under the section, although the money may not be due under the mortgage, for if the original security is no longer available there is no reason why the mortgagee should wait till the due date of the mortgage. Sub-sec. (3) makes a provision for priorities which was not contained in the old section.

Amendment whether retrospective.—This section is not specified in sec. 63 of the Amending Act 20 of 1929 as one of the sections which shall not have restrospective effect. It was treated as restrospective in the undernoted case (*g*).

(*f*) *Moorgate Estates Ld.* v. *Trower* (1940) 1 Ch. 206.

(*g*) *Kapari Sahu* v. *Mathura Das* (1934) 148 I.C. 972, ('34) A.P. 280 ; *Girdhar Lal* v. *Alaya Hasan* (1938) A.A. 221, (1938) All. 513, (1938) A.L.J. 313, 174 I.C. 702.

S. 73

Substituted security.—This section is an instance of the application of the doctrine of substituted security, *viz.*, that the mortgagee is, for the purpose of his security, entitled not only to the mortgaged property, but also to anything that is substituted for it. The old section produced almost *verbatim* the decision of the High Court of Calcutta in the case of *Heera Lal Chowdhry* v. *Janokeenath* (*h*). The doctrine applies not only to the cases referred to in the section but also to judicial sales, and to the conversion of an undivided share into a share held in severalty by partition. In *Byjnath Lall* v. *Ramoodeen Chowdry* (*i*) where the mortgagee lost the undivided share of his mortgagor by reason of a partition, the Judicial Committee said : "He would take the subject of the pledge in the new form which it had assumed." This case was followed in *Mohammad Afzal Khan* v. *Abdul Rahman* (*j*) where the Privy Council said : "Their Lordships are of opinion that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage therefore is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share." If the mortgage contains a personal covenant, the substitution of the security does not affect the mortgagee's remedy on that covenant (*k*).

Revenue and rent sales.—The sale referred to in this section must be a sale free of incumbrances, *i.e.*, a sale which has the effect of nullifying the mortgage (*l*). This must be so, for if the sale does not extinguish the mortgage, the mortgagee can enforce his lien against the property in the hands of the auction purchaser (*m*). Even if the mortgage is executed after default in payment of revenue, the mortgagee has a right to payment out of surplus sale proceeds (*n*). When property is sold under sec. 167 of the Bengal Tenancy Act, 1885, the purchaser has power to annul incumbrances, and it has been held that if he has not exercised that power, the mortgagee may abandon his precarious security and claim payment out of the surplus sale proceeds (*o*). A sale under which the purchaser has power to annul incumbrances is thus treated as a sale free of incumbrances. In some cases (*p*) it was held that the mortgagee could exercise this right irrespective of the question whether the sale would annul the security, but this is open to question. This seems too literal a construction of the section, for the sale could hardly have the effect of enlarging the security. If the sale is set aside the interest of the mortgagor is revested in him and the mortgagee falls back upon his original security (*q*).

Sale of part of the property mortgaged.—The section as amended includes the case where the sale is of only part of the property mortgaged. It is submitted that if the effect of the sale is to extinguish the mortgage of the part sold, the mortgagee can claim a rateable proportion of the mortgage money from the surplus sale proceeds and the mortgage of the unsold residue subsists. Under sec. 54 of the Bengal Land Revenue Sales Act 11 of 1859 a revenue sale of part of an estate does not annul encumbrances.

(*h*) (1871) 16 W.R. 222, followed in *Kristodass* v. *Ramkant* (1881) 6 Cal. 142.

(*i*) (1875) 21 W.R. 233, 1 I.A. 106, 120.

(*j*) *Mohammad Afzal* v. *Abdul Rahman* (1932) 59 I.A. 405, 36 C.W.N. 1129, 139 I.C. 85, ('32) A.PC. 235.

(*k*) *Benarasi Prasad* v. *Mohiuddin* (1924) 3 Pat. 581, 78 I.C. 723, ('24) A.P. 586.

(*l*) *Prem Chand Pal* v. *Purnima Dasi* (1888) 15 Cal. 546 ; *Beni Prosad* v. *Rewat Lall* (1897) 24 Cal. 746 ; *Umartara Gupta* v. *Umacharan Sen* (1906) 3 Cal. L.J. 52 ; *Narottam Das* v. *Thakur Sukhraj Singh* (1928) 3 Luck. 719, 116 I.C. 49, ('28) A.O. 442 ; *Krishna Chandra* v. *Bipin Behari* (1936) 16 Pat. 299, 174 I.C. 584, (1938) A.P. 179.

(*m*) *Prem Chand Pal* v. *Purnima Dasi*, *supra* ; *Rasik Chandra* v. *Jagabandhu* (1929) 118 I.C. 904, ('29) A.C. 392.

(*n*) *Umartara Gupta* v. *Umacharan Sen*, *supra*.

(*o*) *Nim Chand Baboo* v. *Ashutosh Dutt* (1904) 9 Cal. W.N. 117.

(*p*) *Gobind Sahai* v. *Sibdut* (1906) 33 Cal. 878 ; *Mukhram Marwadi* v. *Bateshwar Mahton* (1936) 169 I.C. 805, (1937) A.P. 307.

(*q*) *Rash Behari* v. *Kasum Kumari* (1925) 86 I.C. 382, ('25) A.C. 1145.

To such a sale it is submitted that sec. 73 does not apply. The Patna High Court, however, reading the two sections together, has held that if part of the property mortgaged is sold at a revenue sale the mortgagee can follow the mortgaged property in the hands of the purchaser as well as claim payment out of the surplus sale proceeds (r).

Compensation under Land Acquisition Act.—The same rule applies in cases where the mortgaged property is acquired under the Land Acquisition Act, 1894; the mortgagee is entitled to claim payment out of the sum awarded as compensation (s). The Allahabad High Court in one case held that the mortgagee would lose his claim if he did not claim apportionment under the Land Acquisition Act (t). Assuming that the decision was correct, it will not be so under the present section. If the mortgagee does not exercise his right to claim compensation money before it is withdrawn by the mortgagor it would not deprive him of his original rights as a mortgagee to enforce his security as against the compensation money (u).

Judicial sales.—Surplus sale proceeds left after a prior mortgagee's sale represent the puisne mortgagee's security in a new form and he has a right to follow them (v), even after the creditors of the mortgagor have withdrawn them (w). In *Barhamdeo Prasad* v. *Tara Chand* (x) the first mortgagees under a mortgage of May 1887 had also a third mortgage of 1890 which they sued on without making the second mortgagees on a mortgage of September 1887 a party, and in execution withdrew the surplus sale proceeds of the sale on the first mortgage. The second mortgagees were held entitled to recover the money from them as part of the security. Their Lordships said: "The surplus moneys of that sale represented the security which the plaintiffs had under their mortgage of the 19th September 1887, and did not cease to represent that security owing to the fact that Ram Berhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited."

Partition.—This is a case not dealt with in the section but to which the same doctrine applies. If the subject of the mortgage is an undivided share and the joint sharers effect a partition, the mortgagee must pursue his remedy against the share allotted in severalty to his mortgagor (y); and in the absence of fraud or collusion the co-sharers of the mortgagor would hold their shares free of the mortgage. But if as a part of the partition agreement the coparcener to whose share the subject matter of the mortgage is allotted undertakes to pay the mortgage debt, then the true position is that the said coparcener has in effect obtained the equity of redemption only and is liable to the mortgagee who may

(r) *Kapuri Sahu* v. *Mathura Das* (1934) 148 I.C. 972, ('34) A.P. 209.

(s) *Viraragava* v. *Krishnasami* (1883) 6 Mad. 344; *Topandas* v. *Jesaram* (1907) P.R. 17; *Jotoni Chowdhurani* v. *Amor Krishna* (1908) 13 Cal. W.N. 350, 1 I.C. 164; *Debendra* v. *Mirza Abdul* (1909) 10 Cal. L.J. 150; *Ladli Prasad* v. *Nizam-ud-din* (1920) 54 I.C. 535; *Ashutosh* v. *Babu Lal* (1921) 5 Pat. L.J. 650, 59 I.C. 513, ('21) A.P. 372; *Prag Din* v. *Nankau Singh* (1930) 5 Luck. 702, 123 I.C. 56, ('30) A.O. 292.

(t) *Basa Mal* v. *Tajammal* (1894) 16 All. 78.

(u) *Girdhar Lal* v. *Alay Hasan* (1938) A.A. 221, (1938) All. 513, (1938) A.L.J. 313.

(v) *Barhamdeo Prasad* v. *Tara Chand* (1906) 33 Cal. 92 on app. (1914) 41 Cal. 654, 660, 21 I.C. 961 P.C.; *Bakhtawar* v. *Barumal* (1907) 4 All. L.J. 492.

(w) *Gusto Behary* v. *Shib Nath* (1863) 20 Cal. 241.

(x) *Supra.*

(y) *Mahammad Afzal Khan* v. *Abdul Rahman* (1932) 59 I.A. 405, 13 Lah. 702, 36 Cal. W.N. 1129, 56 Cal. L.J. 324, 1932 All. L.J. 909, 35 Bom. L.R. 1, 139 I.C. 85, ('32) A.P.C. 235; *Byjnath Lall* v. *Ramoodeen Choudhry* (1874) (1875) 21 W.R. 233, 1 I.A. 106; *Hem Chunder Ghose* v. *Thako Moni* (1893) 20 Cal. 533; *Lakshman* v. *Gopal* (1899) 23 Bom. 385; *Joy Sankari* v. *Bhagut Chandra* (1899) 26 Cal. 434; *Amolak Ram* v. *Chandan* (1902) 24 All. 483; *Pullamma* v. *Pradoshan* (1895) 18 Mad. 316; *Muthia Raja* v. *Appala Raja* (1911) 20 Mad.L.J. 393, 6 I.C. 991; *Hakim Lal* v. *Ram Lal* (1907) 6 Cal. L.J. 46; *Shahebzada* v. *Hills* (1908) 35 Cal. 388; *Bhup Singh* v. *Chedda Singh* (1920) 42 All. 596, 58 I.C. 171; *Umar* v. *Sakharam* (1934) 58 Bom. 49, 35 Bom. L.R. 1154, 147 I.C. 280, ('33) A.B. 485; *Amar Singh* v. *Bhagwan Das* (1933) 14 Lah. 749, 149 I.C. 104, ('33) A.L. 771; *Nirmal Kunwar* v. *Sant Lal* (1937) 16 Pat. 662, 171 I.C. 715, (1937) A.P. 563; *Ganga Prasad Sao* v. *Dalan Saran Singh* (1937) 170 I.C. 184, (1937) A.P. 345; *Balakrishna Prasad* v. *Apurbo Krishna* (1938) 175 I.C. 194, (1938) A.P. 99; *Deokinandan* v. *Aghorenath* ('45) A.P. 400.

S. 73

sue him (z). In the leading case of *Byjnath Lall* v. *Ramoodeen Chowdry* (a) the Judicial Committee observed that the mortgagee would take the subject of the pledge in the new form which it had assumed. In this case the partition was by the Collector, but the rule applies to all partitions. If after partition the mortgagor makes another mortgage of the share allotted to him, this mortgage will be a puisne mortgage subject to the mortgage effected before partition. It matters not that the post partition mortgagee had no notice of the pre-partition mortgage, for he cannot take a larger estate than the mortgagor had (b). For the purpose of the application of the principle underlying this section it is immaterial whether there is a transfer of an undivided share or a transfer of a specific item of a joint property (c).

Mortgagor's title altered.—When the mortgagor's title is altered, the land held under the new title is still subject to the mortgage. When a zemindari was mortgaged and the mortgagor lost the zemindari right and became an ex-proprietary tenant of the *Sir*, the mortgage was effectual against the ex-proprietary right (d).

Default of the mortgagee.—If the mortgagee is in possession, it is his duty under sec. 76 (c) to pay the revenue, rent and public charges out of the income. If the income is not sufficient to pay the assessment, the sale is not due to his default and he is entitled to claim payment of his mortgage money out of the surplus sale proceeds; and if he purchases at the sale he is not liable to be redeemed in cases where the revenue sale involves a forfeiture or extinction of the equity of redemption (e). But if the income is sufficient to pay the assessment and if the sale is occasioned by his default, he is not entitled to payment out of the surplus sale proceeds; and if he purchases the property himself he is a trustee for the mortgagor under sec. 90 of the Indian Trusts Act, and is liable to be redeemed (f). Generally speaking a sale for arrears of revenue caused by the mortgagee's default does not affect the right of redemption (g). Conversely, if the sale is for default of the mortgagor to pay the revenue, and the mortgagor purchases, either himself or benami, he takes it subject to the mortgage (h); and if the mortgagee has obtained payment of the surplus sale proceeds in ignorance of the benami character of the purchase on behalf of the mortgagor, and there is a deficit, he may enforce payment against the property in the hands of the auction purchaser (i).

Priority.—The section as now amended makes provision for priority. The right of the mortgagee to the surplus sale proceeds is subject to the general rule of priority enacted in sec. 48. If there are two successive mortgagees, the right of the first mortgagee will take precedence and he will be paid first.

Illustration.

A leased property to *B* by a lease which gave a charge for arrears of rent. *B* mortgaged the leasehold to *C*. *A* in enforcement of his charge brought the property to sale. The decree for rent was satisfied out of the sale proceeds. The surplus sale

(z) *Atmaram Sao* v. *Bhupendranath* (1940) A.N. 149.

(a) (1875) 21 W.R. 233, 1 I.A. 106.

(b) *Mohan Lal* v. *Wadhawa Singh* (1934) 149 I.C. 1195, ('34) A.L. 660.

(c) *Liladhar Uttamchand* v. *Shiwaji Ganesh* (1936) Nag. 22, 165 I.C. 550, (1936) A.N. 125.

(d) *Sham Das* v. *Batul Bibi* (1902) 24 All. 538; *Jotindra Mohan* v. *Godadhur* (1897) 2 Cal. W.N. 29 (a dartaluk changed into a patni).

(e) *Abdul Rehman* v. *Vinayak* (1927) 29 Bom. L.R. 1056, 104 I.C. 653, ('27) A.B. 540; *Ooppath Na..ampa..nbath* v. *Koyakutti* (1915) 29 I.C. 344; *Fekna Mahto* v. *Bahilal Sahu* (1938) 18 Pat. 133, 183 I.C. 374, (1939) A.P. 382.

(f) *Lakshmaya* v. *Appadu* (1884) 7 Mad. 111.

(g) *Kalappa* v. *Shivaya* (1896) 20 Bom. 492; *Sambu* v. *Babaji* (1891) P.J. 160; *Nawab Sidhee* v. *Rajah Ojhoodhyaram* (1866) 10 M.I.A. 540; *Babaji* v. *Magniram* (1897) 21 Bom. 396; *Jaikaran Singh* v. *Sheo Kumar Singh* (1928) 50 All. 636, 108 I.C. 370, ('27) A.A. 747. See note "Mortgagee purchasing at Court sale" under sec. 60.

(h) *Sangapally Lakshmayya* v. *Intoory* (1903) 26 Mad. 385.

(i) *Ganga Sahai* v. *Tulsi Ram* (1903) 25 All. 371.

proceeds were then applied, first, in payment of *A*'s charge for rent from date of suit to date of sale, and then in payment of *C*'s mortgage : *Central Bank of India* v. *S. Sachindra Mohan Ghosh* (1933) 144 I.C. 760, ('33) A.P. 257.

In the case of a partition where the share allotted to the mortgagor was subject to a charge for owelty, that charge took precedence over the mortgage (*j*). If there is a subsequent incumbrance and the sale is subject to that incumbrance, the mortgagee, if the sale proceeds are not sufficient to satisfy his mortgage, may pursue his remedy for the balance against that incumbrance. Thus in a Calcutta case (*k*), the mortgagor after the execution of the mortgage, had granted a patni lease, and the property was sold subject to that patni, and the surplus sale proceeds did not suffice to satisfy the mortgage. The mortgagee was therefore allowed to proceed against the patni interest for the deficit, and it was said that the section was not designed to restrict the rights of the mortgagee. If unsecured creditors of the mortgagor have withdrawn the sale proceeds, the mortgagee can enforce his claim against them. In another case (*l*) a patni taluq had been sold for arrears of land revenue and unsecured creditors of the mortgagor patnidars withdrew part of the surplus sale proceeds. They pleaded that there was a sufficient balance left to satisfy the mortgagees, but the Court held that the surplus sale proceeds represented the security, and as the mortgagees could not be compelled to split their security they could enforce their claim against the unsecured creditors.

Similarly in the case of a judicial sale, the right of the puisne mortgagee to the sale proceeds takes priority over that of a money decree holder or an unsecured debtor of the mortgagor (*m*). A puisne mortgagee not made a party to the prior mortgagee's suit can prove both against the surplus sale proceeds and against the property in the hands of the auction purchaser, for as he has not been made a party the sale cannot affect his rights (*n*).

Illustrations.

A mortgaged property first to *B* and then to *C*. *B* sued on his mortgage without making *C* a party and brought the property to sale. The auction purchaser was *D* and the sale proceeds satisfied *B*'s mortgage and left a surplus. The surplus sale proceeds were attached and taken by an unsecured creditor *E*. *C* was entitled to enforce his mortgage against the property purchased by *D*, subject to the prior mortgage, and to require *E* to repay the surplus sale proceeds : *Krishnaswami* v. *Thirumalai* (1926) 90 I.C. 410, ('26) A.M. 101.

In *Karan Singh* v. *Ishtiaq Husain* (*o*) the surplus sale proceeds on the prior mortgagee's sale were paid to the mortgagor. The puisne mortgagee obtained a decree on his mortgage and proceeded to bring the property to sale. The auction purchaser paid the puisne mortgagee to avert a sale, and was then allowed to recover the amount from the mortgagor.

Limitation.—The surplus sale proceeds in the mortgaged property is a new form and as the mortgagee has the same right to it as he had to the land, his claim is subject to twelve years' limitation under Art. 132 (*p*).

(*j*) *Sahebzada* v. *Hills* (1908) 35 Cal. 388.

(*k*) *Susilabala* v. *Dinabandhu* (1909) 14 Cal. W.N. 186, 5 I.C. 70.

(*l*) *Gusto Behary* v. *Shib Nath* (1893) 20 Cal. 241.

(*m*) *Padmanabh Bombeshwai* v. *Khemu Komar* (1894) 18 Bom. 684.

(*n*) *Gobind Lal Roy* v. *Ramjan Rajah Misser* (1894) 21 Cal. 70, 20 I.A. 165 ; *Krishnaswami* v. *Thirumalai* (1926) 90 I.C. 410, ('26) A.M. 101.

(*o*) (1921) 43 All. 268, 61 I.C. 376, ('21) A.A. 312.

(*p*) *Barhamdeo Prasad* v. *Tara Chand* (1906) 33 Cal. 92 on app. (1914) 41 Cal. 654, 21 I.C. 961 P.C. ; *Kamala Kant* v. *Abul Barkat* (1900) 27 Cal. 180 ; *Gopikrishna* v. *Ram* (1910) 14 Cal. W.N. 484, 5 I.C. 824 ; *Upendra Chandra* v. *Mohri Lal* (1904) 31 Cal. 745.

Ss. 74-76

74. [*Right of subsequent mortgagee to pay off prior mortgagee.*] *Repealed by s.* 39 *of Act* 20 *of* 1929.

75. [*Rights of mesne mortgagee against prior and subsequent mortgagees.*] *Repealed by s.* 39 *of Act* 20 *of* 1929.

Liabilities of mortgagee in possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property—

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own [*p. 505*];

(b) he must use his best endeavours to collect the rents and profits thereof [*pp. 505-506*];

(c) he must, in the absence of a contract to the contrary out of the income of the property, pay the Government revenue, all other charges of a public nature *and all rent* accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold [*pp. 507-508*];

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money [*p. 508*];

(e) he must not commit any act which is destructive or permanently injurious to the property [*pp. 508-509*];

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money [*p. 509*];

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of

such accounts and of the vouchers by which they are supported [*pp. 509-511*]; S. 76

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses *properly incurred for the management of the property and the collection of rents and profits and the other expenses* mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest * * * and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor [*pp. 511-513*];

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his * * * receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court as the case may be, *and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property* [*p. 513*].

Loss occasioned by his default.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure [*pp. 513-514*].

Amendments.—The following amendments have been made by the Amending Act 20 of 1929. The words "and all rent" have been inserted in clause (c) to provide for the case of a mortgage of leasehold property. The words "properly incurred for the management of the property and the collection of rents and profits and the other expenses" have been inserted in clause (h). These words were formerly in sec. 72. The words "on the mortgage money" occurring in clause (h) after the word "interest," have been omitted, as the term "mortgage money" includes interest. The words "and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property" have been added to sub-section (i) in order to supersede the decision in a Madras case (*q*).

(*q*) *Suba Rao* v. *Sarvarayudu* (1924) 47 Mad. 7, 72 I.C. 292, ('23) A.M. 533.

S. 76

Possession.—The section enacts the statutory duties of a usufructuary mortgagee or of a mortgagee in possession (*r*). The view taken in an Allahabad case (*s*) that the section does not apply where the mortgage is in its inception usufructuary is, it is submitted, erroneous. It deals mainly with the debit side of the mortgagee's account, while sec. 72 deals with the credit side (*t*). But sec. 76 is not applicable unless the mortgagee is in possession *qua* mortgagee. Even if a mortgage deed entitles a mortgagee to take possession, collect rents and profits, his liability to account for such rents and profits will not arise unless and until he has taken such possession (*u*). A mortgagee is not in possession *qua* mortgagee if he enters the property as lessee (*v*). In some cases the mortgagee is both a lessee and a mortgagee, and then it is a matter of construction whether the transactions of mortgage and lease are separable or not—see note "Zuripeshgi Leases" under sec. 58. If they are separable, the mortgagee is in possession as lessee and is not liable to account under this section. Where part of the rent is set off against the interest, it has been held that the mortgagee is in possession in his own right in order that the debt should be paid off and that this section applies (*w*). A mortgagor in a zuripeshgi lease may claim credit in the account for arrears of rent due by the mortgagee (*x*), and conversely, a usufructuary mortgagee may set off arrears of rent due by the mortgagor in respect of any tenancy held by the mortgagor within the mortgaged premises (*y*). In an usufructuary mortgage there was a distinct covenant to pay interest and the mortgagee was to appropriate the usufruct towards interest. The mortgagee gave a lease to the mortgagor on annual rent which was equal to the annual interest. In such a case if the mortgagor did not pay rent that did not affect the right of the mortgagee to recover the whole of the mortgage money including the interest (*z*).

A mortgagee generally enters into possession *qua* mortgagee in the case of a usufructuary mortgage or an English mortgage. But a mortgagee may take possession *qua* mortgagee even when the deed is silent as to possession (*a*). Mere receipt of rents and profits does not amount to taking possession unless the mortgagee receives them in such a way as to displace the mortgagor from management of the estate (*b*). A mortgagee is not in possession because the mortgage deed requires the mortgagor to appoint a manager in whom the mortgagee has confidence (*c*). The possession of a statutory receiver appointed by the mortgage under sec. 69A is that of the mortgagor unless the agency has been modified by the terms of the deed (*d*). A mortgagee is not in possession *qua* mortgagee after he purchases in execution of a decree for sale on his mortgage (*e*).

Dekkan Agriculturists Relief Act.—It has been said that the section does not apply when the mortgagor is an agriculturist and the account is taken under secs. 13 and 13A of the Dekkan Agriculturists Relief Act, 1879 (*f*).

(*r*) *Kamlapat* v. *Union Sugar Mills* (1929) 50 Cal. L.J. 561, 119 I.C. 631, ('29) A.PC. 256.

(*s*) *Kallu* v. *Ganesh* (1929) 116 I.C. 747, ('29) A.A. 348.

(*t*) *Subba Rao* v. *Sarvarayudu*, *supra*.

(*u*) *Sivraj Lal* v. *H. P. F. Ltd.* (1943) A.M. 62, (1943) Mad. 430, (1943) 1 M.L.J. 472, 55 M.L.W. 678, (1942) M.W.N. 625, 207 I.C. 535.

(*v*) *Page* v. *Linwood* (1837) 4 Cl. & Fin. 399, 434; *Slanley* v. *Grundy* (1883) 22 Ch. D. 478; *Gulab Chand* v. *Ram Kumar* (1941) 193 I.C. 578, (1941) A.P. 296.

(*w*) *Kishundayal Bhagat* v. *Mahabir Bhagat* (1920) 5 Pat. L.J. 492, 58 I.C. 291; *Vengubai Ammal* v. *Ramaswami* (1927) Mad. W.N. 749, 105 I.C. 419, ('27) A.M. 964.

(*x*) *Nursingh Narain* v. *Baboo Lukputty* (1880) 5 Cal. 333.

(*y*) *Sheo Saran Singh* v. *Mahabir Pershad* (1905) 32 Cal. 657.

(*z*) *Chaitan Prakash* v. *Mumtaz Ahmad* (1937) A.A. 762; *Ghulam Mohammad* v. *Rajeshwar* (1940) A.L. 333, (1940) Lah. 658, 192 I.C. 505.

(*a*) *Madari* v. *Baldeo Prasad* (1905) 27 All. 351 F.B.

(*b*) *Noyes* v. *Pollock* (1886) 32 Ch. D. 53.

(*c*) *Mati Lal Das* v. *Eastern Mortgage and Agency Co.* (1920) 25 Cal. W.N. 265, 61 I.C. 486, ('21) A.PC. 118.

(*d*) *Richards* v. *Overseers of Kidderminster* (1896) 2 Ch. 212.

(*e*) *Rangayya Chettiar* v. *Parthasarathi* (1887) 20 Mad. 120; *Kundanlal* v. *Mt. Rupabai* (1936) Nag. 19, (1936) A.N. 293.

(*f*) *Sakharam* v. *Dhaktojirao* (1934) 58 Bom. 472, 36 Bom. L.R. 633, 152 I.C. 434, ('34) A.B. 321.

Clause (a): Management.—Clause (a) imposes the same obligation as sec. 15 of the Indian Trusts Act, for though a mortgagee in possession is not a trustee for the mortgagor his duties are akin to those of a trustee (*g*). He is therefore bound to act as a prudent owner in the management of the property. The mortgagee in possession of agricultural land is bound to cultivate the ordinary crops that the land is capable of yielding (*h*), but he is not an assurer of the continuance of the same rate of profit as his mortgagor was able to raise, for the very change of management may cause a falling off of receipts (*i*). A mortgagee in possession is liable for loss occasioned by his failure to make necessary repairs (*j*), but he will not be liable for damage caused while the mortgagors were in occupation as tenants (*k*).

Clause (b): Collection of rents and profits.—The mortgagee in possession must use his best endeavours to collect the rents and profits. It is immaterial in such a case that the mortgaged property was leased before the usufructuary mortgage was executed (*l*). If the mortgagee has leased the property mortgaged to the mortgagor and has obtained a decree for rent which has become time-barred, he is not entitled to credit for the amount in a redemption suit (*m*). But when the mortgage deed stipulated for payment of interest and the mortgaged property had been leased to the mortgagor himself and the latter made a default, the mortgagee could not be held liable for failure to recover the rent or to have lost the right of claiming interest (*n*). Even when the mortgage deed contained a stipulation that the mortgagor would pay from year to year the amount by which the profits fell short of interest, the mortgagor was not liable when the deficit was due to the default of the mortgagee (*o*). This is on the principle that the mortgagee must be diligent in realizing his security (*p*). It represents the English rule that the mortgagee in possession is always directed to account on the footing of wilful default, *i.e.*, not merely for rents and profits which he actually receives, but also for rents and profits which but for his mismanagement or neglect he would have received (*q*). This is the usual form of account in actions on mortgages where the mortgagee is in possession (*r*), and the plaintiff has not to make out a special case as in a suit against a trustee (*s*). The Court must find that the mortgagee was in possession and if so from which date and the decree must contain an express provision that accounts are to be taken on this basis (*t*). The mortgagee will be liable to account on this basis only in respect of the portion of the mortgaged premises taken possession of by him (*u*). In *Banarsi Prashad* v. *Ram Narain* (*v*) the Judicial Committee, on a construction of the deed in suit, held that the mortgagee was not in all circumstances responsible for the gross rental as shown in the jummabundi or rent roll, and that he was liable only for such sums as were actually received by him, or on his behalf, and such sums, if any, as might have been received by him but for his own neglect or fault. Some of the old cases (*w*) make the rent roll the basis of the account and hold the mortgagee responsible for that amount, less ten per cent. for collection charges, but this is not correct, for *Shah Mukhun Lall*'s case (*x*) shows that the mortgagee is not an assurer of the rate of profits.

(*g*) *Jagannath* v. *Sripathibabu* (1945) A.M. 297, (1945) 1 M.L.J. 478.

(*h*) *Girjoji* v. *Keshavrav* (1864) 2 Bom. H.C.R. 211.

(*i*) *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (1868) 12 M.I.A. 157, 193.

(*j*) *Shiva Devi* v. *Jaru* (1892) 15 Mad. 290.

(*k*) *Bagar Ali* v. *Nisar Husain* (1885) All. W.N. 262.

(*l*) *Ram Kishen Das* v. *Badri Bishal* (1937) A.A. 337.

(*m*) *Narsina* v. *Shivu Rao* (1918) 41 Mad. 1043, 49 I.C. 123; *Said Ahmed* v. *Raja Barkhandi Mahesh* (1932) 8 Luck. 40, 139 I.C. 64, ('32) A.O. 255; *C. N. Chandra* v. *Dwarka Das* (1936) A.L. 42.

(*n*) *Ghulam Mahomed* v. *Rajeshwar* (1940) A.L. 333, (1940) Lah. 658, 192 I.C. 505.

(*o*) *Ratan Dei* v. *Sher Singh* (1929) 27 All. L.J. 217, 114 I.C. 876, ('29) A.A. 260.

(*p*) *Kensington* (*Lord*) v. *Bouverie* (1855) DeG. M. & G. 134, 157 C.A.

(*q*) *Chaplin* v. *Young* (*No.* 1) (1864) 33 Beav. 330, 337; *Parkinson* v. *Hanbury* (1867) L.R. 2 H.L. 1, 14.

(*r*) *Mayer* v. *Murray* (1878) 8 Ch.D. 424.

(*s*) *In re Wrightson* (1908) 1 Ch. 789.

(*t*) *Anandji* v. *Ahmedbhoy* (1940) A.B. 287, (1940) Bom. 645, 40 Bom. L.R. 580, 170 I.C. 280; *Karson Champsi* v. *Meghji Asana* (1941) A.B. 28.

(*u*) *Chunilal* v. *Abdul Karim* (1937) A.B. 483, 39 Bom. L.R. 795, 172 I.C. 584.

(*v*) 1903) 25 All. 287, 30 I.A. 66; *Gau* v. *Fateh Singh* (1913) 38 I.C. 537.

(*w*) *Hurnuns* v. *Petam* (1854) S.D.N.W.P. 371?

(*x*) (1868) 12 M.I.A. 157.

S. 76

This rule of wilful default applies only when the mortgagee is in possession in his character of mortgagee so that he knows he is in possession and chargeable accordingly. In *Parkinson* v. *Hanbury* (y) Lord Cranworth said—"I think that it is perfectly clear law, that when a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default." When a mortgagee by conditional sale went into possession before the decision in *Ramji* v. *Chinto* (z) believing that he was absolute owner, he was allowed to charge for improvements (a), and was not made accountable for rents and profits (b). But the last case carried the rule too far. For the condition about crediting the rents and profits are to be always implied (c). If not aware of his character of mortgagee he is not liable for default of collection, yet he must be liable in the ordinary way for rents and profits that he has received. In a Calcutta case (d), when a mortgagee by conditional sale went into possession at due date with the consent of the mortgagor, Mookerjee, J., held that he was not a usufructuary mortgagee, but that he was, nevertheless, liable to account for rents and profits as they were incidents *de jure* to the ownership of the equity of redemption. When a mortgagee purchased the equity of redemption at a sale held in contravention of sec. 99 and which was at that time considered to be void, he was held accountable for rents and profits (e). So also when a mortgagee went into possession under an agreement of sale which was invalid (f). When a simple mortgagee went into possession under an invalid decree for possession he was held accountable for rents and profits (g). An assignee of an auction purchaser at a prior mortgagee's sale when redeemed by a puisne mortgagee is also accountable (h).

A mortgagee in possession may enter into any arrangement which might facilitate the recovery of a reasonable return for his money (i), and may grant leases not extending beyond the period of the mortgage. Such a lease can be given even after the suit for redemption is filed (j) but a lease made by a mortgagee determines at redemption (k). So does an occupancy tenancy created by the mortgagee (l). The mortgagee may determine the tenancy of an annual tenant without the consent of the mortgagor (m), and it is his duty not to let vacant lands remain untenanted but to let them to solvent tenants (n). A mortgagee with zemindari rights may settle tenants on the land during the continuance of the mortgage (o).

A mortgagee in England when in possession has the same statutory power of granting leases as a mortgagor (p); and a mortgagee who has appointed a statutory receiver is treated as if he were in possession and can delegate his power of leasing to the receiver (q). There is no similar provision in the Act, but no doubt a receiver appointed under sec. 69A could obtain a direction from the Court as to a lease, by application under sec. 69A (10).

(y) (1867) L.R. 2 H.L. 1, 13-14.
(z) (1864) 1 Bom. H.C. 199.
(a) *Anandrao* v. *Ravji Dashrath* (1864) 2 Bom. H.C. 214.
(b) *Ramshet Bachashet* v. *Pandharinath* (1871) 8 Bom. H.C. 236 A.C.
(c) *Wasu Ram* v. *Md. Ramzan* (1940) A.L. 199, 42 P.L.R. 196, 188 I.C. 570.
(d) *Afsar Shaik* v. *Saurava* (1917) 25 Cal. L.J. 560, 40 I.C. 371.
(e) *Shib Dass* v. *Kali Kumar* (1903) 30 Cal. 463.
(f) *Bama Charan* v. *Nimai* (1922) 35 Cal. L.J. 58, 64 I.C. 903, ('22) A.C. 114.
(g) *Papamma Rao* v. *Pratapa Korkonda* (1896) 19 Mad. 249, 23 I.A. 32.
(h) *Muthammal* v. *Rasu Pillai* (1918) 41 Mad. 518, 44 I.C. 758.
(i) *Karamat Ali Khan* v. *Ganeshi Lal* (1927) 49 All. 658, 101 I.C. 516, ('27) A.A. 552.
(j) *Pramatha Nath* v. *Sashi Bhushan* (1937) A.C. 768.
(k) *Ramchand* v. *Raj Hans* (1906) 3 All. L.J. 517; *Jhagru Mian* v. *Raghunath* (1929) 119 I.C. 551, ('29) A.P. 636.
(l) *Gauri* v. *Mangla* (1926) 94 I.C. 442, ('26) A.A. 463.
(m) *Barjorji* v. *Shripatprasadji* (1927) 29 Bom. L.R. 215, 100 I.C. 1033, ('27) A.B. 145.
(n) *Sheo Barat Singh* v. *Padarath* (1919) 52 I.C. 473.
(o) *Mahadeo Lal* v. *Sri Gobind* (1924) 78 I.C. 943.
(p) Law of Property Act, 1925, s. 99 (2), replacing s. 18 of the Act of 1881.
(q) Law of Property Act, 1925, s. 99 (19), replacing s. 3 (ii) of the Conveyancing Act of 1911.

Clause (c): Public charges.—The mortgagor when in possession is liable to pay public charges and rent under sec. 65 (c) and (d). The mortgagee is under the same liability when he is in possession. The word "rent" did not occur in the corresponding clause of the old section. The omission has now been supplied; but even under the old section the mortgagee in possession of leasehold property was liable to pay rent (*r*). The section, however, deals only with the relative rights and duties of the mortgagor and the mortgagee and does not confer any right on a third party. Thus in the case of a usufructuary mortgage of a leasehold property, the lessor cannot recover the arrears of rent from the mortgagee (*s*). The mortgagee is, however, bound to pay out of the income of the property and is not entitled to charge such payments against the mortgagor in the accounts (*t*). But if the mortgagor has covenanted to pay the rent and makes default, the mortgagee may pay the rent and debit the mortgagor with the payment in the mortgage account (*u*). If the mortgagee cannot pay out of the income, and pays out of his own pocket, in order to save the security, he is entitled, under sec. 72 (b), to add the amount to the mortgage money (*v*). If the mortgagee cannot pay out of the income and does not pay out of his own pocket, and the property is sold, he will have a charge on the surplus sale proceeds under sec. 73. If the mortgagee does not pay and the mortgagor pays in order to avert a sale, he is entitled to credit for the amount in the mortgage account (*w*), and to charge interest (*x*). He is also entitled to recover such payment by a separate suit by way of damages (*y*). But the default of the mortgagee does not entitle the mortgagor to such credit, unless the mortgagor has actually paid (*z*). If the land is sold for the mortgagee's default of payment and is purchased by the mortgagee, it is still open to redemption by the mortgagor (*a*). If after the execution of the mortgage the Government assessment is raised, then, in the absence of a contract to the contrary, the mortgagee is liable to pay the enhanced assessment (*b*), though there is a case to the contrary (*c*). But the point is settled by the case of *Abid Husain Khan* v. *Kaniz Fatima* (*d*), where, in the case of a mortgage before the Act, the Privy Council said that in the absence of a provision to the contrary, the mortgagee must pay out of the income of the property in his possession the Government revenue that might be assessed upon it, this being part of his duty of prudent management.

S. 76 (c)

The liability to pay assessment, whether enhanced or not, is subject to a contract to the contrary and is therefore controlled by any special stipulation in the deed of

(*r*) *Kannye Loll* v. *Nistoriny* (1884) 10 Cal. 443; *Vithal* v. *Shriram* (1905) 29 Bom. 391; *Kshetranath* v. *Dargapada* (1919) 52 I.C. 902; *Jagat Narain* v. *Sheonarain Marwadi* (1937) 174 I.C. 1001 (1938) A.P. 196.

(*s*) *Govindarajulu* v. *Gopal Swami* (1941) A.M. 401 (1941) 1 M.L.J. 225, 53 M.L.W. 150 (1941) M.W.N. 185 following *Sachindra Mohan* v. *Commissioners for the Port of Calcutta* (1938) 1 Cal. 21, 41 C.W.N. 1141, 66 C.L. 910.

(*t*) *Abid Husain* v. *Kaniz Fatima* (1924) 46 All. 269, 51 I.A. 157, 80 I.C. 1019, ('24) A.PC. 102.

(*u*) *Hardwar Bhagat* v. *Sita Ram* (1934) All. L.J. 637, 150 I.C. 879, ('34) A.A. 888.

(*v*) *Farzand Ali* v. *Mirza Sadiq* (1919) 22 O.C. 270, 54 I.C. 264.

(*w*) *Jaijit Rai* v. *Gobind Tiwari* (1884) 6 All. 303.

(*x*) *Krishnan* v. *Komath Ambu Kurup* (1927) 51 Mad. L.J. 633, 98 I.C. 802, ('27) A.M. 59.

(*y*) *Duraiswami Pillai* v. *Venkata Reddy* (1940) A.M. 233, 50 M.L.W. 889 but see *Raj Mohon* v. *Sarada Charan* (1936) A.C. 200 as to maintainability of a separate suit.

(*z*) *Prasanna Kumar Haldar* v. *Girish Chandra* (1934) 37 Cal. W.N. 1162, 58 Cal. L.J. 80, 149 I.C. 667, ('34) A.C. 149.

(*a*) *Kshetranath* v. *Dargapada* (1919) 52 I.C. 902; *Lakshmaya* v. *Appadu* (1884) 7 Mad. 111; *Kalappa* v. *Shivaya* (1896) 20 Bom. 492; *Jaikaran Singh* v. *Sheo Kumar Singh* (1927) 25 All. L.J. 658, 103 I.C. 370, ('27) A.A. 747.

(*b*) *Sadanand* v. *Ratanji* (1886) P.J. 68; *Veyather* v. *Lakshiammal* (1909) 5 Mad. L.T. 284; *Valia Achan* v. *Ravunni* (1911) 22 Mad. L.J. 151, 12 I.C. 140; *Kolli Valappil* v. *Valiya* (1913) 14 I.C. 590, *Nanu Nair* v. *Ashta* (1915) 29 Mad. L.J. 772, 29 I.C. 386; *Vastera Holla* v. *Mahabala Rao* (1925) 91 I.C. 943, ('26) A.M. 405; *Farzand Ali* v. *Mirza Sadiq* (1919) 22 O.C. 270, 54 I.C. 264; *Chempthoor Raman* v. *Nayalasari* (1915) 24 I.C. 870; *Tuppan Nambudri* v. *Chinna Pari* (1908) 18 Mad. L.J. 81; *Sankunni Varriar* v. *Neelakandhan* (1943) A.M. 620, (1943) 2 M.L.J. 127, 56 M.L.W. 398.

(*c*) *Krishnier* v. *Arrappuli* (1904) 14 Mad. L.J. 488.

(*d*) (1924) 46 All. 269, 51 I.C. 157, 80 I.C. 1019 ('24) A.PC. 102; followed in *Vastera Halla* v. *Mahabala Rao* (1925) 91 I.C. 943, ('26) A.M. 405.

S. 76 (d), (e)

mortgage (*e*). If a usufructuary mortgagee agrees to take rents and profits in lieu of interest, or part of the interest, he is liable under the contract to pay enhanced assessment (*f*). When the Government revenue is a consolidated demand on the land mortgaged and other lands as well, the mortgagee is bound to pay the whole revenue accruing due on all the lands (*g*).

Public charges have been held to include tagavi advances (*h*) and local rates (*i*).

The provision as to arrears of rent in default of payment of which the property may be summarily sold, has reference to patni tenures and saleable undertenures. The word "summarily" implies that the proceedings for realization of rent by sale of the property are of a summary nature; for instance, as in the case of a certificate under the Public Demands Recovery Act (*j*). It has been held that the mortgagee is liable to pay such arrears even if they are due for a period before his entry into possession (*k*).

Clause (d): Repairs.—The duty of the mortgagee to make necessary repairs out of the rents and profits was recognized before the Act (*l*). The cost of repairs to a well has been allowed (*m*), but not the cost of laying out water pipes in a house (*n*). But the mortgagee in possession is not bound to spend money on necessary repairs, unless there is a surplus left after deducting interest and money paid for public charges. Hence the use of the words "rents and profits" in this clause which are less extensive than the word "income" in clause (c). The mortgagee's liability in England is similarly limited, for the mortgagee is not bound to increase his debt by spending money on repairs (*o*). If the parties dispense with an account, the mortgagee cannot charge for repairs (*p*).

The mortgagor is entitled to credit in the account for loss caused by the mortgagee's failure to repair (*q*).

Clause (e): Waste.—The mortgagee in possession must not commit waste, and the prohibition is enacted in the same words as in the case of a mortgagor in possession under sec. 66 and in the case of a lessee under sec. 108 (o). This prohibition is a corollary to the direction given in clause (a) to the mortgagee to manage the property as a person of ordinary prudence would if it were his own. A mortgagee in possession commits waste if he fells trees or even immature bamboo clumps standing at the date of the mortgage (*r*), but not if he fells trees he has himself planted (*s*); a

(*e*) ...... *Narempparembath* v. *Koyakutti* (1915) 29 I.C. 844; *Panigatan* v. *Raman* (1907) 17 Mad. L.J. 517; *Maharaj Singh* v. *Lalta Prasad* (1919) 17 All. L.J. 93, 57 I.C. 774.

(*f*) *Thippa Ramaswami* v. *Krishnaswami* (1911) 9 Mad. L.T. 206, 8 I.C. 845; *Pannambatta* v. *Kalathinpadkil* (1914) 16 Mad. L.T. 317, 25 I.C. 641; *Hari* v. *Shridhar* (1914) 10 Nag. L.R. 9, 23 I.C. 181.

(*g*) ...... *Dorayya* v. *Vadapalli* (1914) 27 Mad. L.J. 295, 25 I.C. 797.

(*h*) *Chhita Bhula* v. *Bai Jamni* (1916) 40 Bom. 488, 37 I.C. 295.

(*i*) *Abid Husain* v. *Kaniz Fatima*, *supra*; *Kesho Ram* v. *Ram Lal Saha* (1936) 163 I.C. 55, (1936) A.P. 312.

(*j*) *Jagat Narain* v. *Sheonarain Marwadi* (1937) 174 I.C. 901, (1938) A.P. 196.

(*k*) *Kshetra Nath* v. *Durgapada*, *supra*.

(*l*) *Jogendronath Mullick* v. *Raj Narain* (1868) 9 W.R. 488; *Ragho Bagaji* v. *Anaji* (1868) 5 Bom. H.C. 116 A.C.; *Jamal* v. *Mahomed* (1874) P.J. 7; *Balaji* v. *Nana* (1881) P.J. 195.

(*m*) *Durga Singh* v. *Naurang Singh* (1896) 17 All. 282.

(*n*) *Kuttuva Narayanasami* v. *Soranammal* (1914) 15 Mad. L.T. 374, 22 I.C. 635.

(*o*) *Richards* v. *Morgan* (1753) 4 Y. & C. (Ex.) 570 App.; *Godfrey* v. *Watson* (1747) 3 Atk. 517.

(*p*) *Lakshman* v. *Hari Dinkar* (1880) 4 Bom. 584, 589.

(*q*) *Shiva Devi* v. *Jaru* (1892) 15 Mad. 290; *Raghu* v. *Ashraf* (1879) 2 All. 252.

(*r*) *Ghasi Ram* v. *Bhola Nath* (1924) 46 All. 115, 79 I.C. 314, ('24) A.A. 158; *Raghu* v. *Ashraf* (1879) 2 All. 252; *Mahabir* v. *Sheo Shankar* (1929) 112 I.C. 434, ('29) A.O. 124.

(*s*) *Ramchandra* v. *Shripati* (1926) 50 Bom. 692, 99 I.C. 400, ('26) A.B. 595; *Krishna Patter* v. *Shrinivasa* (1897) 20 Mad. 124, 127.

S. 76 (e)-(g)

Kanomdar in Madras has power to remove trees planted by himself (*t*). When the mortgagee in possession depreciated the value of the estate by granting occupancy rights in exchange for nazarana, he was held accountable to the mortgagor for the nazarana (*u*). A somewhat forced construction was put upon this clause in an Allahabad case where it was said that a violation of the right of privacy, by keeping a door on the mortgaged premises open, would constitute waste (*v*).

Clause (f): Insurance.—Section 72 gives the mortgagee the right to insure the mortgaged property if there is no contract to the contrary, and if the mortgagor has not already done so. When the mortgagee has so insured, he is entitled under that section to tack the premiums to the mortgage money. This clause provides for the application of the insurance money. The mortgagee must apply it in reinstating the property or, if the mortgagor so directs, in reduction or discharge of the mortgage debt. Ghose points out the impossibility of the mortgagee reinstating the property, for the insurance is limited by sec. 72 to two-thirds of the value; but the section only means that the money should be applied to repair any damage caused by the fire. In a case in which the insurance was effected neither by the mortgagor nor by the mortgagee but by the Receiver of the Court the application of the insurance money was held to be in the discretion of the Court (*w*). If the mortgagor has insured, the mortgagee has no claim to the insurance money as against the Insurance Company (*x*).

Clause (g): Accounts.—The mortgagee in possession must keep clear, full and accurate accounts supported by vouchers. This is another duty of the mortgagee which is akin to that of a trustee—see sec. 19, Indian Trusts Act. The same obligation was imposed by the Regulations (*y*); and it mattered not whether the mortgagee was in possession with or without the consent of the mortgagor (*z*). With reference to the Bengal Regulation, Phear, J., said in *Goluck Chunder* v. *Mohan Loll* (*a*) that the mortgagee's account should show what the mortgagee has realized, from what portions of the mortgaged property, in what terms or periods, with what loss or gain on the several assets, and with what necessary reductions, and the net profits available as actual realizations towards liquidating the mortgage amounts. And again in *Mokund Lall* v. *Goluck Chunder* (*b*) he said that the mortgagees were bound to exhibit detailed items of all receipts and disbursements up to the time of accounting verified by themselves and accompanied by all vouchers. This clause has been based on these cases. In a case under the Act the necessity for detailed accounts has been stressed by the Bombay High Court (*c*). If the mortgagee employs an agent it is not sufficient to show lump sums received from the agent, and the mortgagee should show what the agent received from the tenants (*d*). It has been held (*e*) that the accounts to be kept by a mortgagee are independent of any which may be kept by a patwari, and this has been followed by the Chief Court of Oudh (*f*). In the undernoted case the Privy Council applied the maxim *qui facit per alium facit per se*, and held that the accounts of the property

(*t*) *Vasudevan Nambudripad* v. *Valia* (1901) 24 Mad. 47 F.B.; *Krishna Patter* v. *Srinivasa*, *supra*.

(*u*) *Ghasi Ram* v. *Bhola Nath*, *supra*.

(*v*) *Lachmi Narain* v. *Jethu Mal* (1894) 16 All. 386.

(*w*) *Dooly Chand* v. *Ramashwar* (1917) 40 I.C. 623.

(*x*) *P. V. Chetty* v. *Motor Union Insurance* (1923) 67 I.C. 777, ('23) A.R. 6.

(*y*) Bengal Reg. 15 of 1793 and 1 of 1798; Madras Reg. 24 of 1802, see also *Shah Mukhun Lall* v. *Baboo Sree Kishen* (1869) 12 M.I.A. 157.

(*z*) *Nilkant Sein* v. *Sheikh Jasnoddeen* (1876) 7 W.R. 30.

(*a*) (1866) 5 W.R. 271.

(*b*) (1868) 9 W.R. 572.

(*c*) *Kundanmal* v. *Kashibai* (1902) 26 Bom. 363.

(*d*) *Noyes* v. *Pollock* (1885) 30 Ch. D. 336.

(*e*) *Ram Kissen Singh* v. *Shah Kundun Lal* (1864) Gat. No. W.R. 177.

(*f*) *Kudai Lal* v. *Mst. Aisha Jehan* (1927) 2 Luck. 564, 102 I.C. 263, ('27) A.O. 199 citing *Lal Bahadur* v. *Murli Dhar* (1924) 74 I.C. 95, ('24) A.O. 92; *Lachmi Narain* v. *Mohamadi Begam* (1932) 7 Luck. 484, 137 I.C. 102, ('32) A.O. 123; *Said Ahmad* v. *Raja Barkhandi Mahesh* (1932) 8 Luck. 40, 139 I.C. 64, ('32) A.O. 255.

S. 76 (g) managed by the agent, though prepared by the agent, are the principal's accounts (g).

If there are two mortgages, the mortgagee must file a separate account of each, for the Court will take separate accounts (h). In a case where the mortgage decree directed two accounts, the Privy Council held that the mortgagee is not bound to credit receipts to the debt which bore compound interest and was more burdensome to the mortgagor (i).

Failure to account.—If the mortgagee fails to keep accounts, there will be a general presumption against him *in odium spoliatoris* (j). But the presumption must have reasonable limits and not be mere conjectures based on inexact data (k). Thus when the accounts of all the years have not been kept, the Court may proceed on the basis of an average annual income (l), or may assume that all the tenants have paid their rents and may order the accounts to be prepared on the basis of gross annual rentals (m). But the presumption should not be carried beyond reasonable limits and if the mortgagee is debited with gross rentals, he should be allowed collection charges (n). In some cases interest has been disallowed (o), or if there is no definite evidence as to the amount of the rent (p), it has been assumed that the profits would balance the interest (q). This was done with the consent of the parties as being just and convenient when a puisne mortgagee was redeeming a prior mortgagee who had realized his security and purchased and taken possession of the property (r). But this is not a rule of law, for a prior mortgagee who has realized his security and is in possession as purchaser is liable to account for rents and profits when sued for redemption by a puisne mortgagee who had not been made a party (s). The mortgagee cannot be heard to say that an item entered in his account is an illegal collection (t); and when a mortgagee collected a cess which was introduced by an Act subsequent to the mortgage and realizable only by the mortgagor, it was held that the amount should be credited to the mortgagor (u).

Wilful default.—A mortgagee is not liable to account under the rule of wilful default (*i.e.*, not only for actual receipts but also for what he might and ought to have received) unless he is in possession in the character of a mortgagee. See note *ante* under sub-section (b). But when a mortgagee enters into possession under a deed which is silent as to possession he takes upon himself the obligation of accounting for rents and profits (v).

(g) *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (1868) 12 M.I.A. 157, 196 on appeal from *Ram Kissen Singh* v. *Shah Kundun Lal* cited in footnote (e).

(h) *Ramchandra Baba* v. *Janardan* (1890) 14 Bom. 19.

(i) *Kader Moideen* v. *Nepean* (1890) 26 Cal. 1 P.C. 25 I.A. 241.

(j) *Shah Gholam Nuzuf* v. *Musst. Emanum* (1868) 9 W.R. 275; *Allah Yar* v. *Thakar Das* (1918) 44 I.C. 9.

(k) *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh*, *supra*; *Lal Bahadur* v. *Murli Dhar*, *supra*.

(l) *Muhammed* v. *Uttamchand* (1921) 63 I.C. 598.

(m) *Lakshmi Narain* v. *Mohamadi Begam*, *supra*; *Hardeo Prasad* v. *Ganga Sahai* (1921) 19 All. L.J. 155, 61 I.C. 48, ('21) A.A. 197.

(n) *Khwaja Saiyed Kazi Husain* v. *Debi Dayal* (1934) 9 Luck. 456, 148 I.C. 880, ('34) A.O. 104.

(o) *Shadi Lal* v. *Lal Bahadur* (1933) 377 Cal. W.N. 420, 57 Cal. L.J. 152, 64 Mad. L.J. 298, 35 Bom. L.R. 308, 1933 All. L.J. 339, 142 I.C. 739, ('33) A.PC. 85.

(p) *Hardat Singh* v. *Mt. Damodar* (1933) 145. I.C. 122, ('33) A.L. 141.

(q) *Hardat Singh* v. *Mt. Damodar*, *supra*; *Amirchand* v. *Tirath Ram* (1908) P.L.R. 95.

(r) *Umes Chunder Sircar* v. *Mt. Zahoor Fatima* (1891) 18 Cal. 164, 180, 17 I.A. 201.

(s) *Muthammal* v. *Razu Pillai* (1918) 41 Mad. 513, 44 I.C. 753; contra, *Syed Ibrahim Saheb* v. *Arumugathayee* (1915) 38 Mad. 18, 16 I.C. 877; *Sri Ram* v. *Kesri Mal* (1904) 26 All. 185; *Hari Krishna* v. *Gajendra Nath* (1939) A.C. 15.

(t) *Nuwal Kishore* v. *Syyud Inayat Ali* (1852) 7 Agra S.D. 248.

(u) *Ramavatar* v. *Tulsi Prosad* (1911) 14 Cal. L.J. 507, 11 I.C. 713.

(v) *Madari* v. *Baldeo Prasad* (1904) 27 All. 351 F.B.

Contract to the contrary.—The sub-section is not expressed to be subject to a contract to the contrary, and a mortgagee in possession cannot contract himself out of the duty to account (*w*). Every mortgagee in possession is bound to account unless he establishes a contract in the terms of sec. 77 (*x*). In *Bihari Lal* v. *Shib Lal* (*y*) the contract in the mortgage was that the mortgagee should take the rents and profits in lieu of interest and pay the mortgagor a fixed annual sum by way of malikhana and that there was to be no account except as to malikhana. The agreement was enforced and redemption was decreed on payment of the principal sum less the balance due on the malikhana account.

Accounts only on redemption.—The mortgagor cannot claim an account, unless he has filed a suit for redemption (*z*). A suit for an account only would contravene the provision of Order 2, rules 1 and 2 of the Code of Civil Procedure, for the mortgagor cannot split his remedies. But under sec. 15D of the Dekkan Agriculturists Relief Act 17 of 1879 as amended by Act 22 of 1882 an agriculturist is allowed the privilege of suing for an account without asking for redemption (*a*). As the prayer for an account is ancillary to the claim to redeem, no question of limitation can arise between a mortgagor and mortgagee when accounts are taken at the time of redemption (*b*).

Clause (h): System of accounting.—The account has to be taken with rests, so that, strictly speaking, as soon as there is a surplus of net receipts over interest, the balance should be applied in reduction of principal, and then interest runs on the reduced amount. This piece-meal method of taking accounts is not favoured in England where the practice is to take a continuous account, though if the continuous account unduly favours the mortgagee the Court may interfere and make a special order for an account with rests (*c*). The section says "from time to time" and evidently contemplates a rest whenever there is a surplus, but the practice of Courts in India is to take annual rests (*d*), though in one reported case half yearly rests were ordered (*e*). But if the net receipts are less than the interest, the deficit is not added to the principal, as that would lead to compound interest which is not allowed (*f*), unless there is express provision to that effect. The same clause in the old section referred to "interest on the mortgage money," but these words have been omitted, because as mortgage money means principal and interest, the phrase might imply that compound interest was to be charged even when the deed only provided for simple interest.

Occupation rent.—Occupation rent is an expression which also occurs in sec. 62 of the Indian Trusts Act. This is charged if the mortgagee is in personal occupation and it represents what the land would yield if let to a tenant (*g*). In English law a mortgagee is charged with an occupation rent for any part of the premises which he personally occupies (*h*), and with loss caused by deterioration due to his mismanagement after taking possession (*i*). In a case before the Act, Westropp, C.J., said that either a fair

(*w*) *Muhammad Ishaq Khan* v. *Rup Narain Singh* (1932) 54 All. 205, 136 I.C. 363, ('31) A.A. 562; *Lal Bahadur* v. *Murli Dhar* (1923) 74 I.C. 95, ('24) A.O. 92; *Ch. Sarfraz Ahmed* v. *L. Mannilal* (1943) A.O. 38, 18 Luck. 273, (1942) O.W.N. 585, 203 I.C. 449.

(*x*) *Kamla Prasad* v. *Bamdeo* (1935) 155 I.C. 22, ('35) A.P. 148; *Kishun Lal* v. *Hira Lal* (1929) 120 I.C. 763, ('29) A.P. 571.

(*y*) (1924) 46 All. 633, 82 I.C. 25, ('24) A.A. 591.

(*z*) *Bhau Balaji* v. *Hari Nilkanthrao* (1883) 7 Bom. 377; *Gordhanlal* v. *Thakur Radha Kant* (1943) A.A. 109, 205 I.C. 580.

(*a*) *Laluchand* v. *Girjappa* (1896) 20 Bom. 469.

(*b*) *Thakkamannengath Raman* v. *Kakkasseri* (1915) 28 Mad. L.J. 184, 27 I.C. 969; *Banwari* v. *Sakhraj* (1931) 29 All. L.J. 421, 135 I.C. 248, ('31) A.A. 585.

(*c*) *Wrigle* v. *Gill* (1905) 1 Ch. 241, 253.

(*d*) *Jaijit Rai* v. *Gobind Tiwari* (1884) 6 All. 308; *Radhabenode Misser* v. *Kripa Moyee* (1872) 14 M.I.A. 443; *Muhammed* v. *Uttamchand* (1921) 63 I.C. 598.

(*e*) *Doolee Chand* v. *Omda Khanum* (1881) 6 Cal. 377.

(*f*) *Radhabenode Misser* v. *Kripa Moyee* (1872) 14 M.I.A. 443.

(*g*) *Raghoonath Roy* v. *Baraik* (1867) 7 W.R. 244.

(*h*) *Marriott* v. *Anchor Reversionary Co.* (1861) Deg. F. & J. 177.

(*i*) *Taylor* v. *Mostyn* (1886) 33 Ch.D. 226.

S. 76 (h). occupation rent or net profit might be debited to a mortgagee (*j*). This was probably because net profits were considered to be the same as occupation rent. But there can be no question of an occupation rent if the premises are not personally occupied by the mortgagee. In a Patna case (*k*) the mortgagees were in personal occupation at the time of the mortgage and were charged an occupation rent, but when they let the premises to tenants they were liable for the rent that they received. The Court will not, however, require the mortgagee to account for any collateral advantage received from his occupation. So when the mortgaged property is a public house, and the mortgagee, a brewer, lets the house as a tied house, he is not called upon to render an account of the profits of the sale of the beer, but the rent charged is that which would be realized if the house was let without the condition as to purchase of beer from the mortgagee (*l*).

After deducting expenses.—The mortgagee's receipts are his actual realizations. From these are deducted the expenses allowed by this clause, and the balance is debited in reduction first of interest and then of principal. The expenses to be deducted are those under clauses (a) and (b), (c) and (d), *i.e.*, management, collection of rents and profits, public charges and necessary repairs. The provision allowing a deduction for expenses of management and collection of rents, is new. Under the old section these were omitted from this clause but allowed in clause (a) under sec. 72—so that they were strictly speaking not recoverable by the mortgagee until the principal money became due. It is more reasonable that the mortgagee should get credit for these at once and that they should be deducted from the receipts before these are debited against the mortgagee (*m*), and that they should be on the same footing as expenses of collection and necessary repairs. This is in accordance with the law in England where expenses of management are allowed to the mortgagee in the accounts (*n*) as "just allowances," *i.e.*, items admissible though not expressly mentioned in the decree (*o*). Expenses of repairs are also allowed as "just allowances" (*p*). Costs of litigation incurred bona fide by a mortgagee to collect his rents have been allowed (*q*). But in another case it was said that the mortgagor was not responsible for such costs unless the mortgagor's title was impeached in the suit (*r*). It is submitted that the former view is correct. There is however nothing to prevent the mortgagor and mortgagee making an express bargain that a fixed sum should be charged annually for expenses (*s*). The word "expenses" includes public charges but the mortgagee is not entitled to deduct such charges paid after the date when the amount mentioned in the decree for redemption is tendered to him (*t*).

Remuneration.—The mortgagee is not allowed to charge remuneration for his personal services in connection with the management of the mortgaged property (*u*); but he may employ an agent at a salary, if the work is so onerous that he would do so if the property were his own (*v*). In *Kader Moideen* v. *Nepean* (*w*) the mortgagee's

(*j*) *Prabhakar* v. *Pandurang* (1879) 12 Bom. H.C. 88.

(*k*) *Kishun Lal* v. *Hira Lal* (1929) 120 I.C. 768, ('29) A.P. 571.

(*l*) *White* v. *City of London Brewery Co.* (1889) 42 Ch.D. 237.

(*m*) *Shib Chandra* v. *Lachmi Narain* (1929) 51 All. 686, 56 I.A. 339, 119 I.C. 612, ('29) A.PC. 243; *Kirat Singh* v. *Ramsaran* (1941) A.A. 380.

(*n*) *Leith* v. *Irvine* (1833) 1 My. & K. 277; *Raja Sir Mahomed Esaa* v. *Hakim Saiyed* (1941) A.O. 498.

(*o*) *Wilkes* v. *Saunion* (1877) 7 Ch.D. 188; Seton, p. 1976.

(*p*) *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.* (1877) 7 Ch.D. 192.

(*q*) *Basant Singh* v. *Mata Baksh* (1914) 17 O.C. 47, 23 I.C. 456.

(*r*) *Pokree Saheb* v. *Pokree Beary* (1898) 21 Mad. 32.

(*s*) *Chalikani Venkatarayanim* v. *Zemindar of Tuni* (1923) 46 Mad. 108, 50 I.A. 41, 71 I.C. 1035, ('23) A.PC. 26.

(*t*) *Paliyadi Rajagopala* v. *Karruppiah* (1946), A.M. 464.

(*u*) *Re Wallis, ex parte Lickorish* (1890) 25 Q.B.D. 176; *Mahadev* v. *Ramchandra* (1904) 6 Bom. L.R. 590; *Langstaffe* v. *Fenwick* (1805) 10 Ves. 404.

(*v*) *Eyre* v. *Hughes* (1876) 2 Ch.D. 148; *Leith* v. *Irvine* (1833) 1 My. & K. 277, 295.

(*w*) (1898) 26 Cal. 1, 25 I.A. 241.

son lived on the mortgaged property and managed it, but the Privy Council allowed only the cost of maintenance of the son during the father's lifetime, but nothing after the father's death when the son himself became the mortgagee. However, this strict rule has been relaxed on the principle of *Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs* (*x*) and a mortgagee may stipulate for his own remuneration and the stipulation will be valid if it is free from oppression and limited to the duration of the mortgage. The Bombay High Court allowed a mortgagee to charge remuneration for the management of a mortgaged mill (*y*). In England a mortgagee company was allowed to charge for the remuneration of one of its directors employed in a professional capacity in addition to its own stipulated remuneration (*z*). See in this connection note "Collateral benefit" under sec. 60. S. 76(i)

Surplus.—If, on redemption, it is found that the mortgagee has received a surplus in excess of the principal and interest, the mortgagor is entitled to recover the surplus. The mortgagee is also liable to pay interest on the surplus, but cases conflict as to whether the interest should run from the time when the debt is satisfied (*a*), or from the time when the redemption suit was instituted (*b*). In a more recent case (*c*) the Allahabad High Court pointed out that the English authority, *Charles* v. *Jones* (*d*), referred to a surplus left after the exercise by the mortgagee of a right of private sale and that the mortgagee is not liable for interest on the surplus until the institution of a redemption suit.

Clause (i): Effect of tender or deposit.—A deposit of the mortgage money in Court operates as a tender as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the money—secs. 84 and 102. Tender when wrongfully refused operates as a cessation of interest if there is a continued readiness to pay (*e*). But the mortgagee is still in possession as mortgagee, and under a statutory liability to account for rents and profits received from the date of tender (*f*). In the same clause of the old section the mortgagee was required to account for his *gross* receipts. It was not clear what was meant by the word "gross" which has now been omitted. After tender or deposit the mortgagee is not entitled to collection charges (*g*), but in a Madras case (*h*) this was said to be too drastic and the mortgagee was allowed to make deductions for collection charges, Government revenue and repairs. The express provision added at the end of the clause has the effect of superseding the latter decision. It is submitted that the word "receipt" is used in the same sense as in clause (h), and that after tender the mortgagee is neither entitled to interest nor to deductions for expenses of management, collection of rents and profits, public charges, or repairs (*i*).

Loss.—If loss is occasioned by the mortgagee's default in the performance of the duties imposed upon him by this section the amount will be determined in the same suit (*j*). If the mortgagee fails to pay the Government revenue and the mortgagor pays to avert a sale, the mortgagor is entitled to credit for the amount in the mortgage

(*x*) (1898) 2 Ch. 307 C.A.

(*y*) *Hope Mills* v. *Cawasji* (1911) 13 Bom. L.R. 162, 10 I.C. 749.

(*z*) *Bath* v. *Standard Mills Co. Ltd.* (1911) 1 Ch. 618 C.A.

(*a*) *Haji Abdul Rahman* v. *Haji Noor Mahomed* (1896) 16 Bom. 141; *Bhaya Lal* v. *Mohammed Hakim* (1920) 57 I.C. 294.

(*b*) *Janoji* v. *Janoji* (1883) 7 Bom. 185.

(*c*) *Ismail Hasan* v. *Mehdi Hasan* (1924) 49 All. 897, 80 I.C. 63, ('24) A.A. 881.

(*d*) (1887) 35 Ch.D. 544.

(*e*) *Jagat Tarini* v. *Naba Gopal* (1907) 34 Cal. 305; *Velayuda Naicker* [illegible] *Hussan* (1910) 33 Mad. 100, 8 [illegible] 729; *Hukam Singh* v. *Babu Lal* (1922) 44 All. 198, 64 I.C. 971, ('22) A.A. 181; *Raj Mohan* v. *Sarada Charan* (1936) A.C. 200.

(*f*) *Rukhminibai* v. *Venkatesh* (1907) 31 Bom. 527; *Satyabadi Behara* v. *Harabati* (1907) 34 Cal. 223; *Ma Nyo* v. *Maung Hla Ba* (1924) 2 Rang. 382, 84 I.C. 395, ('25) A.R. 13.

(*g*) *Beni Prasad* v. *Narain Das* (1909) 5 I.C. 529.

(*h*) *Subba Rao* v. *Sarvarayudu* (1924) 47 Mad. 7, 72 I.C. 292, ('23) A.M. 533.

(*i*) *Rajagopala* v. *Karruppiah* (1946) A.M. 464.

(*j*) *Shiva Devi* v. *Jaru* (1891) 15 Mad. 290; Contra *Raghu Nath Das* v. *Ashraf Hussain* (1879) 2 All. 252 ([illegible] to be incorrect).

Ss. 76, 77

account (*k*). The remedy under this section is cumulative and does not operate as a bar to any other remedy the mortgagor may have at law (*l*). He may bring a suit for damages at once and need not wait to debit the mortgagee with the loss when accounts are taken at redemption (*m*).

Receipts in lieu of interest.

77. Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Receipts in lieu of interest.—Sec. 77 enacts an exception to sec. 76. It omits reference to clause (c) of sec. 76 which makes it obligatory on the mortgagee to pay Government revenue (*n*). There is no account to be taken between the mortgagor and mortgagee when the rents and profits are taken in lieu of interest or in lieu of interest and defined portions of the principal (*o*). In such cases if the mortgagee does not realize the full value of the usufruct it is the mortgagee and not the mortgagor who suffers. The section was applied in a case in which the rents and profits were taken in lieu of a portion of the interest only (*p*), but the judgment proceeds on the erroneous assumption that a usufructuary mortgagee is not liable to account unless there is an express contract to that effect (*q*); this decision would appear to have been impliedly overruled by a subsequent Full Bench decision (*r*). The exception therefore is limited to the two cases specified. And when the mortgage merely made an estimate of the amount of rents and profits that would be available for reduction of the debt, the mortgagees were not exonerated from their liability to account (*s*). But when the mortgagee was to take the rent and profits in lieu of interest and receive a fixed annual sum from the mortgagor as well, he was not liable to account (*t*). If there is a contract that receipts shall be taken in lieu of interest, the fact that the rate of interest is specified in the mortgage does not necessarily show that the mortgagee is liable to account (*u*). When the mortgage stipulated that the mortgagee was to pay a fixed annual sum to the mortgagor as malikhana and that the rents and profits were to be taken in lieu of interest and that there was to be no account except as to malikhana, redemption was decreed on payment of the principal sum less the balance due on the malikhana account (*v*). But when the malikhana was not to be paid to the mortgagor and the mortgagee withheld payment as he claimed himself to be the malikhandar, the mortgagee was not liable to account but was required to give the mortgagor an indemnity against the claim of some other person proving to be the malikhandar (*w*). In a case

(*k*) *Jaijit Rai* v. *Gobind Tiwari* (1884) 6 All. 303; *Krishnan* v. *Komath Ambu Kurup* (1927) 51 Mad. L.J. 683, 98 I.C. 802, '27) A.M. 59.

(*l*) *Shivachidambara* v. *Kamatchi* (1909) 33 Mad. 71, 3 I.C. 433.

(*m*) *Mahabir* v. *Sheo Shankar* (1929) 112 I.C. 434, ('29) A.O. 124.

(*n*) *Misri Lal* v. *Gajadhar* (1943) A.O. 433, (1943) O.W.N. 347, 200 I.C. 324.

(*o*) *Bachchu Lal* v. *Chaudri Syed Mohammad* (1933) 37 Cal. W.N. 457, 1933 All. L.J. 350, 144 I.C. 1025, ('33) A.PC. 136; *Moulvi Osman Ali* v. *Faijjan Bewa* (1931) 53 Cal. L.J. 380, 134 I.C. 95.

(*p*) *Shafi-un-nissa* v. *Fazalrab* (1910) 7 All. L.J. 787.

(*q*) See the criticism in *Kishun Lal* v. *Hira Lal* (1929) 120 I.C. 768, ('29) A.P. 571.

(*r*) *Muhammad Ishaq Khan* v. *Rup Narain Singh* (1932) 54 All. 205, 136 C.I. 363, ('31) A.A. 562; *Kanala Prashad* v. *Bamdeo* (1935) 155 I.C. 22, ('35) A.P. 148.

(*s*) *Surendra* v. *Khitindra* (1919) 29 Cal. L.J 484, 53 I.C. 59.

(*t*) *Sitla Sahi* v. *Dhum Singh* (1924) 82 I.C. 406, ('25) A.O. 114.

(*u*) *Mahomed Ali* v. *Ali Mirza* (1935) 10 Luck. 70, 148 I.C. 908, ('34) A.O. 220.

(*v*) *Bihari Lal* v. *Shib Lal* (1924) 46 All. 636, 82 I.C. 25, ('24) A.A. [illegible]; *Basant Rai* v. [illegible] *Lal* (1879) 2 All. 455.

(*w*) [illegible] v. *Mohit Narayan* (1928) 7 Pat. [illegible] I.C. 472, ('29) A.P. 37.

when the rent and profits were taken in lieu of interest and the mortgagee covenanted to pay rent to the zemindar who held by title paramount, the fact that the mortgagee afterwards escaped payment of rent did not entitle the mortgagor to get credit for this rent (*x*). A usufructuary mortgage provided that the mortgage should be discharged by the rents and profits for 55 years, but that an annual sum of Rs. 60 should be paid out of the rents and profits to the mortgagor. If these payments had been made there would have been no account, but as the payments were not made, the mortgagee was held liable to account and the term of the mortgage was proportionately reduced (*y*). A fallen tree is part of the produce of the land, and if the mortgage is one to which sec. 77 applies the mortgagee may take it without accounting for its value (*z*).

Priority.

Postponement of prior mortgagee.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Priority.—The priority of successive mortgages is determined by sec. 48 which enacts the rule *qui prior est tempore potior est jure*. The following Oudh case (*a*) is an instance of the rule: *A* mortgaged a share in village *X* to *B* in 1917 and there was a provision in the mortgage that if *A* was dispossessed of any part of that share by other heirs the mortgage should operate as a mortgage of a share in village *Y*. In 1918 *A* mortgaged the share in village *Y* to *C*. In 1922 *A* was dispossessed of part of his share in village *X* by co-heirs. The contingent mortgage of village *Y* to *B* did not vest till 1922, and therefore *C*'s mortgage had priority over the mortgage to *B*.

A question of priority arose in a curious way in the following case (*b*): A prior mortgagee sued to enforce his mortgage making the puisne mortgagee a party. The puisne mortgagee did not appear and a decree for sale was made on the prior mortgage, but as the puisne mortgagee was not before the Court the Judge erroneously made an order dismissing the suit as against him. The puisne then sued to enforce his mortgage and claimed priority as the prior mortgagee's suit against him had been dismissed. The Court got over the difficulty by applying the rule that the object of impleading a puisne mortgagee is to enable the property to be sold free from his incumbrance. The effect of dismissing the suit against the puisne was that the sale was subject to the incumbrance of the puisne mortgage, but did not affect the priority of the prior mortgage.

If the mortgagor admits the validity of a puisne mortgage, the prior mortgagee cannot dispute it (*c*); but the mortgagee who is first in time has priority over a subsequent mortgagee. A prior mortgage duly registered is a valid security in priority to all of later date. Such priority will be displaced if the puisne mortgagee has redeemed

(*x*) *Fakir Mahammed* v. *Ali Sherkhan* (1911) 10 I.C. 113; *Paru Amma* v. *Kelu Kurup* (1941) A.M. 549, (1941) I.M.L.J. 484, (1941) M.W.N. 289 reversing *Kelu Kurup* v. *Paru Amma* (1940) A.M. 686 (1940) I.M.L.J. 693, 51 M.L.W. 617, (1940) M.W.N. 55.

(*y*) *Narasimha Rao* v. *Seshayya* (1925) 48 Mad. L.J. [illegible], 90 I.C. 128, [illegible] M. 825 on app.; *Immani Se*[illegible] 57 Mad. L.J. 800, 24 I.C. [illegible] M. 180; *Jaifit Rai* v. *Gobind* [illegible]) 6 All. 303.

(*z*) *Durga Shanker* v. *Ganga Sahai* (1932) 30 All. L.J. 493, 142 I.C. 889, ('32) A.A. 500.

(*a*) *Mst. Murtazai Begam* v. *Dildar Ali* (1930) 124 I.C. 417, ('30) A.O. 129.

(*b*) *S. K. A. R. S. T. Chettyar Firm* v. *A. L. A. R. Chettyar Firm* (1931) 9 Rang. 1, 132 I.C. 281, ('31) A.R. 105.

(*c*) *Maula Bakhsh* v. *Imam Din* (1927) 101 I.C. 324, ('27) A.L. 81.

S. 78

the prior mortgagee (*d*). The prior mortgagee does not lose priority by releasing part of his security (*e*).

The section enacts an exception based on the doctrine of estoppel. A mortgagee need not go out of his way to give notice of his security when he hears that the mortgagor is dealing with the property. But if there is any fraud or artifice, direct or indirect, of the mortgagee, he is postponed to the subsequent mortgagee. In a Bombay case (*f*) the one-sixth share of a member of a joint Hindu family was purchased at an execution sale by the plaintiff's son, who sold it to the defendant without telling him that the whole property was under mortgage to his father, the plaintiff. West, J., held that the mere fact that the son bought and sold a share of the property without disclosing the existence of the mortgage was not estoppel against the mortgagee; but that if there had been any active fraud or artifice, by which the mortgagee directly or indirectly had prevented the purchaser from his son making inquiries as to title, the case might have been different. Again in a Calcutta case (*g*) the mortgagor, after the mortgage to the plaintiff, sold part of the property to *A*, and gave a second mortgage of the remainder to *B*. The mortgagee had led both *A* and *B* to believe that the property was unencumbered. His suit against *A* was barred by estoppel and as to *B* his mortgage was postponed to that of *B*.

The section summarizes the cases under three heads: fraud, misrepresentation, and gross negligence. These ingredients, it has been said, are disjunctive and indicate three different kinds of conduct (*h*).

Fraud.—Fraud on the part of the mortgagee is the same as fraud on the part of anyone else. The word "fraud" is used in the section in the sense of the definition in sec. 17 of the Indian Contract Act. Under the explanation to that section non-disclosure is not fraud unless in the circumstances of the case there is a duty to speak—or unless silence is in itself equivalent to speech. Thus there is a duty on the mortgagee to disclose his lien at a Court sale. If the mortgagee brings the property to sale in execution of a money decree and the lien is not notified in the sale proclamation, he is guilty of fraud and cannot assert priority to the auction purchaser (*i*). In a Bombay case (*j*), the omission to notify was held not to be fraudulent concealment because the mortgage was registered, but this, it is submitted, is erroneous, for a person who is under a duty to disclose an incumbrance cannot take shelter behind a plea of constructive notice. The mortgagee need not give express notice at the time of the sale if his mortgage is notified in the sale proclamation (*k*). There is no duty on the mortgagee to disclose his mortgage when attesting a puisne mortgage if he is not aware of the contents of the deed—yet where that knowledge is brought home to him and there are circumstances which show that he acted dishonestly or disingenuously, and the puisne mortgagee was in consequence deceived, the prior mortgagee will be deprived of priority (*l*).

Misrepresentation.—Misrepresentation is defined in sec. 18 of the Indian Contract Act. It includes cases where there is no intent to deceive. An omission to notify a prior incumbrance in a sale proclamation, even if an innocent mistake, would amount to misrepresentation if the purchaser was thereby misled to his prejudice. If the mortgagee

(*d*) *P. S. S. M. K. T. Chethiresan Chettiar* v. *N. S. Nadhiappa Chettiar* (1933) 143 I.C. 761, ('33) A.PC. 191.

(*e*) *Punjab and Sindh Bank* v. *Amin Chand* (1930) 11 Lah. 694, 125 I.C. 631, ('30) A.L. 781.

(*f*) *Joshi* v. *Joshi* (1878) 2 Bom. 650; *Bhurrut Lal* v. *Gopal Suran* (1869) 11 W.R. 286.

(*g*) *Sukiuddin Sahz* v. *Sonaullah* (1918) 22 Cal. W.N. 641, 45 I.C. 986.

(*h*) *Nanda Lal* v. *Abdul Aziz* (1916) 43 Cal. 1052, 34 I.C. 115.

(*i*) *Jaganatha* v. *Gangi* (1892) 15 Mad. 303; *Kasturi* v. *Venkatachalapathi* (1892) 15 Mad. 412; *Muhammad Hamiduddin* v. *Shib Sahai* (1899) 21 All. 309; *Ramchandra* v. *Jairam* (1896) 22 Bom. 686.

(*j*) *Dhondo Balkrishna* v. *Raoji* (1896) 20 Bom. 290.

(*k*) *[illegible]* v. *Muhammad* (1887) 9 All. 690.

(*l*) *Salamat Ali* v. *Budh Singh* (1879) 1 All. 303.

stands by and sees another lending money on the same estate without giving notice of his first mortgage, it is a misrepresentation, and he will lose his priority (m). S. 78

Gross negligence.—The history of the doctrine of gross negligence has been explained in the note under the same heading under sec. 3. Lord Lindley in *Oliver* v. *Hinton* (n) said:—"To deprive a purchaser for value without notice of a prior incumbrance, of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority." This was followed by the Calcutta High Court (o) dissenting from a dictum of Jenkins, J., that gross neglect in this section means neglect that amounts to evidence of fraud (p). The Lahore High Court (q) has also dissented from the view of Jenkins, J.

Ghose defines gross negligence as any act or omission by the prior mortgagee which enables the mortgagor to deal with the property as if it was not encumbered. This is a good working definition and may be illustrated by the case of *Briggs* v. *Jones* (r), where the mortgagee of leasehold property lent the lease to the mortgagor to enable him to raise money, telling him to give notice of the mortgage. The mortgagor raised money from a Bank without giving notice and the mortgagee was postponed to the Bank. Lord Romilly in this case said that "a person who puts it in the power of another to deceive and to raise money, must take the consequences." This case is very similar to the Madras cases (s) where the mortgagee instead of retaining the deeds and insisting on their being inspected in his presence, returned them to the mortgagor to enable him to secure a fresh advance. In a Nagpur case (t) the mortgagee made an incorrect endorsement of satisfaction on the mortgage deed and returned it to the mortgagor who was enabled to raise money on subsequent mortgages. The mortgagee was therefore postponed to the subsequent encumbrancers. If a mortgagee allows a mortgagor to remain in possession and the latter pays rent to the mortgagee, the former cannot be held to be negligent (u).

Illustration.

G deposited title deeds of his property with Bank *N* to secure an overdraft. *G* then asked for the return of the deeds saying that he wished to sell the property and clear the overdraft. The usual pratice is for the prospective purchaser to inspect the deeds in the office of the Bank's solicitor. But *G* said he would not get a good price if the purchaser knew the Bank had the deeds, and the Bank Manager returned the deeds to *G*. *G* then borrowed money from Bank *L* on a deposit of the deeds falsely representing that there was no incumbrance on the property. The mortgage to Bank *L* had priority over the mortgage to Bank *N*: *Lloyds Bank Ltd.* v. *P. E. Guzdar & Co.* (1929) 56 Cal. 868, 121 I. C. 625, ('30) A. C. 22.

But there is no negligence if the mortgagee inquires for the deeds and the mortgagor gives a reasonable excuse that they are lost or that he never had any and that his title is prescriptive; and if the mortgagee honestly accepts the owner's statements he will

(m) *Re Thatched House* (1667) 1 Eq. Cas. Abr. 322; *Ramen Chetty* v. *Steel Bros.* (1911) 15 Cal. W.N. 813, 11 I.C. 508 P.C.

(n) (1899) 2 Ch. 264, 274.

(o) *Lloyds Bank, Ltd.* v. *P. E. Guzdar & Co.* (1929) 56 Cal. 868, 121 I.C. 625, ('30) A.C. 22.

(p) *Manindra Chandra* v. *Troylukho Nath* (1898) 2 Cal. W.N. 750.

(q) *Ghulam Fatima* v. *Gopal Devi* (1940) A.L. 209, 190 I.C. 599, (1943) A.L. 118, 45 P.L.R. 143, 209 I.C. 75.

(r) (1870) L.R. 10 Eq. 92, 98; *Clarke* v. *Palmer* (1882) 21 Ch. D. 124; *Perry Herrick* v. *Attwood* (1857) 25 Beav. 205; *Cowasji Jehangir & Co.* v. *Tyabji* (1928) 112 I.C. 722, ('28) A.S. 179.

(s) *Madras Hindu Union Bank* v. *Venkatrangiah* (1889) 12 Mad. 424; *D[illegible]* v. *Somasundara* (1889) 12 Mad. 429; *Nataraja* v. *Lakshamma* (1937) A.M. 196.

(t) *Rangappa* v. *Immamuddin* (1934) ('34) A.N. 29.

(u) *Banarsi Das* v. *Mati Ram* (1940) A.L. 209, 190 I.C. 599.

S. 78 not be postponed if it turns out afterwards that the mortgagor had deeds (*v*); but not if the owner merely says he has not got the deed and the mortgagor makes no further inquiry (*w*). Again, the mortgagee does not lose priority when he gives the deeds to a sub-mortgagee who returns them to the mortgagor (*x*), or when the non-possession of the deeds is reasonably accounted for (*y*). But when the mortgagee allowed the title deeds to remain four years in the possession of the mortgagor and could give no reasonable explanation, he was postponed (*z*). When a vendor had taken a mortgage to secure the greater part of the price, and knowing that the buyer was impecunious and a bad paymaster allowed him to retain the deeds, he was postponed to a second mortgage by deposit of title deeds (*a*). If the prior mortgagee has done nothing to induce a subsequent mortgagee to advance money he cannot be postponed simply because there has been a delay in the registration of his mortgage (*b*). In an Allahabad case (*c*) an incorrect description of the land in the prior mortgage led to a second mortgagee advancing money in the belief that the land was not encumbered. The mistake was due to an error in the mortgagor's title deeds and the prior mortgagee would have discovered the mistake if he had examined the revenue registers. His omission to do so was held not to be such gross negligence as to justify his being deprived of priority. The ratio decidendi seems to be that the omission was rather want of caution than gross negligence. See note 'Gross Negligence' under sec. 3.

The rule as to priority, it is submitted, was misapplied in a Lahore case (*d*). The first mortgage was a usufructuary mortgage for Rs. 99, but the mortgagee omitted to register the deed or to take possession or to apply for mutation of names in the revenue records and yet he was not postponed to a second mortgage with possession. The Court was under the erroneous impression that gross negligence must be fraudulent.

The act or omission must be the proximate cause of the change of position (*e*). For even if the mortgagee allows the deeds to remain with the mortgagor, he will not be postponed if the second mortgagee advances the money without investigating title or searching the register (*f*). One of the facts to be taken into consideration is the existence of a universal system of registration (*g*). Two Madras cases on this point are, it is submitted incorrect (*h*).

To constitute a valid equitable mortgage it has in some cases been held that it is not necessary that all the deeds of title should be deposited. It may therefore happen that an equitable mortgage is created by the deposit of some deeds with a first mortgagee, and then another equitable mortgage is created over the same property by the deposit of the remaining deeds with a second mortgagee. In such cases it is a question of fact whether the omission of the first mortgagee to require the deposit of the remaining deeds

---

(*v*) *Dixon* v. *Muckleston* (1872) 8 Ch. App. 155; *Surendra Mohan Roy Chaudhri* v. *Mahendranath Banerji* (1932) 59 Cal. 781, 36 Cal. W.N. 420, 140 I.C. 662, ('32) A.C. 589.

(*w*) *Kshetranath* v. *Harasukdas* (1927) 31 Cal. W.N. 703, 102 I.C. 871, ('27) A.C. 538.

(*x*) *Mutha* v. *Sami* (1885) 8 Mad. 200.

(*y*) *Somasundara Tambiran* v. *Sakkarai* (1870) 4 Mad. H.C. 369 (mere possession of deeds by 2nd mortgagee insufficient to give him priority); see also *Grierson* v. *National Provincial Bank* (1913) 2 Ch. 18.

(*z*) *Shan Maun* v. *Madras Building Co.* (1892) 15 Mad. 268.

(*a*) *Nanda Lal* v. *Abdul Aziz* (1916) 43 Cal. 1052, 34 I.C. 115.

(*b*) *Surendranath Ghosh* v. *Haridas Biswas* (1933) 60 Cal. 225, 144 I.C. 196, ('33) A.C. 398.

(*c*) *Ratan Lal* v. *Makundi Lal* (1933) All. L.J. 16, 146 I.C. 486, ('33) A.A. 299.

(*d*) *Mahesh Dass* v. *Daulat Ram* (1929) 11 Lah. L.J. 82, 118 I.C. 655, ('29) A.L. 314.

(*e*) *Lloyds Bank Ltd.* v. *P. E. Gusdar & Co.* (1928) 56 Cal. 868, 121 I.C. 625, ('30) A.C. 22.

(*f*) *Monindra Chandra* v. *Troyluckho Nath* (1898) 2 Cal. W. N. 750; *Balmakundas* v. *Moti Narayan* (1894) 18 Bom. 444; *Rangasami* v. *Annamalai* (1908) 31 Mad. 7; *Chettiappa* v. *Periasami* (1910) 20 Mad. L.J. 979, 7 I.C. 810; *A. L. R. M. Chettiar* v. *L. P. R. Chettiar* (1927) 4 Rang. 238, 98 I.C. 19, ('26) A.R. 195.

(*g*) *Monindra Chandra* v. *Troyluckho Nath* (1898) 2 Cal. W.N. 750; *Agra Bank* v. *Barry* (1874) L.R. 7 H.L. 135.

(*h*) *Madras Building Co.* v. *Rowlandson* (1890) 13 Mad. 383; *Shan Maun Mull* v. *Madras Building Co.*, *supra*.

as evidence of such gross negligence as to deprive him of priority. In *Jones* v. *Williams* (i) a deposit of deeds gave no security over property not comprised in the deeds; but in *Roberts* v. *Croft* (j) a deposit of deeds relating to the property, but not sufficient to show a title in the mortgagor, was held to be sufficient to give the depositee priority; and in the undernoted cases (k) priority was not forfeited. Where the deeds deposited showed no title and documents showing title were in existence, it was held that no security was intended to be created (l).

Liability of mortgagor not affected.—Questions of priority only arise between successive mortgagees. They do not affect the liability of the mortgagor. This is illustrated by the case of *Padaruth Halwai* v. *Ram Nain* (m). There was a first mortgage of villages *A* and *B* to *S*; a second mortgage of village *A* to *L*; a third mortgage of villages *A* and *B* to *S*, for the amount due on the first mortgage and a further advance; and a fourth mortgage of village *A* to *L*. *L* sued on the second and fourth mortgages for sale of village *A* making *S* a party. The Court by mistake overlooked the priority of the first mortgage to *S* and directed the sale proceeds of village *A* to be paid first to satisfy the second mortgage, then the first and then the fourth. The second mortgage was fully satisfied and the first mortgage partly satisfied out of the sale proceeds. The fourth mortgage was not satisfied and so village *B* was sold under a personal decree under sec. 90 and purchased by *P*. *S* then sued on his third mortgage and the purchaser of *B* claimed that village *B* was relieved of all liabilities under the first mortgage by reason of the failure of *S* to insist upon his priority in respect of that mortgage. Their Lordships said that it was true that if *S* had appealed against the decree of the Subordinate Judge he could have had his interest as first mortgagee protected, and could, on the sale of *A*, have obtained payment of the amount then due under that mortgage, but the fact that he had not done so did not disentitle him from recovering the full amount of his claim in this suit. *P* as purchaser of the equity of redemption was in the position of the mortgagor and his liability was not affected by the fact that *S* had lost priority owing to the erroneous order of the Court.

Liability of purchaser not affected.—The liability of a purchaser is not affected by sec. 78, for the section applies in cases of successive mortgages and not to the case of a mortgagee and a subsequent purchaser (n). On the other hand a purchaser of an equity of redemption is not affected by further advances made after his purchase, though in a Bombay case the purchaser was held to have lost priority on the very doubtful ground that he had allowed the mortgagee to believe that the mortgagor was still the owner (o). In a later Bombay case (p) the mortgagee paid only part of the mortgage money at the time of the mortgage and the remainder after the mortgagor had sold a portion of the property mortgaged to a third person. The purchaser was only liable for the amount advanced prior to his purchase.

Res judicata.—A claim to priority may also be lost by *res judicata*. When a puisne mortgagee sued to redeem a prior mortgagee and the latter omitted to set up an earlier mortgage to which he was subrogated, a suit subsequently brought on that mortgage against the puisne mortgagee is barred by *res judicata* (q). Similarly in *Mahomed*

(i) (1857) 24 Beav. 47.

(j) (1857) 24 Beav. 223. But see the criticism of this case in *V. E. R. M. A. R. Chettyar Firm* v. *Ma Joo Teen* (1933) 11 Rang. 239, ('33) A.R. 299.

(k) *V. E. A. R. M. Firm* v. *A. K. R. M. K. Firm* (1929) 7 Rang. 28, 116 I.C. 475, ('29) A.R. 65; *Ralli Brothers* v. *Punjab National* [illegible] (1930) 11 Lah. 564, 129 I.C. 21, ('30) A.L. 930: *Surendra Mohan* v. *Mohendra Nath* (1932) 59 Cal. 781, ('32) A.C. 580.

(l) *Venkataramayya* v. *Narasingha Row* (1911) I.C. 309.

(m) (1915) 37 All. 174, 42 I.A. 163, 30 I.C. 966, ('15) A.PC. 21.

(n) *Pt. Sita Ram* v. *Raj Narain* (1934) 150 I.C. 145, ('34) A.O. 283.

(o) *Govindrao* v. *Ravji* (1887) 12 Bom. 33.

(p) *Subraya* v. *Ganpa* (1911) 35 Bom. 295, 11 I.C. 969.

(q) *Sri Gopal* v. *Pirthi Singh* (1902) 24 All. 429, 29 I.A. 118.

Ss. 78, 79

Ibrahim Hossein Khan v. *Ambika Persad Singh* (r), a claim to priority was barred by *res judicata* and by limitation. The fifth mortgagee sued for sale claiming to have paid off the first mortgagee and to be subrogated to him and to have priority over the second, third and fourth mortgagees. But the second and third mortgagees had previously sued for sale making the fifth a party, and in that suit the fifth had not claimed to be subrogated to the first. The claim to priority was therefore barred as against these mortgagees by *res judicata*. It was also barred by limitation as against all intermediate mortgagees as the suit was filed after the period of limitation (under article 132) for the enforcement of the first mortgage had expired.

Mortgage to secure uncertain amount when maximum is expressed.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, *B & Co.*, to secure the balance of his account with them to the extent of Rs. 10,000. *A* then mortgages Sultanpur to *C*, to secure Rs. 10,000, *C* having notice of the mortgage to *B & Co.*, and *C* gives notice to *B & Co.*, of the second mortgage. At the date of the second mortgage, the balance due to *B & Co.* does not exceed Rs. 5,000. *B & Co.* subsequently advanced to *A* sums making the balance of the account against him exceed the sum of Rs. 10,000. *B & Co.* are entitled, to the extent of Rs. 10,000, to priority over *C*.

Priority as to subsequent advances.—This section like sec. 78 enacts an exception to the rule of priority. In accordance with that rule a mortgagee who makes a subsequent advance is, as regards that subsequent advance, puisne to an intermediate mortgagee—Thus :

(1) *A* mortgages to .. .. *B*.
(2) *A* mortgages to .. .. *C*.
(3) *A* for a fresh advance again mortgages to .. .. *B*.

then *B*'s mortgage (1) is prior to *C*'s mortgage (2). Even if *B* were to take a renewal of his mortgage (1) at the time of making a fresh advance on mortgage (3) the latter mortgage would be puisne to mortgage (2) though he would not lose priority as to mortgage (1). See note "Renewal" under sec. 101.

But the exception made by this section is that if *B*'s mortgage (1) is to secure a present advance as well as future advances up to a fixed maximum, then any further advance made by *B* within that maximum will be treated as part of the first mortgage and take priority over *C*'s mortgage (2)—provided *C* had notice of that first mortgage. Thus if the mortgage (1) to *B* is to secure the balance of *A*'s account up to a maximum of Rs. 1,000 and Rs. 600 is advanced at the time of the mortgage; and after the mortgage (2) to *C* who has notice of mortgage (1), *B* advances the balance of Rs. 400, this advance is not treated as a third mortgage but as a fulfilment of the first mortgage, and has priority over *C*'s mortgage (2).

(r) (1912) 39 Cal. 527, 39 I.A. 68, 14 I.C. 406.

The two elements to be considered are: (i) whether the subsequent mortgagee took with notice of the prior mortgage; and (ii) whether the prior mortgage expresses the maximum amount to be secured (*s*). In a case when the prior mortgage was registered only a day before the second mortgage, it was held that the second mortgagee could not have had notice of it (*t*). The section, however, has no application when the prior mortgagee claims interest only on the sum advanced under his mortgage prior to the second mortgage. The prior mortgagee has priority for the amount of such interest (*u*).

English rule.—The section is the exact reverse of the English rule settled by the House of Lords in their judgment in *Hopkinson* v. *Rolt* (*v*) under which the mortgagee, when the mortgage is made to cover a present advance and further advances, is entitled to tack by force of the contract as against subsequent encumbrances of which he had no notice at the time of the subsequent advance. Thus the English rule allows *B* to tack only when he makes the further advance without notice of *C*'s mortgage, while the Indian rule allows *B* to tack only if *C* had advanced money on his mortgage with notice of *B*'s mortgage. The English rule is based on the consideration that, in spite of his agreement to make a further advance, the mortgagee has the option of doing so or not, for specific performance cannot be had of an agreement to lend money (*w*). But before the decision in *Hopkinson* v. *Rolt*, the English rule was as enacted in this section (*x*), and was justified in Lord Cranworth's dissenting judgment on the ground that *C* had no reason to complain if he advances money having notice of *B*'s mortgage and understands the law that allows *B* to tack. Lord Cranworth's opinion is followed in this section. The corresponding sec. 94 (1) of the Law of Property Act, 1925, enacts:

> "After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable)—
>
> (a) if an arrangement has been made to that effect with the subsequent mortgages; or
>
> (b) if he had no notice of such subsequent mortgages at the time when the further advance was made by him; or
>
> (c) whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances.
>
> This sub-section applies whether or not the prior mortgage was made expressly for securing further advances."

The third condition reverses the decision in *West* v. *Williams* (*y*) that the undertaking to make further advances is only binding so long as the mortgagor does nothing to derogate from the mortgagee's security.

Expresses the maximum.—These words do not import an obligation to advance up to a maximum limit. The security is for future advances which may or may not be made. When a mortgage was executed of a leasehold by the lessee to secure payment of rent and interest on defaulted instalments for a period of nine years, and the rent per

(*s*) *Dalip Narayan* v. *Chait Nas* (1912) 16 Cal. L.J. 401, 17 I.C. 931.

(*t*) *Dalip Narayan* v. *Chait Narayan* (1912) 16 Cal. L.J. 394, 17 I.C. 927.

(*u*) *Allahabad Bank Ltd.* v. *Benares Bank Ltd.* (1938) A.A. 473, (1939) A.L.J. 658, 177 I.C. 219.

(*v*) (1861) 9 H.L. Cas. 514.

(*w*) *Sichel* v. *Mosenthal* (1862) 30 Beav. 371; *Rogers* v. *Challis* (1859) 27 Beav. 175; *Western Waggon and Property Co.* v. *West* (1892) 1 Ch. 271.

(*x*) *Gordon* v. *Graham* (1716) 2 Eq. Cas. Abr. 598.

(*y*) (1899) 1 Ch. 132, 152 C.A.

S. 79-81

annum was stated, it was held that the maximum secured was expressed (*z*). Their Lordships said—" Even if we assume for a moment that the amount of interest was not sufficiently specified, there can be no question that the aggregate rent payable under the lease could be determined by a simple arithmetical calculation.... We hold, therefore, that the prior mortgage expressed the maximum to be secured thereby within the meaning of sec. 79 (*a*)." This is on the maxim *Id certum est quod certum fieri potest.* If no maximum is fixed the mortgage will not have priority as to future advances. This is illustrated by the Privy Council decision in *Imperial Bank of India* v. *U Rai Gyaw Thu* (*b*). The Bank was equitable mortgagee by deposit of title deeds for a present and for future advances. The mortgagor then granted a legal registered mortgage of some of the property, and subsequently took a further advance from the Bank. The Judicial Committee held that the Bank was not entitled to priority as to such further advances, as the equitable mortgage did not express the maximum to be advanced in future. The argument was pressed upon their Lordships that equitable mortgages were granted to finance commercial operations and that the exigencies of business required immediate advances and preclude the possibility of a search of the registers. But Lord Dunedin pointed out that the remedy was to fix the maximum in the first mortgage so as to secure priority. It was contended that the subsequent mortgagee must have notice of the prior mortgage which expresses the maximum, but as to this it was said that if the subsequent mortgagee advances money without asking for the title deeds such notice should be imputed to him under sec. 3 of this Act.

Charge.—The section was applied in the case of a charge created by a partition deed which provided that " the common family debts should be discharged by the respective sharers to whom they fell, as per schedule of the document, and that, if any sharer failed to discharge accordingly, such sharer's properties should be liable for such debts and for the losses that might happen to the family." One sharer defaulted and a creditor obtained a decree against all the sharers. The other sharers discharged this decree, and claimed priority against a subsequent mortgagee of the defaulter, and the claim was allowed; the obligation created by the partition deed being treated as a charge for the performance of a future engagment (*c*).

80. [*Tacking abolished*]. *Repealed by s. 41 of Act 20 of 1929.* See sec. 93 as amended.

Marshalling and Contribution.

Marshalling securities.

81. *If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.*

(*z*) *Dalip Narayan* v. *Chait Narayan* (1912) 16 Cal. L.J. 401, 17 I.C. 931; *Brijmohan Singh* v. *Dukhan Singh* (1930) 9 Pat. 816, 130 I.C. 168, ('31) A.P. 33.

(*a*) *Dalip Narayan* v. *Chait Narayan* (1912) 16 Cal. L.J. 401, 403, 17 I.C. 931.

(*b*) (1923) 1 Rang. 637, 50 I.A. 283, 76 I.C. 910, ('23) A.PC. 211.

(*c*) *Sesha Iyer* v. *Srinivasa* (1921) 41 Mad. L.J. 282, 283, 70 I.C. 362, ('21) A.M. 459.

Amendment.—This section has been substituted by the amending Act 20 of 1929. The old section was as follows :—

> "If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any person having acquired for valuable consideration an interest in either property."

The scope of this section has been much enlarged. It now applies to several properties, and to several successive mortgagees. It has thus been brought into line with sec. 56, and marshalling may be claimed not only by the second mortgagee but by any subsequent mortgagee. Again the condition of notice has been dispensed with ; and lastly the word "valuable" before consideration has been omitted, for the law in India does not recognize any distinction between good and valuable consideration. See Pollock and Mulla's Contract Act, 6th Ed., pp. 31-32.

Marshalling.—The original section in the Act of 1882 was based on the following passage from Fisher on Mortgages (*d*) :—

> "If the owner of two estates mortgaged them both to one person and then one of them to another without notice, the second mortgagee may insist under the doctrine of marshalling, but without interfering with the rights of the former that the debt of the first shall be satisfied out of the estate not mortgaged to the second, so far as that shall extend."

Thus supposing :

A mortgages X and Y to..............*B*

A again mortgages X to..............*C*

and *B* threatens to realize his mortgage out of X so as to deprive *C* of his security, *C* under the doctrine of marshalling can compel *B* to realize his mortgage as far as possible out of Y so as to leave X available for himself. The principle was stated in the leading case of *Aldrich* v. *Cooper* (*e*) to be "that it shall not depend upon the will of one creditor to disappoint another."

The right of marshalling must be exercised at the time when the first mortgagee seeks to realize his security (*f*).

Moveables.—This section applies to the mortgages of immoveable property and not to the hypothecation of moveables. Thus where certain immoveable property is mortgaged to a certain person and under the same document some cattle are hypothecated to him and the immoveable property is again mortgaged to another person, it was held that section 81 had no application and the subsequent mortgagee could not insist that the prior mortgagee should first liquidate the debt due to him out of the cattle hypothecated (*g*). Where a claim to marshalling has been raised as an issue in a suit and has been decided on the merits, the matter is not open to a fresh contest in execution (*h*).

(*d*) Fisher on Mortgages, 7th Ed., 572, 573.

(*e*) (1803) 8 Ves. 382, 405.

(*f*) *Unnamalai* v. *Gopalaswami* (1931) 54 59, 129 I.C. 655, ('31) A.M. 199.

(*g*) *K. S. P. Subbiah Naidu* v. *Ram Sabad* (1936) 14 Rang. 196, 163 I.C. 444, (1936) A.R. 266.

(*h*) *Kathisa-Bi* v. *Venkataraghava Iyer* (1943) A.M. 705, (1943) 2 M.L.J. 301, 56 M.L.W. 501.

S. 81.

Notice.—Under the old section the second mortgagee had no right to have the securities marshalled, unless he had no notice of the prior mortgage (*i*). The condition as to notice seems to have been taken from a statement of the rule by Lord Hardwicke in the old case of *Lanoy* v. *Athol* (*Duke and Duchess*) (*j*), but latter cases appear to have been decided without reference to notice (*k*). In cases to which the Act did not apply a subsequent mortgagee was held to have an equity to call for marshalling of securities even though he had taken with notice of the prior mortgage (*l*). The principle that it should not depend upon the will of one creditor to disappoint another is quite independent of the question of notice; and the rights of the prior mortgagee and of other encumbrancers are sufficiently safeguarded by the words "but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties." The condition as to notice has accordingly been omitted in this section. The right to call for marshalling is, however, subject to other conditions.

Common debtor.—The first of these is that there must be a common debtor, and marshalling applies only when there are different debts realizable out of the several properties of that one common debtor; and so the section requires that both mortgages shall be by the same owner (*m*). This qualification was applied in a Madras case (*n*) where a manager of a joint and undivided Hindu family mortgaged the family property and then made a mortgage of his own share for his personal debt. The second mortgagee had no right of marshalling, for the first mortgagor was the coparcenary, and the second mortgagor the individual coparcener. Again when *A* and *B* mortgaged properties in which they had separate interests to *C*, and then *B* alone mortgaged his interest to *D*, it was held that *D* had no right of marshalling (*o*).

No prejudice to first mortgagee.—Marshalling being a rule of equity will not be enforced so as to work injustice to the prior creditor. The prior mortgagee cannot be compelled to proceed against a security which may be insufficient or doubtful or which may involve him in litigation (*p*). Again marshalling has never been enforced unless the properties are separate parcels. Thus if the puisne mortgage was of a fractional share of the prior mortgage the puisne mortgagee could not compel the prior mortgagee to proceed against the fractional residue. A proper price would not be realized and such a procedure would prejudice both the prior mortgagee and the mortgagor. In a Rangoon case (*q*) a puisne mortgagee was allowed to require a prior mortgagee to proceed first against a property which he had "released" from his mortgage. It is not however clear from the judgment whether the property was still part of the prior mortgagee's security.

The Madras High Court has construed the words "but not so as to prejudice the rights of the prior mortgagee" to mean that the first mortgagee's right to sell whichever property he pleases cannot be curtailed and that the right of marshalling can only be exercised against the mortgagor (*r*). This construction would make the section a dead letter, and the omission of the words "as against the seller" which occurred in the old sec. 56

(*i*) *Inderdawan Pershad* v. *Govind Lall* (1896) 23 Cal. 790; *Kishan Chand* v. *Ramsukhi Das* (1916) P.R. 86, 33 I.C. 815; *Rama- Chetty* v. *Madura Mills Co.* (1916) 1 M.W.N. 265, 34 I.C. 338; *Low & Co.* v. *Hazarimull* (1926) 30 Cal. W.N. 183, 94 I.C. 786, ('26) A.C. 525; *Rajkeshwar Prasad* v. *Mohammad* (1924) 3 Pat. 522, 78 I.C. 796, ('24) A.P. 459; *Sripat Singh* v. *Naresh Chandra* (1925) Pat. H. Ct. C. 239, ('26) A.P. 94; *Lakshmana Iyer* v. *Sankaramurthi* (1913) 25 Mad. L.J. 245, 18 I.C. 199.

(*j*) (1742) 2 Atk. 444.

(*k*) *Gibson* v. *Seagrim* (1855) 20 Beav. 614; *Flint* v. *Howard* (1893) 2 Ch. 54.

(*l*) *Chunilal Vithaldas* v. *Fulchand* (1894) 18 Bom. 160; *Dina* v. *Nathu* (1902) 26 Bom. 538, 542.

(*m*) Cf. *Ex parte Kendall* (1811) 17 Ves. 514.

(*n*) *Gopala* v. *Saminathayyan* (1889) 12 Mad. 255; *Ramaswamy Chetty* v. *Madura Mills Co.* (1916) 1 Mad. W.N. 265, 34 I.C. 338.

(*o*) *Venkayya* v. *Venkataramayya* (1929) Mad. W.N. 629, 125 I.C. 66, ('30) A.M. 178; *Neelamegan* v. *Govindan* (1891) 14 Mad. 71.

(*p*) Cf. *Krishna Ayyar* v. *Muthukumaraswamiya* (1906) 29 Mad. 217, 222.

(*q*) *Ram Sabad* v. *Subiah* (1935) 156 I.C. 318, ('35) A.R. 189.

(*r*) *Thanmula Sowcar* v. *Ramadoss* (1928) 51 Mad. 648, 110 I.C. 54, ('28) A.M. 500.

shows that this view is no longer tenable. In some cases the Court, in exercise of its discretion under O. 34, r. 5 of the Code of Civil Procedure, has adjusted the equities by requiring a prior mortgagee to proceed first against properties that are not subject to a puisne mortgage (*s*).

No prejudice to other incumbrancers.—For the same reason marshalling will not be enforced so as to prejudice another incumbrancer. For instance:—

A mortgages	X and Y	to	*B*
A "	X	to	*C*
A "	Y	to	*D*

then if *C* were to insist that *B* should pay himself wholly out of Y, there might be nothing left for *D*. The Court would therefore apportion *B*'s mortgage rateably between X and Y, and the surplus of X would go to *C* and the surplus of Y to *D*. The leading case on this point is *Barnes* v. *Racster* (*t*), from which the illustration is taken. This rule was referred to by the Calcutta High Court in a case in which marshalling was refused as the rights of subsequent purchasers would be affected (*u*).

Contract to the contrary.—The right of marshalling may be excluded by contract. Thus if *A* mortgages X and Y to *B*, and *A* then mortgages X to *C*, *C* will have no right to require *B* to realize his mortgage as far as possible out of Y if *C*'s mortgage has been made *expressly subject to and after satisfaction of B*'s mortgage. The converse is also true, for if there is a third incumbrancer thus:—

A mortgages	X and Y	to	*B*
	X	to	*C*
	X and Y	to	*D*

then if *D*'s mortgage has been made *expressly subject to and after satisfaction of* the two prior mortgages, *D* could not prevent *C* from marshalling against him (*v*).

Prejudice to volunteer.—The section refers to prejudice to the rights of the first mortgagee or any other person who has acquired for consideration an interest in either property. This excludes volunteers. So in the last illustration, if *D* were a grantee under a voluntary settlement he could not prevent *C* from marshalling against him.

Funds on the same footing.—Another condition for the application of the equity is that securities must be on the same footing. The section deals only with successive mortgages. A fund and a right of action are not marshalled (*w*). If the double creditor has a charge on one fund and a right of set off against another fund, he cannot be compelled by a second incumbrancer on the first fund to abandon his charge and rely on his right of set off (*x*).

Right of purchaser.—The right to claim marshalling is not confined to puisne mortgagees. The right of purchasers is recognized in sec. 56. A puisne mortgagee who has a right of marshalling against a prior mortgagee does not lose that right because he has purchased the equity of redemption (*y*).

(*s*) *Rajkeshwar Prasad* v. *Mohammad* (1924) 3 Pat. 522, 78 I.C. 796, ('24) A.P. 459; *Kaisar Beg* v. *Sheo Shankar* (1931) 53 All. 391, 129 I.C. 708, ('32) A.A. 85. See also *Chettyar* v. *Chettyar* (1937) 171 I.C. 444, (1937) A.R. 220.

(*t*) (1842) 1 Y. and C. Ch. Cas. 401. See also *Gibson* v. *Seagrim* (1855) 20 Beav. 614; *Flint* v. *Howard* (1893) 2 Ch. 54.

(*u*) *Umesh Chandra Mandal* v. *Haq* (1933) 60 Cal. 87, 143 I.C. 315, 325.

(*v*) *Re Mower's Trusts* (1869) L.R. 8 Eq. 110.

(*w*) *The Arab* (1859) 5 Jur. N.S. 417.

(*x*) *Webb* v. *Smith* (1885) 30 Ch.D. 192 C.A.

(*y*) *Rajkeshwar Prasad Narain Singh* v. *Mohammad Khalil-ul-Rahman* (1924) 3 Pat. 522, 78 I.C. 796, ('24) A.P. 459; *Inderjeeum Persad* v. *Gobind Lall* (1896) 23 Cal. 790; *Lakhmidas* v. *Jamnadas* (1898) 22 Bom. 304 F.B.: *Madan Mohan* v. *Nand Ram* (1943) A.A. 154, (1943) All. 444, (1943) A.L.J. 63, 206 I.C. 148.

Ss. 81, 82

Illustration.

A mortgages X and Y to *B*. *A* then mortgages X to *C*. *C* brings X to sale in enforcement of his mortgage and himself purchases X. *B* then obtains an order for sale on his mortgage. *C* is entitled to require *B* to bring Y to sale first and realize his security as far as possible out of Y: *Inderdawan Pershad* v. *Gobind Lall* (1896) 23 Cal. 790.

Right of volunteers.—It seems that a grantee under a voluntary conveyance may also claim the right of marshalling though the point is not settled in India. If a mortgage comprise both settled and unsettled estates, it will be thrown as far as possible on the unsettled estate (*z*).

Right of surety.—A surety who has given his property as security for the debt may require the creditor to resort to the other property of the debtor first (*a*).

Lessee.—A lessee has no right to claim marshalling. If a mortgagee of several properties is executing a decree for sale, the lessee of one of the properties has no right to require that the other properties should be sold first (*b*).

Contribution to mortgage-debt.

82. *Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are,* in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, *and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage* after deduction of the amount of any other *mortgage or charge* to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the *subsequent* mortgagee.

Amendments.—The first paragraph of the section was substituted by the Amending Act 20 of 1929. The old paragraph was :—

"Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting

(*z*) *Hales* v. *Cox* (1863) 32 Beav. 118; *Mallet* v. *Wilson* (1903) 2 Ch. 494.

(*a*) *Re Westzinthus* (1833) 5 B. and Ad. 817.

(*b*) *Lew & Co.* v. *Hazarimull* (1926) 30 Cal. W.N. 183, 94 I.C. 786, ('26) A.C. 525.

from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage."

This amendment makes two improvements. In the first place it covers cases not only where several properties are mortgaged but where the mortgaged property is subsequently divided into shares held in severalty. And in the second place it fixes the date of the mortgage as the date at which the valuation for the purpose of contribution should be made (*c*). The words "in the absence of a contract to the contrary" relate to a contract to which the mortgagee is a party and not to one between co-mortgagors (*d*).

In the third paragraph the word "subsequent" has been substituted for the word "second." This amendment is merely consequential.

Amendments whether retrospective.—This section is not specified in sec. 63 of the Amending Act 20 of 1929 as one of the sections which shall not have retrospective effect. But the Privy Council have held that the amendments are not retrospective (*e*).

Contribution.—Marshalling settles the rights of competing mortgages, while contribution settles the rights of mortgagors of several properties or of several shares in one property. Marshalling requires that the creditor who has the means of satisfying his debt out of several funds shall so exercise his rights as not to take from another creditor the funds which forms his only security. Contribution requires that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone (*f*). It therefore follows that such of the mortgaged properties as have been sold for the realization of the mortgage money and have thus contributed to the mortgage debt are not liable to a claim for contribution; and that such a claim can only be advanced by the owners of those properties which have contributed more than their rateable share of the debt, and against those portions of the mortgaged property only, which have not contributed to the mortgage debt and have benefited by the sale of the property of the claimants for contribution (*g*).

Illustration.

Three brothers *A*, *B* and *C* mortgaged their joint property first to *D*, and then to *E*. *A*, *B* and *C* effected a partition of the property into three shares. *D* brought a suit for sale on his mortgage and realized the amount by the sale of *A*'s share. *A* obtained a decree for contribution against the shares of *B* and *C*. Thereafter *B* and *C* redeemed the puisne mortgage to *E* and claimed contribution from *A*. Held that they had no right to contribution as *A*'s share had been sold to satisfy the prior mortgage debt: *Kashi Ram* v. *Het Singh* (1915) 37 All. 101, 26 I.C. 417 (facts simplified).

The first paragraph enacts the general rule that if several properties whether of one or several owners are mortgaged for one debt they shall contribute rateably to its discharge, after deducting from each property the value of any prior incumbrance to which it may be subject. As the mortgage debt is indivisible, the mortgagee may realize the whole debt out of only one parcel of the property mortgaged and in that case it is only fair that the other should be liable to contribute. To quote the words of the Privy Council, "if a person owning one property subject, with the property of other persons, to a common mortgage, has paid off the mortgage, he is entitled to call upon the owners of

(*c*) *Damodar Sami* v. *Govindarajalu* (1943) A.M. 429, (1943) Mad. 531, (1943) 1 M.L.J. 291, 56 M.L.W. 144, 206 I.C. 370 (F.B.); *Narayen* v. *Nallamal* (1942) A.M. 685 (F.B.).

(*d*) *Damodar Sami* v. *Govindarajalu*, *supra*.

(*e*) *Faquir Chand* v. *Aziz Ahmad* (1932) 59 I.A. 106, 54 All. 199, 36 Cal. W.N. 436, 55 Cal. L.J. 271, 1932 All. L.J. 195, 62 Mad. L.J. 492, 34 Bom. L.R. 760, 136 I.C. 751, ('32) A.PC.74.

(*f*) Fisher on Mortgages, 7th Ed., p. 567, cited in *Hari Raj* v. *Ahmaduddin Khan* (1897) 19 All. 545, 546.

(*g*) *Hari Raj Singh* v. *Ahmaduddin Khan*, *supra*.

S. 82

the other property to bear their proper proportion of the burden" (*h*). The suit for contribution is maintainable when the whole of the mortgage debt has been paid out of parts of the mortgaged property and it is not necessary that the whole of the debt was paid out of the properties of the plaintiff alone (*i*).

The second paragraph is only an illustration of the first and assumes that payment of the prior incumbrance has been made in which case the amount of the incumbrance is deducted from the value of that property in ascertaining its rateable contribution (*j*). Thus supposing:—

Property X is mortgaged for Rs. 200 to................*A*

Properties X and Y are mortgaged for Rs. 400 to........*B*

then if X and Y are each worth Rs. 500 and are sold X to *C* and Y to *D*, the contribution of *C* and *D* to the mortgage of Rs. 400 is in the ratio of 300 to 500, and *C* is liable for Rs. 150 and *D* for Rs. 250. As a consequence of this rule, the person who has paid in excess of his share or who has discharged the whole is entitled to be reimbursed by the others. Thus if *B* has recovered the whole debt of Rs. 400 from *C*'s property X, *C* would be entitled to recover Rs. 250 from *D* by suit for contribution.

The old section used the word "incumbrance" which is a term of wider connotation than mortgage (*k*). With reference to this word the Judicial Committee have held that if one of the properties, the subject of a second mortgage, is along with different properties the subject of a first mortgage, the value of the property for purposes of contribution to the second mortgage-debt would be ascertained by deducting not the whole of the first mortgage-debt but the rateable share of that debt (*l*). Sir George Lowndes in delivering the judgment of the Board said: "Where properties A, B and C are all made security for one mortgage, if property A is subject to a prior incumbrance jointly with properties X, Y and Z, their Lordships think that the rateable share to be attributed to A under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage."

Two or more persons having distinct and separate rights.—These words are new and include not only cases where several properties are mortgaged, but also cases where the property becomes divided after the mortgage either by the death of the mortgagor or by partition or by the sale of shares. The old section merely referred to several properties mortgaged. The question was raised in a Madras case (*m*) whether this covered a case of subsequent division. The amendment answers the question, but even under the old section it was held that the rule of contribution would be applicable as between shares purchased from the mortgagor (*n*) or heirs of the mortgagor (*o*), or in cases of partition between joint mortgagors (*p*).

(*h*) *Kamta Singh* v. *Chaturbhuj Singh* (1934) 61 I.A. 85, 13 Pat. 310, 38 Cal. W.N. 575, 59 Cal. L.J. 277, 66 Mad. L.J. 662, 1934 All. L.J. 462, 36 Bom. L.R. 547, 148 I.C. 486, ('34) A.P.C. 98; *Purbi Din* v. *Hardeo Baksh Singh* (1935) 159 I.C. 1049 (1936) A.O. 169.

(*i*) *Md. Yahiya* v. *Rashid-ud-din* (1908) 31 All. 65.

(*j*) *Gopal Das* v. *Durga Singh* (1917) 38 I.C. 649.

(*k*) *Faqir Chand* v. *Aziz Ahmad* (1932) 59 I.A. 106, 110, 54 All. 199, 36 Cal. W.N. 436, 1932 All. L.J. 195, 62 Mad. L.J. 492, 55 Cal. L.J. 271, 34 Bom. L.R. 750, 136 I.C. 751, ('32) A.P.C. 74; *Aziz Ahmad* v. *Chhote Lal* (1928) 50 All. 569, 109 I.C. 38, ('28) A.A. 241.

(*l*) *Faquir Chand* v. *Aziz Ahmad*, *supra*, reversing *Aziz Ahmad* v. *Chhote Lal*, *supra*; and by implication overruling *Inder Prasad* v. *Naurang Kuar* (1930) 129 I.C. 92, ('30) A.P. 607.

(*m*) *Rajah of* [illegible] *Rajah Setrucherla* (1903) 26 Mad. 686.

(*n*) *Hirachand* v. *Abdal* (1877) 1 All. 455; *Chagandas* v. *Gansing* (1896) 20 Bom. 615; *Jagat Narain* v. *Qutub Husain* (1879) 2 All. 807; *Sirajuddin* v. *Sirajuddin* (1905) 2 All. L.J. 698; *Baldeo* v. *Baijnath* (1891) 13 All. 371; *Dhakeswar Prosad* v. [illegible] (1915) 21 Cal. L.J. 104, 24 I.C. 780.

(*o*) *Mutty Lal* v. *Nandu Lal* (1907) 12 Cal. W.N. 745 but see contra, *Nawab Jahan* v. *Mirza Shujauddin* (1904) 9 Cal. W.N. 865.

(*p*) *Rama*[illegible]*ar* v. *Srinivasa* (1901) 24 Mad. 85.

Obligation not personal.—The obligation to contribute is not personal. The section attaches liability to the properties (q). Contribution is in proportion to the value of the properties and not according to the extent of the benefit the co-mortgagors have received from the mortgage money (r). The owner of the property has an option either to pay his rateable share or to allow it to be realized out of the property. An order giving this option was made in the undernoted case (s).

Prior incumbrance—The amount of a prior incumbrance is deducted for the purpose of ascertaining the rateable contribution to a subsequent debt. But if the amount due on the earlier mortgage on one property exceeds the value of that property, it follows that the whole amount of the second mortgage is recoverable from the other properties (t), for the value of that property for the purpose of contribution is nil.

The same result ensues when the prior mortgagee has realized the first mortgage by sale of the mortgaged property.

Thus let us suppose that

X is mortgaged to......................*B*

and X and Y are mortgaged to............*C*.

If *B* sells X in execution of a decree on his mortgage, the whole burden of *C*'s mortgage must fall on Y. An illustration of this rule is the case of *Bohra Thakur Das* v. *Collector of Aligarh* (u). The mortgagor mortgaged the village of Kachaura to Nand Kishore and another in 1868 by simple mortgage, and then again mortgaged an eleven biswa share of Kachaura and an eight biswa share of another village Agrana to Nand Kishore in 1870. The plaintiffs in 1873 purchased the equity of redemption of Agrana. The first mortgagees obtained a decree on their mortgage and in execution purchased the eleven biswa share of Kachaura. The plaintiffs then sued to redeem the second mortgage and contended that as the mortgagee had purchased the eleven biswa share of Kachaura they were only liable to pay a proportionate share of the debt on redemption. As to this the High Court said—

> "The answer to this question depends on the circumstances under which the purchase was made. Supposing *A* and *B* are mortgagors of certain property which they have jointly mortgaged to *C*. Now if *C*, the mortgagee himself, purchases the equity of redemption from *A*, it is clear that he cannot be permitted to throw on *B*'s share the whole burden of his mortgage. In such a case *B*'s share can only be saddled with the proportionate amount of the mortgaged debt. But if, as is the case here, *C*'s purchase was at a sale in execution of a decree obtained on a prior mortgage, the case is different. The learned Judge finds that the mortgagee bought the Kachaura property at an open sale and not subject to any charge and that he must be presumed to have paid fair value for it. The case then stands thus.—The whole of the Kachaura property has been swallowed up by the first mortgage and consequently the burden of the second mortgage falls entirely on the Agrana property. The owner of the latter property has under the circumstances no right of contribution against the owner of the Kachaura property."

The case went on appeal to the Privy Council (v), and their Lordships said—"As Kachaura was sold and purchased by Nand Kishore in execution and part satisfaction

(q) *Narayan* v. *Nallamal* (1942) A.M. 686 (F.B.).

(r) *Jai Narain* v. *Rasik Behari* (1931) 131 I.C. 545, ('31) A.A. 546.

(s) *Bhagirath* v. *Naubat* (1892) 2 All. 115; *Sri Jagapati of Raju* v. *Sri Rajah Sadrusannamma* (1916) 39 Mad. 795, 31 I.C. 255.

(t) *Ghulam Hazrat* v. *Gobardhan Das* (1911) 33 All. 357, 9 I.C. 983; *Murti Prasad* v. *Sheo Dat* (1931) 29 All. L.J. 349, ('31) A.A. 625.

(u) (1906) 28 All. 593, 599.

(v) *Bohra Thakur Das* v. *Collector of Aligarh* (1910) 32 All. 612, 37 I.A. 182, 186, 7 I.C. 732 P.C.

S. 82 of a decree obtained on a prior mortgage of 1868, the Courts in India properly overruled the appellants' contention which has not been pressed before this Board."

Another illustration of the rule is the case of *Sesha Ayyar* v. *Krishna Ayyangar* (*w*). The facts, omitting irrelevant details, were:

X and Y were mortgaged to................*R*
and X and Z were mortgaged to..............*P*.

R executed his decree for sale on the first mortgage by the sale of X. *P* then sued to enforce his mortgage, but as X had been sold by the prior mortgagee the whole burden of *P*'s mortgage fell on Z. In this case *P* sought not only to realize his mortgage by the sale of Z, but he also claimed contribution against Y, which had been sold to *D*. This claim was not admitted and the reason given in the judgment is as follows:

"In the present case the plaintiffs, who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property subsequently sold under *R*'s decree, had their opportunity, and they might by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property. They would then have stood in a position analogous to that of one of several mortgagors who has redeemed the whole property and claims to take advantage of sec. 95 of the Act. But the plaintiffs did nothing and, therefore, no right of contribution arose and the other property stood free from any lien."

This passage has been criticized by Ghose as suggesting that no right of contribution arises in the case of an enforced sale. But it is doubtful if the Judge meant any more than that the case did not fall under the doctrine of subrogation. In *Raghavachari* v. *Venkatanarayana* (*x*) Madhavan Nair J. relying on *Ramabhadrachar* v. *Sreenivasa Iyengar* (*y*) doubted the correctness of the above passage. It is difficult to see why payment in cash by a puisne mortgagee to discharge the prior mortgage should be treated differently from discharge of the prior mortgage by sale of part of the mortgaged property in which the puisne mortgagee is interested. This view was expressed by Banerji in *Ibu Hasan* v. *Brijbhukan Saran* (*z*). The judgment in *Sesha Ayyar*'s case also contains the following passage:—

"In our opinion sec. 82 does not justify the notion that a man who has bought a property which at one time was, with other property, subject to a mortgage, may, after the mortgage debt has passed into a decree and after the decree has been satisfied by the sale of that other property, be held responsible for part of the mortgage debt."

This passage was referred to in a Bombay case (*a*) by Chandavarkar, J., who hesitated to follow it. The decision in *Sesha Iyer* v. *Krishna* has since been overruled by the Full Bench of the Madras High Court in *Narayan* v. *Nallamal* (*b*). The Full Bench held that in deciding *Sesha Iyer*'s case, the learned judges had not sufficient regard to the wording of sec. 82 even as it stood before the amending Act of 1929. The Full Bench expressed the view that a second mortgagee did not stand in the shoes of the mortgagor, that he held a mortgagee's interest in the property and the fact that some other person had previously received a mortgagee's interest did not detract from the nature of his interest, that when a person agreed to lend money on the security of a second mortgage of a portion of the property he knew that the first mortgagee had the benefit of the whole of the property; and that the first mortgagee, if he called in the mortgage loan, would have the right to cause

(*w*) (1901) 24 Mad. 96, 107, 108.
(*x*) (1935) A.M. 456, 156 I.C. 715, 41 M.L.W. 416.
(*y*) (1901) 24 Mad. 85.
(*z*) (1904) 26 All. 407, 1 A.L.J. 148, (1904) A.W.N. 74.
(*a*) v. *Yamnappa* (1902) 26 Bom. 379,
(*b*) See *supra*. See also *Chunilal* v. *Srinivasa* (1944) A.M. 276.

the whole of the hypotheca to be sold and that if the first mortgagee did not cause the whole of the hypotheca to be sold the second mortgagee had the right to call upon the holder of the unsold portion to contribute his share of the principal debt. It was held, therefore, that when a portion of the mortgaged property was sold and the sale proceeds were sufficient to pay off the mortgage over the entire property, the subsequent mortgagee of the portion sold was entitled to sue the holder of the unsold portion for contribution whether he pays cash to discharge the first mortgage or not. According to the Bombay High Court the principle of sec. 82 can apply where the mortgage is subsisting. It applies even more when the mortgage has been paid off out of some only of the properties mortgaged and the owner or the person interested in the properties from which the mortgage has been paid off then has a right to claim contribution from the owner of other properties which were liable under the mortgage, but which were not called upon to pay off (*c*).

Cases in footnote (*d*) are further instances of a prior mortgagee's sale removing property from the scope of a second mortgage. A puisne mortgagee may claim for contribution in a suit for sale. Such claim is not premature (*e*).

Mortgagor sells part and retains a share.—If the mortgagor sells part of the mortgaged property and retains part, and the mortgage debt is realized by the sale of the part retained by the mortgagor, the mortgagor's share cannot claim contribution (*f*). The reason for this is clear, for the mortgagor who has sold shares to others cannot derogate from his grant by calling upon the others to contribute to the discharge of the mortgage. But if the mortgagor has sold only the equity of redemption of part of the property, his vendee is in the position of a co-mortgagor and the mortgagor can claim contribution against him (*g*).

Illustrations.

(1) *A* mortgages two properties X and Y to *B*. *A* sells X to *C* alleging that the mortgage to *B* has been discharged. Thereafter *B* realizes his mortgage by the sale of Y only. *A* is not entitled to contribution from *C*: *Viswanatha* v. *Vengamma* (1924) 78 I.C 52, ('24) A.M. 749 (facts simplified).

(2) *A* mortgages 8 villages to *B*. *A* then sells his interest in 3 of the villages to *C*. *B* realizes his mortgage by the sale of 2 of *A*'s villages. *A* is entitled to contribution from *C*: *Ram Shankar* v. *Ghulam Husain* (1921) 43 All. 589, 63 I.C. 209, ('21) A.A. 323 (facts simplified).

The principle of contribution to the mortgage debt has recently been discussed in *In re Mainwaring, Mainwaring* v. *Verden* (*h*). The following propositions may be deducted from the decision of the Court of Appeal:

(i) where the mortgagor transfers the whole of the mortgaged properties subject to the mortgage, the transferee may in the equity be called upon to indemnify the mortgagor who may have to pay the mortgage debt on his personal covenant to pay the same. This is how the dictum of Lord Eldon in *Waring* v. *Ward* (*i*) was explained.

(ii) where the mortgagor transfers the whole mortgaged property but not subject to the mortgage, *i.e.*, without disclosing that there is a mortgage or representing that

(*c*) *Basavannewa* v. *Dadgowda* (1942) A.B. 95, 44 Bom. L.R. 15, 199 I.C. 723.

(*d*) *Sheo Baldeo Prasad* v. *Sheo Dial* (1906) 3 All. L.J. 441; *Bhagwati Prasad* v. *Shafaat Muhammad* (1921) 43 All. 42, 58 I.C. 414, ('21) A.A. 350; *Raghunath Prasad* v. *Jamna* (1907) 29 All. 233; *Daud Bahadur* v. *Deenandan* (1918) 43 I.C. 915.

(*e*) *Chunilal* v. *Srinivasa Ayyangar* (1944) A.M. 276.

(*f*) *Magniram* v. *Mehdi Hossein* (1904) 31 Cal. 95, 103; *Viswanatha* v. *Vengamma* (1924) 78 I.C. 52, ('24) A.M. 749.

(*g*) *Rama Shanker* v. *Ghulam Hussain* (1921) 43 All. 589, 63 I.C. 209, ('21) A.A. 323.

(*h*) (1937) 1 Ch. 96.

(*i*) (1802) 7 Ves. 332 at p. 337.

S. 82 the mortgage has been paid off, so far from the transferee being bound to indemnify the transferor, the transferor is bound to indemnify the assignee as was held in *In re Best* (*j*).

(iii) where the mortgagor transfers a part of the mortgaged property subject to the mortgage and retains the remaining properties, the *prima facie* rule is that the mortgage debt as between the transferor and the transferee should be borne rateably in proportion to the respective values of the items of the mortgaged properties.

(iv) where the mortgagor transfers a part of the mortgaged property without reference to the mortgage and retains the remaining mortgaged properties the mortgagor is not entitled to any indemnity or contribution as was held in *In re Durby's Estate* (*k*).

English rule of inverse order.—As regards persons who have purchased shares in the equity of redemption from the mortgagor the rule in English law is that the residue left with the mortgagor is primarily liable and then the share last sold by the mortgagor is next liable, and so backwards in inverse order of the mortgagor's sales. The rule is further complicated by questions of notice (*l*). Fortunately this rule is not observed in India. In *Magniram* v. *Medhi Hoosein* (*m*) properties X and Y were mortgaged to secure the debt and, subsequent to the mortgage, X was purchased at a private sale by the defendants subject to the mortgage and then Y was purchased by the plaintiffs at an ordinary execution sale subject to the mortgage. The mortgagee on a decree for sale sold Y and satisfied the mortgage. The plaintiffs sued for contribution and the defendants claimed that under the rule of inverse order the whole burden of the mortgage should be thrown on Y. But the rule was not applied and plaintiff's suit was decreed.

Not applicable to mortgagee.—Contribution is only applicable between the mortgagors *inter se*. It does not affect the mortgagee's power to enforce his mortgage against all or any of the properties mortgaged to him (*n*). Section 60 recognises the integrity of the mortgage security and the section does not empower the mortgagors to require the mortgagee to split his lien and distribute the debt among the mortgagors rateably (*o*). The mortgagee cannot, by the act of parties entitled to the equity of redemption, be deprived of his right to resort to any estate comprised in the mortgage—so long as he has not released or given it up and so long as the mortgage is legally kept alive. This principle was enunciated in the case of *Chinnery* v. *Evans* (*p*) and was followed by the Calcutta High Court in a case (*q*), where a suit on the mortgage would have been time-barred but for payments made by the original mortgagor and it was held that the remedy not being time-barred the mortgage could also be enforced against a part of the property which was in the possession of a purchaser. This right of the mortgagee can only be curtailed under the equity of marshalling, either under sec. 56 or sec. 81. But the Courts have sometimes controlled this right by directions under the repealed sec. 88, now the Code of Civil Procedure, Order 34, rule 4. See the undernoted cases (*r*).

(*j*) (1924) 1 Ch. 42.

(*k*) (1907) 2 Ch. 465.

(*l*) See the statement of the rule in Dart's Vendors and Purchasers, pp. 947, 948.

(*m*) (1904) 31 Cal. 95.

(*n*) *Arunagni* v. *Radha Krishna* (1942) A.M. 44. (1942) 2 M.L.J. 520, 201 I.C. 351.

(*o*) *Roghu Nath* v. *Harilal Sadhu* (1891) 18 Cal. 320; *Hara Kumari* v. *Eastern Mortgage and Agency Co.* (1908) 7 Cal. L.J. 274; *Kuppusami Cheti* v. *Papathi* (1898) 21 Mad. 369; *Krishna Ayyar* v. *Muthu Kumarasawmiya* (1906) 29 Mad. 217; *Timaji* v. *Rama* (1918) 20 Bom. L.R. 175, 45 I.C. 362; *Wan Tsikya* v. *M. S. S. Chettyar* (1935) 155 I.C. 954, ('35) A.L. 26.

(*p*) (1864) 11 H.L.C. 115.

(*q*) *Krishna Chandra* v. *Bhairab Chandra* (1905) 32 Cal. 1077; *Dina Nath* v. *Lachmi Narain* (1903) 25 All. 446; *Shib Lal* v. *Bhawani Shankar* (1904) 26 All. 72; *Inukhan* v. *Naimudin* (1906) 3 Cal. L.J. 377; *Ghasi Khan* v. *Kishori* (1929) 27 All. L.J. 846, 119 I.C. 437, ('29) A.A. 380; *Umesh Chandra* v. *Hemangachandra* (1933) 60 Cal. 87, 143 I.C. 315, ('33) A.C. 325.

(*r*) *Rajkeshwar Prasad* v. *Mohammad Khalil-ul-Rahman* (1924) 3 Pat. 522, 78 I.C. 796, ('24) A.P. 459; *Kaisar Beg* v. *Sheo Shankar* (1931) 53 All. 391, 129 I.C. 708, ('32) A.A. 85.

Mortgagee purchasing share in equity of redemption liable.—The mortgagee, however, may become liable to contribution when he purchases a share in the equity of redemption, for he then splits his security and a co-mortgagor can redeem for a proportionate part. This is the principle enacted in the last clause of sec. 60, for the vesting of part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage debt (*s*); and if the mortgagee after his purchase sues for sale of the remaining property he must give credit for a proportionate part of the debt (*t*), and on the other hand the mortgagor is entitled to redeem the residue for a proportionate part of the debt (*u*). In *Bisheshur Dial* v. *Ram Sarup* (*v*) the principle is stated as follows :— S. 82

> "When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage."

This principle has been followed in the Punjab where the Act is not in force (*w*).

Illustrations.

(1) *A* mortgaged property to *B*. *B* obtained a decree for a sale on the mortgage. *C* purchased a quarter of the property in execution of a money decree against *A*. *B* then assigned the decree to *C*. The decree was extinguished *pro tanto* and *C* could only execute the decree for three-quarters of the amount against the residue of the property : *Sarju Kumar* v. *Thakur Prasad* (1920) 42 All. 544, 58 I.C. 743.

(2) *A* mortgages a village to *B* and then mortgages ½ of the same village to *C*. *C* brings a suit for sale on his mortgage and purchases ½ of the village subject to *B*'s mortgage. *B* obtains a decree for sale on his mortgage, *C* pays the amount of the decree and sets aside the sale. *C* has a right of contribution in respect of ½ of *B*'s decree : *Naubat Lal* v. *Mahadeo Prasad* (1929) 51 All. 606, 116 I. C. 297, ('29) A.A. 309.

(Note that the second illustration is a case of subrogation under sec. 92 of the present Act. *B*'s mortgage as to ½ is extinguished and *C* is subrogated to the rights of the prior mortgagee *B* as to ½ of the village.)

(3) *A*, mortgages, properties X and Y to *B*. *A* sells X to *C* subject to *B*'s mortgage. *A* then mortgages Y to *D*. *B* obtains a decree for sale on his mortgage. *D* pays the amount of the decree and averts the sale. *D* is entitled to contribution against *C* : *Raghavachari* v. *Venkatanarayana* (1935) 156 I.C. 715, ('35) A.M. 456.

(4) *A*, a mortgagee, purchased ½ of one of the mortgaged properties for Rs. 3,800. The value of that portion was Rs. 18,000. It was held that *A*'s mortgage debt was satisfied to the extent of Rs. 14,200 and he could enforce the unsatisfied portion of the debt against

(*s*) *Bisheshur Dial* v. *Ram Sarup* (1900) 22 All. 284 F.B. ; *Sarju Kumar* v. *Thakur Prasad* (1920) 42 All. 544, 58 I.C. 743 ; *Krishnachandra* v. *Pabna Model Co.* (1932) 59 Cal. 76, 137 I.C. 260, ('32) A.C. 349 ; *Chinniah* v. *A. B. Mirthuraman* (1934) 141 I.C. 366, ('34) A.M. 250.

(*t*) *Lakhmidas* v. *Jamnadas* (1898) 22 Bom. 304 ; *Mutty Lal* v. *Nandu Lal* (1907) 12 Cal. W.N. 745 ; *Aulad Ali* v. *Abdul Hamid* (1923) 2 Pat. 715, 74 I.C. 102, ('23) A.P. 490 ; *Nyaungiebin Co-operative Bank* v. *Maung Ba U* (1928) 6 Rang. 417, 14 I.C. 290, ('28) A.R. 266 ; *Prabhu Ram* v. *Kameshwar Prasad* (1940) 19 Pat. 524, 190 I.C. 449, (1940) A.P. 420 ; *Mt. Sadigunnissa* v. *Bhagwandan* (1937) 166 I.C. 779, (1937) A.O. 284.

(*u*) *Gangadas* v. *Jogendra* (1906) 11 Cal. W.N. 403 ; *Jugdeo* v. *Habibullah* (1907) 12 Cal. W.N. 107 ; *Maharajah Ramnarain* v. *Ram Kumar* (1916) 1 Pat. L.J. 228, 36 I.C. 206.

(*v*) (1900) 22 All. 293 F.B. ; *Mahomed Abdul* v. *Baldeo* (1930) A.A. 36.

(*w*) *Gian Singh* v. *Atma Ram* (1933) 141 I.C. 595, ('33) A.L. 374.

S. 82 the other parts of the security : *Suraj Narain* v. *Bisheshwar Singh* (1940) 19 Pat. 688, 191 I. C. 773, (1940) A.P. 420, (facts simplified). Following *Doolichand* v. *Ram Kishan Singh*, I. L. R. 7 Cal. 648, 8 I.A. 93 P.C.

But if the mortgagee buys not a share in the equity of redemption but a share in the property itself he has paid a higher price and the liability to discharge that share of the mortgage debt is on the mortgagor and not on him. In such a case he can enforce the whole of the mortgage debt against the rest of the property (*x*).

If there are successive mortgages of two properties to the same mortgagee and he realizes first the one and then the other in successive suits his first purchase is only of the equity of redemption and he is liable to contribution in the second suit (*y*). In *Kaliprosonno* v. *Kamini Soonduri* (*z*) there were two mortgages by conditional sale of several villages. The plaintiff purchased the equity of redemption of one village and then took an assignment of the mortgages. He then sought to escape contribution by foreclosing the first mortgage as to the remaining villages, and suing for a personal decree on the second mortgage. This, however, was not permitted and the foreclosure of the first mortgage was reopened and he was made to contribute to both mortgages. The case of *Fakiraya* v. *Gadigaya* (*a*) is a good illustration of a mortgagee on purchasing part of the equity of redemption being liable to contribution. Three fields and a house were mortgaged to the plaintiff'suncle for Rs. 2,000. The uncle got a money decree against the mortgagor and sold the property. The fields he purchased himself and the house was purchased by the first defendant. The plaintiff who had succeeded to his uncle's rights sued on the mortgage, and at the time of the suit the mortgage debt had increased to Rs. 4,000. The fields were valued at Rs. 3,600 and the house at Rs. 340. The first defendant was therefore liable for $340/3940 \times 4000 =$ Rs. 345.

In this case Fulton, J., in a dissenting judgment said that as the mortgagee had brought to sale the equity of redemption instead of enforcing his mortgage and bringing the property to sale free of incumbrance, there was an equity requiring satisfaction of the mortgage debt primarily out of the share purchased by the mortgagee. The sale was before the Act came into force in Bombay, but even if the principle of sec. 99 (now the Code of Civil Procedure, Order 34, rule 14) were applied, the only equity was that of the mortgagor to treat the plaintiff mortgagee's purchase as of a trustee ; see note "Mortgagee purchasing at a Court sale" under sec. 60. But the defendant could not avail himself of this equity, for he held the house under the same title.

It was at one time supposed that the mortgagee was accountable to the mortgagor if he paid less than the full value for the property. But it is now settled that even if the value of the property exceeds what is due on the mortgage, yet, in the absence of fraud, the mortgage debt is not discharged but only a portion of it which bears the same proportion to the whole amount of the debt as the property purchased bears to the whole property mortgaged (*b*). The fact that the property was purchased at a low price does not affect the case in any way (*c*).

Release by the mortgagee.—If the mortgagee releases any part of the property mortgaged, he only diminishes his own security and the rest of the property remains

(*x*) *Gaya Prasad* v. *Salik Prasad* (1881) 3 All. 682, 686 ; *Sesha Ayyar* v. *Krishna Ayyangar* (1901) 24 Mad. 96, 113.

(*y*) *Mahomed Taki* v. *Thomas* (1906) 4 Cal. L.J. 317 ; *Moro Raghunath* v. *Balaji* (1889) 13 Bom. 45.

(*z*) (1879) 4 Cal. 475.

(*a*) (1900) 26 Bom. 88.

(*b*) *Ponnambala Pillai* v. *Annamalai* (1920) 43 Mad. 372, 55 I.C. 666 F.B., following *Bisheshur Dial* v. *Ram Sarup* (1900) 22 All. 284 and overruling *Sami Rowappa* v. *Kuppusami Iyengar* (1911) 2 Mad. W. N. 342, 12 I.C. 130.

(*c*) *Bhagwati* v. *Shafaat Muhammad* (1921) All. 42, 58 I.C. 414, ('21) A.A. 350.

subject to the mortgage for the full amount (*d*). So when a part of the property mortgaged was acquired under the Land Acquisition Act and by consent of the mortgagors the compensation money was applied in discharge of an unsecured debt due by the mortgagor to the mortgagees subsequent transferees of the equity of redemption could not claim credit for the amount (*e*).

If the interest in the equity of redemption has been divided either by partition or part-sale before the release, the burden on the shares not released is increased. The holders of such shares have a right of contribution against the share released (*f*). This has already been explained in the note "Partial redemption" under sec. 60. Before that section was amended by the insertion of the word "only," it was generally thought that a release by a mortgagee of part of the property mortgaged had the same effect as if the mortgagee had himself bought the property released, and apportioned the mortgage debt (*g*), and that the mortgagee was liable to contribution and must abate a proportion of the mortgage debt (*h*), though of course part payment of the debt had not that effect (*i*). The reason was that the mortgagee could not release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected (*j*). But the obligation is not personal. The burden is upon the property and though the mortgagee may release his claim, the liability of the property released towards the mortgagors of the other shares is not affected and they can enforce contribution against it (*k*).

Illustration.

A mortgaged a 3 anna share to *B*. In execution of a money decree against *A* the 3 anna share was sold and was purchased 1 anna by *C*, 1 anna by *D* and 1 anna by *E*. *B* sued on his mortgage and got a decree for Rs. 15,533-5-4. *B* entered into a compromise with *C* and released *C*'s share for Rs. 1,333-5-4 and agreed to indemnify *C* for any further sum he might be required to pay under the decree. *B* then brought *D*'s share to sale and it realized Rs. 4,200. *B* then brought *E*'s share to sale and it realized Rs. 10,000 and the mortgage was discharged. *E* then sued for contribution. As *C*'s share had been released for less than the rateable proportion, it was liable to contribute. *D*'s share could not contribute as it had been sold. But as the sale of *D*'s share realized only Rs. 4,200 the burden on the shares of *C* and *E* was Rs. 11,333-5-4, *i.e.*, Rs. 5,666-10-8 each. *E* had therefore a right to recover Rs. 5,666-10-8 less Rs. 1,333-5-4, *i.e.*, Rs. 4,333-5-4, from *C*'s share. The first Court however dismissed the suit against *C* and gave *E* a decree against *B* on the indemnity. This was wrong, as *E* was not a party to the agreement of indemnity. *E* appealed against the dismissal of his suit against *B* but not against the dismissal of his suit against *C* and so he got no relief. If *E*'s case had been properly conducted he would have had a decree against *C* for Rs. 4,333-5-4 and *C* could then have sued *B* on the indemnity : *Karamat Ali* v. *Gorakhpur Bank* (1922) 44 All. 488, 67 I.C. 29, ('22) A.A. 495.

(*d*) *Sheo Prasad* v. *Behari Lal* (1903) 25 All. 79; *Sheo Tahal* v. *Sheodan Rai* (1906) 28 All. 174; *Jugal Kishore* v. *Kedar Nath* (1912) 34 All. 606, 16 I.C. 400; *Perumal* v. *Raman Chettiar* (1917) 40 Mad. 968, 42 I.C. 352 F.B.; *Rama* v. *Manak* (1912) 7 Bom. L.R. 191; *Ram Chand* v. *Prabhu Dayal* (1942) A.PC. 50.

(*e*) *Kustea Loan Office* v. *Annada Charan* (1923) 27 Cal. W.N. 763, 77 I.C. 26, ('23) A.C. 681.

(*f*) *Jugal Kishore* v. *Kedar Nath* (1912) 34 All. 606, 16 I.C. 400; *Perumal* v. *Raman Chettiar* (1917) 40 Mad. 968, 42 I.C. 352 F.B.

(*g*) *Hari Kissen* v. *Veliat Hossein* (1903) 30 Cal. 755.

(*h*) *Mir Eusuff Ali* v. *Panchanan Chatterjee* 1910) 15 Cal. W.N. 800, 11 Cal. L.J. 639, 6 I.C. 842; *Ponnusami Mudaliar* v. *Srinivasa* (1908) 31 Mad. 333.

(*i*) *Pande Satdeo* v. *Ramayan Tewari* (1923) 2 Pat. 335, 71 I.C. 705, ('23) A.P. 242.

(*j*) *Surjiram* v. *Barhamdeo* (1905) 1 Cal. L.J. 337; *Surjiram* v. *Barhamdeo* (1905) 2 Cal. L.J. 202; *Imam Ali* v. *Baij Nath* (1906) 33 Cal. 613; *Hakim Lal* v. *Ram Lal* (1907) 6 Cal. L.J. 46; *Ponnusami Mudaliar* v. *Srinivasa* (1908) 31 Mad. 333; *Muktakeshi* v. *Ramani* (1927) 96 I.C. 504, ('27) A.C. 195.

(*k*) *Jugal Kishore Sahu* v. *Kedar Nath* (1912) 34 All. 606, 16 I.C. 400; *Perumal* v. *Raman Chettiar* (1917) 40 Mad. 968, 42 I.C. 352 F.B.; *Ramchand* v. *Parbhu Dayal* (1942) A.PC. 50.

S. 82

If the mortgagee releases part of his security his right to proceed for the whole debt against the remainder is not affected. Therefore if the remainder is not sufficient to discharge the whole debt he is still entitled to a personal decree in cases in which the mortgagor is personally liable (*l*). Calcutta decisions to the contrary (*m*) proceed on the mistaken view that by such release the mortgagee makes himself liable to contribution. The mortgagee's remedy under Order 34, rule 6 of the Code of Civil Procedure is not impaired when he releases one of several mortgagors, for the liability for the debt in India is joint and several (*n*).

Laches of the mortgagee.—It is no part of the duty of the mortgagee to keep an account of what the mortgagor himself was doing with his equity of redemption. It is therefore fundamentally erroneous to talk of a mortgagee who is out of time in discovering that an equity of redemption has been assigned as a person who is guilty of negligence or laches (*o*). But before the Act was amended in 1929 it was said that the mortgagee cannot claim to throw the entire burden upon a portion of the mortgaged premises because by reason of his own laches he has lost his remedy against the remainder, *e.g.*, by allowing the period of limitation to expire (*p*). In a Bombay case, *Budhmal Kevalchan* v. *Rama Valad Yesu* (*q*), the mortgage was executed in 1870 and the equity of redemption was sold in 1883 to the defendant and another who separated and divided it half and half. The mortgagee sued to recover the whole amount from the defendant, but did not make the other sharer a party and the suit as against him became barred by limitation. The Court held that he could only recover half the debt from the defendant. Again, when the mortgagee omitted some mortgaged lands from his suit and included others that were not mortgaged, his conduct was treated as a release of the lands not included and it mattered not whether the mistake was intentional or not (*r*). These are erroneous decisions, and the Act as amended makes it clear that they are not law; for the mortgagee has a right to enforce the mortgage against any part of the security, and the discharge of one mortgagor by limitation or otherwise does not affect his liability for contribution to the co-mortgagor.

Suit for contribution.—The extension of the doctrine of subrogation under sec. 92 of this Act to the case of redemption by a co-mortgagor has limited the scope of suits for contribution. Thus if three brothers *A*, *B* and *C* mortgage their joint property and then effect partition in equal shares and *A* redeems the whole mortgage, then *A* would have a right of suit for contribution out of the shares of *B* and *C* for ⅔ of the mortgage money. But under the doctrine of subrogation enacted in sec. 92, the mortgage on *A*'s ⅓ share is extinguished, and he is subrogated to the rights of the mortgagee, as to ⅔, on the shares of *B* and *C*. It would make no difference if *A* instead of redeeming the whole mortgage paid the whole mortgage money in order to avoid a sale by the mortgagee, for in that case also he would, before the present sec. 92, have had a right of contribution (*s*), while now he is subrogated to the rights of the mortgagee. But there would be no right

(*l*) *Sheo Prasad* v. *Behari Lal* (1903) 25 All. 79; *Ghafur Hasan* v. *Muhammad* (1906) 28 All. 19; *Pirbhu Narayan* v. *Amir Singh* (1907) 29 All. 369; *Arunachala Velan* v. *Venkatarama* (1920) 26 Mad. L.J. 192, 51 I.C. 84.

(*m*) *Ram Ranjan* v. *Indra Narain* (1906) 33 Cal. 890. See also cases cited at f.n. (*k*) at p. 425.

(*n*) *Chand Mall* v. *Ban Behari* (1923) 50 Cal. 718, 74 I.C. 1021, ('24) A.C. 209.

(*o*) *Rajani Kanta* v. *Sourendra Nath* (1924) 38 Cal. W.N. 124, 151 I.C. 454, ('34) A.C. 421.

(*p*) *Imam Ali* v. *Baijnath* (1906) 33 Cal. 613; *Isri Prosad* v. *Rai Gunga* (1909) 14 Cal. W.N. 165, 3 I.C. 311.

(*q*) (1920) 44 Bom. 223, 55 I.C. 327.

(*r*) *Mayashankar* v. *Burjorji* (1926) 27 Bom. L.R. 1449, 91 I.C. 978, ('26) A.B. 31.

(*s*) *Ibn Hasan* v. *Brijbhukan* (1904) 26 All. 407; *Rajah of Vizianagram* v. *Raja Setrucherla* (1903) 26 Mad. 686; *Dhaleswar Prosad* v. *Harihar Prosad* (1915) 21 Cal. L.J. 104, 27 I.C. 780; *Muhammad Mian* v. *Thakur Bharat* (1930) 5 Luck. 727, 125 I.C. 402, ('30) A.O. 260; *Krishnaswami Pillai* v. *Janaklaxmi Ammal* (1934) 66 Mad. L.J. 308, 148 I.C. 217, ('34) A.M. 189.

of contribution or of subrogation as to the 5 per cent. paid to the disappointed purchaser, for that is not a charge on the property (*t*). S. 82

After the enactment of sec. 92.—Cases of contribution arise only when the mortgagee realizes his debt from different parcels of the property unequally, and not when one co-mortgagor redeems or pays the amount of the mortgage to avert a sale. The liability to contribute which arises when the mortgagee realizes his debt unequally is by the joint effect of sec. 82 and 100 a charge, so that limitation is 12 years under Article 132 from the time when the excess payment was made (*u*). This was so held by the Allahabad High Court. The point was referred to but not decided when the case went on appeal to the Privy Council (*v*).

Before the enactment of sec. 92.—When one co-mortgagor redeemed the whole mortgage there were conflicting decisions as to his rights over the other shares. In some cases it was held that he had a charge—on the analogy of the charge that was given in the old sec. 95 (*w*). But in a case where one of several representatives of the deceased mortgagor paid the mortgage debt, the Calcutta High Court held that he had no charge (*x*), but this was dissented from in a later case in which a charge was allowed when a purchaser of one of two properties mortgaged paid off the mortgage debt (*y*). The same Court also held that though a co-mortgagor paying off a mortgage debt had a charge, that charge cannot be claimed when an assignee of a mokurrari interest created by the mortgagor paid off the mortgage debt (*z*), a distinction which is not intelligible. In some cases the Calcutta High Court allowed a charge as a matter of equity (*a*). A charge would not be enforcible against a bona fide purchaser for value without notice, but the Allahabad High Court nevertheless held that a redeeming co-mortgagor was entitled to priority over a subsequent mortgagee (*b*). All these cases have been rendered obsolete by the extension of the doctrine of subrogation to co-mortgagors.

Co-mortgagor omitted from the mortgagee's suit.—It is no defence that the co-mortgagor against whom contribution is sought was improperly omitted from the mortgagee's suit (*c*). In *Shanto Chandar Mukerji* v. *Nain Sukh* (*d*) the mortgagee obtained a decree for sale against the *karta* of a joint Hindu family and brought the property to sale. The mortgage was discharged by the price paid by the auction purchaser. Four sons, who were not parties to the suit, were bound by the mortgage but not by the decree.

(*t*) *Bhagwan Singh* v. *Mazhar Ali* (1914) 36 All. 272, 23 I.C. 339; *Krishnaswami Pillai* v. *Janaklaxmi Ammal*, *supra*; *Jag Mohan* v. *Jugal Kishore* (1932) 36 Cal. W.N. 4, 137 I.C. 475, ('32) A. PC. 99; *Nisar Ahmad Khan* v. *Manjur Ahmad* (1935) 154 I.C. 267, 35 A.O. 245.

(*u*) *Aziz Ahmad Khan* v. *Chhote Lal* (1928) 50 All. 569, 109 I.C. 38, ('28) A.A. 241; *Bhagwandas* v. *Karam Husain* (1911) 33 All. 706, 11 I.C. 145; *Brij Bhukan* v. *Bhagwan Dutt* (1942) A.O. 114 (F.B.) (the charge relates back to the first mortgage for the purpose of determining priority but not for purposes of limitation).

(*v*) *Faquir Chand* v. *Aziz Ahmad* (1932) 59 I.A. 106, 54 All. 199, 36 Cal. W.N. 436, 55 Cal. L.J. 271, 1932 All. L.J. 195, 62 Mad. L.J. 492, 34 Bom. L.R. 760, 136 I.C. 751, ('32) A. PC. 74.

(*w*) *Ibn Husain* v. *Ramdai* (1890) 12 All. 110; *Baldeo Sahai* v. *Baij Nath* (1891) 13 All. 371; *Hari Raj* v. *Ahmaduddin* (1897) 19 All. 545; *Shanto Chandar* v. *Nain Sukh* (1901) 23 All. 355; *Danappa* v. *Yamnappa* (1902) 26 Bom. 379; *Bhagwan* v. *Har Dei* (1903) 26 All. 227; *Yakub Ali* v. *Kishan* (1906) 28 All. 743; *Har Prasad* v. *Raghunandan* (1909) 31 All. 166, 1 I.C. 825; *Bhagwan Das* v. *Karam Husain* (1911) 33 All. 708, 11 I.C. 145 F.B.; *Muhammad Mian* v. *Thakur Bharat* (1930) 5 Luck. 727, 125 I.C. 402, ('30) A.O. 260; *Kashi Ram* v. *Het Singh* (1915) 37 All. 101, 26 I.C. 417. See also *Panchom Singh* v. *Ali Ahmad* (1881) 4 All. 58 and *Bhagirath* v. *Naubat Singh* (1879) 2 All. 115, both cases before the Act.

(*x*) *Nawab Jahan* v. *Mirza Shujauddin* (1904) 9 Cal. W.N. 865.

(*y*) *Dhakeswar Prosad* v. *Harihar Prosad* (1915) 21 Cal. L.J. 104, 27 I.C. 780.

(*z*) *Raushan Ali* v. *Kali Mohan* (1906) 4 Cal. L.J. 79.

(*a*) *Parbhu Narain* v. *Babu Beni* (1909) 14 Cal. W.N. 361, 5 I.C. 779; *Digambar Das* v. *Harendra Narayan* (1909) 14 Cal. W.N. 617, 5 I.C. 165.

(*b*) *Har Prasad* v. *Raghunandan*, *supra*, followed in *Kashi Ram* v. *Het Singh*, *supra*.

(*c*) *Jagat Narain* v. *Qutub Husain* (1882) 2 All. 807; *Chagandas* v. *Gansing* (1896) 20 Bom. 615; *Krishna Ayyan* v. *Muthu Kumaraswamya* (1906) 29 Mad. 217.

(*d*) (1901) 23 All. 355.

S. 82

The sons' shares in the property were exempted from the sale. The auction purchaser was not entitled to recover any part of the purchase money from the decree holder; but as he had relieved their shares from the mortgage he was entitled to a charge for four-fifths of the mortgage money.

Parties.—It has been held that the claim must be preferred against each party liable to contribute and not against all collectively (*e*). However this may be, all persons in whom the mortgaged property is vested should be made parties to the suit (*f*). If apart from any question of non-joinder of parties, the materials placed before the Court are not sufficient to work out the account, the Privy Council have said that the suit should be dismissed (*g*).

Scope of the suit.—The owner of property sold on two separate occasions may bring a single suit as to both sales (*h*). In a suit to enforce a mortgage the decree may settle questions of contribution between the mortgagors *inter se* (*i*). But in a redemption suit, the Allahabad High Court refused to determine questions of contribution between the holders of the equity of redemption (*j*). A suit for contribution is not barred by *res judicata* or by Order 2, rule 2 of the Code of Civil Procedure on the ground that the claim was not included in the suit for redemption (*k*). This was a suit by the owner of one of several properties mortgaged and such a case is now not one of contribution but of subrogation, and there would be no subrogation until the mortgage was discharged. In the case of *Sesha Ayyar* v. *Krishna Ayyangar* (*l*) the facts of which are set out at p. 530, the Madras High Court said that if *P* had a right of contribution against *Y*, he could not join that in a suit to enforce his mortgage against *Z*. As stated above this case has been overruled by a Full Bench on the main point. It is doubtful whether this case can be supported on the present point as to a claim for contribution being premature in a suit on the mortgage. That such a claim is not premature has been definitely held in *Chunilal* v. *Srinivasa, supra.*

Questions of contribution are sometimes referred to execution proceedings (*m*); but the practice is improper (*n*), for a claim to contribution cannot be said to relate to the execution, discharge or satisfaction of the decree (*o*) and should be enforced by an independent suit.

Contribution if mortgage debt not fully discharged.—Before the enactment of the doctrine of subrogation it was a point of controversy whether a suit for contribution was maintainable by a co-mortgagor who had paid more than his rateable proportion but without fully satisfying the mortgage debt. A Full Bench of the Allahabad High Court has by a majority held that it is not (*p*), and this is also the view taken in Calcutta (*q*). The Madras cases are not consistent (*r*). Ghose suggests that there may be a personal claim for reimbursement, when the mortgage is not fully satisfied, but no charge until

(*e*) *Hira Chand* v. *Abdal* (1877) 1 All. 455.

(*f*) *Shankarlal* v. *Latafat* (1916) 14 All. L.J. 713, 35 I.C. 600.

(*g*) *Faquir Chand* v. *Aziz Ahmad* (1932) 59 I.A. 106, 54 All. 199, 36 Cal. W.N. 436, 55 Cal. L.J. 271, 1932 All. L.J. 195, 62 Mad. L.J. 492, 34 Bom. L.R. 760, 136 I.C. 751, ('32) A.PC. 74.

(*h*) *Ibn Husain* v. *Ramdai* (1889) 12 All. 110.

(*i*) *Bhyrub Chunder* v. *Nuddiar Chand* (1869) 12 W.R. 291; *Ibn Hasan* v. *Brijbhukan* (1904) 26 All. 407, 432 F.B.; *Chunilal* v. *Srinivas* (1944) A.M. 276.

(*j*) *Rugad Singh* v. *Sat Narain* (1905) 27 All. 178.

(*k*) *Sabir Husain* v. *Firasat Ghaus* (1929) 27 All. L.J. 1162, ('29) A.A. 696.

(*l*) (1901) 24 Mad. 96.

(*m*) *Harendra Kumar* v. *Din Dayal* (1906) 4 Cal. L.J. 195.

(*n*) *Amir Chand* v. *Bukshi* (1907) 34 Cal. 13; *Veerapa* v. *Chandra Mereleshwara* (1943) A.M. 637, (1943) 2 M.L.J. 45, 56 M.L.W. 365.

(*o*) *Ram Saran* v. *Janki* (1896) 18 All. 106; *Sarju Lal* v. *Baijnath Prasad* (1923) 71 I.C. 26, ('23) A.P. 44.

(*p*) *Ibn Hasan* v. *Brijbhukan*, *supra*; *Muhammad Yahiya* v. *Rashid-ud-din* (1909) 31 All. 65, 1 I.C. 5, approved in *Muhammad Mian* v. *Thakur Bharat* (1930) 5 Luck. 727, 115 I.C. 402, ('30) A.O. 260.

(*q*) *Gurdeo Singh* v. *Chandrikah* (1908) 36 Cal. 193, 1 I.C. 918.

(*r*) *Pattabhiramayya* v. *Ramayya* (1897) 20 Mad. 23 on the one hand and *Raja of Vizianagram* v. *Raja Setrucherla* (1903) 26 Mad. 686, 716 on the other.

the mortgage is fully paid off (*s*). In an Allahabad case (*t*) a suit for contribution was held to be maintainable when further realization of the mortgage decree had become time-barred. The new sec. 92 excludes the right of partial subrogation, and it is submitted that contribution when the mortgage debt is not fully discharged must also be excluded, for it would give rise to complications and multiplicity of actions, if claims for contributions were allowed while further realizations of the mortgage debt were pending.

Valuation.—The section requires that the valuation of the properties should be made as at date of mortgage. There was no such express provision in the old section, but the Courts had held that valuation should be made as at the date of the mortgage, irrespective of the price that may have been paid by a purchaser (*u*). This rule has the support of a decision of the Judicial Committee who in assessing contribution to a decree for mesne profits assessed liability as at the date of the decree (*v*). When a mortgagor died and one of his three sons sold his share of the equity of redemption to the mortgagee, the latter had to give credit for one-third share of the mortgage debt (*w*). In a Bombay case the valuation was made as at the date of sale, but there does not appear to have been a change in the value (*x*). In *Mardan Singh* v. *Thakur Sheo Dayal* (*y*) a simple money decree holder purchased in execution of his decree a two-thirds share of two mortgaged villages and paid off the mortgage in order to avert a mortgagee's sale. He claimed contribution on the basis of the value at the time of his purchase, but the Court held that the valuation should be made as at the time of the mortgage. Hence if a mortgagee purchases some items of the property mortgaged for a sum equal to the amount of the mortgage debt, the mortgage will not be extinguished for the value of the portion purchased will be assessed as at the date of the mortgage (*z*).

Contract to the contrary.—The liability to rateable contribution imposed by this section may be modified by the terms of the mortgage (*a*). If the mortgage specifies one property as the primary security for the debt, the liability will be thrown entirely on that property to the exoneration of the ancillary security (*b*). But the description of a property as collateral security does not necessarily imply that it is a secondary security so as to be exonerated (*c*). The contract to the contrary is one between the mortgagor and mortgagee (*d*), and not necessarily at the time of the mortgage (*e*). It was, however, held by the Allahabad High Court that the contract to the contrary is general and may refer to any contract such as an implied agreement between the surety and the principal debtor (*f*). In *Ramabhadrachar* v. *Srinivasa* (*g*), a sharer in the equity of redemption sold his share in the property to the plaintiff with an indemnity bond authorizing him to

(*s*) Ghose, p. 398.

(*t*) *Udit Narain* v. *Asarfi Lal* (1916) 38 All. 502, 35 I.C. 732.

(*u*) *Mutty Lal* v. *Nandu Lal* (1907) 12 Cal. W.N. 745; *Jugdeo Singh* v. *Habibullah* (1907) 12 Cal. W.N. 107; *Shib Lal* v. *Bhawani Shankar* (1904) 26 All. 72; *Bhagwan Singh* v. *Mazhar Ali* (1914) 36 All. 272, 23 I.C. 389; *Meghraj* v. *Krishna Chandra* (1924) 46 All. 286, 78 I.C. 243, ('24) A.A. 365; *Shankar Lal* v. *Latafat* (1916) 14 All. L.J. 718, 35 I.C. 600; *Gobind* v. *Kailash* (1917) 25 Cal. L.J. 354, 40 I.C. 230.

(*v*) *Jotindra Mohun* v. *Guru Prosunno* (1904) 31 Cal. 597, 31 A.I. 94.

(*w*) *Mutty Lal* v. *Nandu Lal*, (1907) 12 Cal. W.N. 745.

(*x*) *Fakiraya* v. *Gadigaya* (1902) 26 Bom. 88.

(*y*) (1905) 27 All. 549.

(*z*) *Ponnambala* v. *Annamalai* (1920) 43 Mad. 272, 55 I.C. 666 overruling *Sami Rowarpa* v. *Kuppusami* (1911) 2 Mad. W.N. 342, 12 I.C. 130.

(*a*) *Re Dunlop, Dunlop* v. *Dunlop* (1882) 21 Ch. D. 583 C.A.

(*b*) *Stringer* v. *Harper* (1858) 26 Beav. 33.

(*c*) *Re Athill, Athill* v. *Athill* (1880) 16 Ch.D. 211 C.A.

(*d*) *Ramabhadrachar* v. *Srinivasa* (1901) 24 Mad. 85; *Charan Singh* v. *Ganeshi Lal* (1926) 24 All. L.J. 401, 94 I.C. 1048, ('26) A.A. (1926) 24 All. L.J. 714, 96 I.C. 765; *Sonaji* v. *Krishna Rao* (1931) 27 Nag. L.R. 258, 134 I.C. 856, ('31) A.N. 172; *Muthu Ramaswami* v. *Govind Vedayachi* (1932) 137 I.C. 285, ('32) A. M. 218; *Doraiswami* v. *Govindrajalu* (1943) A.M. 429, (1943) Mad. 531, (1943) 1 M.L.J. 291, 56 M.L.W. 194, 208 I.C. 370 (F.B.).

(*e*) *Rama* v. *Manah* (1905) 7 Bom. L.R. 191.

(*f*) *Karim Khaleean* v. *Narendra Nath* (1936) A.A. 258, 58 All. 548, 162 I.C. 117, (1936) A.L.J. 1273.

(*g*) (1901) 24 Mad. 85. See also *Bara Saheb* v. *Krishna Bayan* (1936) A.M. 896; *Muthu* v. *Arunayee* (1936) A.M. 901.

S. 92 proceed against other properties of the vendor in case his share was sold by the mortgagee. The mortgagee realized his debt by sale of the share sold to the plaintiff who thereupon recovered the amount on the indemnity bond. The plaintiff was nevertheless entitled to contribution because the indemnity bond merely represented the difference between the value of the property and the value of the equity of redemption, so that the net result of the transaction was a sale of the equity of redemption. The right to contribution was therefore not affected by the indemnity bond. In *Kunchithapatham* v. *Palamalai* (*h*), a contract between a vendor and a purchaser of a share in the equity of redemption was held not to be a contract to the contrary; but the contrary has been held in a Patna case (*i*). But no doubt the statutory liability could be altered by subsequent contract between the contributories; or it may be altered by subsequent decree (*j*).

The following case (*k*) was decided as an instance of a contract to the contrary under the law before the enactment of s. 92. There was a first mortgage of villages K and L to *A*, a second mortgage of village K to *B* and a third mortgage of village L to *C*. *B* enforced his mortgage by sale and purchased village K. *B* then paid off *A*'s mortgage of villages K and L. *B* then sued *C* for contribution as he had relieved L of the first mortgage. It was held that there was no right of contribution as by agreement the whole burden of the first mortgage had been put upon K. Under the new s. 92 this was a case of subrogation. *B* when he paid off the first mortgage was subrogated to the rights of the first mortgagee as against *C*. But as the whole burden of the first mortgage had been placed upon K, there was no prior mortgage of L and therefore no subrogation as against *C*.

The Judicial Committee have said that the statutory liability to contribution under this section is not subject to any extrinsic principle (*l*). If there is no contract to the contrary the right cannot be controlled by equitable considerations.

Illustration.

A in 1906 mortgaged properties X and Y to *B* for Rs. 8,000. Various creditors of *A* attached his interest in both properties. Nevertheless *A* in May 1914 purported to sell X to *C* and left Rs. 17,000 part of the price with *C* to discharge *B*'s mortgage. Y was then brought to sale by an attaching creditor and purchased by *D* in July 1914. X was then brought to sale by an attaching creditor and purchased by *C* in November 1914. This sale overrode the sale of May 1914 which was contrary to the attachment. *C* was therefore purchaser of X by the execution sale of November 1914 and *D* was purchaser of Y by the execution sale of July 1914, both subject to *B*'s mortgage. *B* in 1918 obtained a decree for sale on his mortgage for Rs. 31,939. *C* paid off this decree and claimed contribution against Y which had been purchased by *D*. It was held that he was entitled to contribution for a rateable proportion of Rs. 31,939, although if he had performed in 1914 his contract with *A*, the mortgage might have been paid off for Rs.17,000: *Ganeshi Lal* v. *Charan Singh* (1930) 52 All. 358, 57 I.A. 189, 124 I.C. 911, ('30) A.PC. 183.

One debt.—There is no liability to contribute unless the properties are subject to a common debt. Thus if property X is mortgaged to *A*, and property Y to *B*, and then properties X and Y to *C* and *A* and *B* agree to give priority to *C*'s mortgage then if *C*'s

(*h*) (1917) 32 Mad. L.J. 347, 39 I.C. 405; So also in *Mothooranath Chuttopadhyu* v. *Kristokumar* (1879) 4 Cal. 369, a case decided under s. 69 of the Contract Act.

(*i*) *Isri Prasad* v. *Jagat Prasad* (1937) 16 Pat. 557, 172 I.C. 187, (1937) A.P. 628.

(*j*) *Satya Kripal* v. *Gopi Kishore* (1901) 6 Cal. W.N. 582.

(*k*) *Gulzari Lal* v. *Ali Ahsan* (1933) 147 I.C. 521, 1933 All. L.J. 1639, ('33) A.A. 929.

(*l*) *Ganeshi Lal* v. *Charan Singh* (1930) 52 All. 358, 57 I.A. 189, 124 I.C. 911, ('30) A.PC. 183, confirming *Charan Singh* v. *Ganeshi Lal* (1926) 24 All. L.J. 401, 94 I.C. 1048, ('26) A.A. 352 and distinguishing *Muhammad Abbas* v. *Muhammad Hamid* (1912) 9 All. L.J. 499, 44 I.C. 179; *Isri Prasad* v. *Jagat Prasad* (1937) 16 Pat. 557, 172 I.C. 187, (1937) A.P. 628.

mortgage is realized by the sale of X and of Y and the surplus sale proceeds of X are insufficient to pay *A*'s mortgage he has no right of contribution against *B* (*m*).

Nor is there a right of contribution when one property is mortgaged and the other property is subject to a general lien for debt (*n*).

Subject to marshalling.—The last paragraph of the section is somewhat cryptic, but it apparently means that the right of contribution is subject to the right of marshalling. Thus if the owner of two properties X and Y:

mortgages	X to	*A*
,,	Y to	*B*
,,	X and Y to	*C*
,,	X to	*D*

then X and Y both contribute to *C*'s mortgage in the proportion of their values after deducting from X the amount of *A*'s mortgage and from Y the amount of *B*'s mortgage; but under the right of marshalling *D* could require *C* to proceed first against Y. This right of D to marshal would prevail against the right of contribution.

Equal equities.—There is no liability to contribution unless the equities are equal; in other words, both the properties must be equally liable for the debt. If a person mortgages and subsequently assigns part of the mortgaged property without mention of the mortgage, he is not entitled to call on the assignee to contribute (*o*).

Deposit in Court.

Power to deposit in Court money due on mortgage.

83. At any time after the principal money *payable in respect of any mortgage* has become *due* and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed *and all documents in his possession or power relating to the mortgaged property* apply for and receive the money, and the mortgage deed *and all such other documents* so deposited shall be delivered to the mortgagor or such other person as aforesaid.

(*m*) *Re Kelly* (1858) 9 Ir. Ch. R. 53.
(*n*) *Re Dunlop, Dunlop* v. *Dunlop* (1882) 21 Ch. D. 583.
(*o*) *Vishwanatha* v. *Vengama* (1924) 78 I.C. 52, ('24) A.M. 749; *Muhammad Abbas* v. *Muhammad Hamid* (1912) 9 All. L.J. 499, 44 I.C. 179; *In re Darby's Randall* v. *Darby* (1907) 2 Ch. 465.

S. 83

the Court shall, before paying to him the amounts so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

Amendments.—Three amendments have been made in this section by Act 20 of 1929. The words "principal money payable in respect of any mortgage has become due" have been substituted for the words "principal money has become payable" to indicate that "payable" means "due" in point of time. This corresponds to a similar amendment in sec. 60. Again the words "and all documents in his possession and power relating to the mortgaged property" and the words "and all such other documents" have been inserted. This also corresponds to the amendment of sec. 60 to express the liability of the mortgagee on redemption to deliver up not only the mortgage deed but all documents relating to the mortgaged property. The third amendment is the addition of the last paragraph requiring a mortgagee in possession to deliver possession, and to execute a reconveyance or give a written acknowledgment. This requisition was contained in rules made by some of the High Courts with reference to this section. The validity of these rules had been questioned (*p*) but the amended section removes the doubt.

Deposit in Court.—This section is a survival from the repealed Bengal Regulations: Bengal Regulation 1 of 1778 enabled the mortgagor to redeem by payment into Court, and Bengal Regulation 17 of 1806 required the mortgagee to make an application in Court if he intended to foreclose a mortgage by conditional sale, and allowed the mortgagor a year's grace for redemption—see note "Bengal" under sec. 60.

A mortgagor, after the mortgage money has become due and before his right to redeem has become barred, may either (1) pay or tender at the proper time and place the amount due on the mortgage under sec. 60, or (2) deposit the amount due on the mortgage under sec. 83, or (3) sue for redemption under sec. 91 of the Act (*q*).

Under the Regulations the proceedings of the Judge were ministerial (*r*). Similarly this section provides a summary procedure for redemption which is not a suit. The provisions of sec. 375 of the Code of Civil Procedure, 1882, now Order 23, rule 3, do not apply, and an agreement between the mortgagor and mortgagee that the mortgagee should accept the deposit as a discharge of his mortgage on the mortgagor conveying part of the mortgaged premises to him, is not a compromise of a suit, and is enforceable though not recorded in Court (*s*). The function of the Court being ministerial it is submitted that it is not for the Court to ascertain the amount due on the mortgage or the sufficiency of the deposit or to decide the rival claims of contending mortgagees. So in an Allahabad case (*t*) as also in a Madras case (*u*), and a Patna case (*v*), it was held that a mortgagor

(*p*) Shephard and Brown, p. 352.

(*q*) *Het Singh* v. *Bihari* (1921) 43 All. 95, 59 I.C. 92, ('21) A.A. 358; *Sardar Karan Singh* v. *Raja Muhammad Siddik* (1901) 4 O.C. 387 B.

(*r*) *Forbes* v. *Ameeroonissa Begum* (1865) 10 M.I.A. 340.

(*s*) *Tatayya* v. *Pichayya* (1890) 13 Mad. 316.

(*t*) *Debendra Mohan* v. *Sona* (1904) 26 All. 291; *Ganeshi Lal* v. *Rohni* (1928) 50 All. 655, 108 I.C. 570, ('28) A.A. 311 dissenting from *Ram Sumran* v. *Sahibzada* (1885) All. W.N. 328.

(*u*) *Madhavi Amma* v. *Kunhi Pathumma* (1900) 23 Mad. 510.

(*v*) *Anup Kuar* v. *Kameshwar Nath* (1939) 183 I.C. 454, (1939) A.P. 415.

could not make a deposit to the account of a mortgagee and a third person. This is because the association of a third person would make it impossible for the mortgagee to withdraw the money without his consent, and it makes no difference if the mortgagor acted bona fide. But as a sub-mortgagee is an assignee of a mortgagee the deposit may be in favour of a legal representative of the mortgagee and his sub-mortgagee (w). But the Madras High Court has gone to the length of saying that a mortgagor should not deposit the money in Court if there is no dispute (x) and that he should deposit the money when he is in doubt as to who is the rightful claimant and that by so doing he absolves himself from liability as to the person entitled to receive it (y). The Patna High Court followed the Madras decisions in the case of a deposit made to the credit both of the beneficial owners and the benamidar mortgagees but at the same time held that ordinarily it is the duty of the person interested to find out who the mortgagee is and to make the deposit to his account (z). Again when one of the mortgagees was dead, the Allahabad High Court held that the Court was competent to inquire who were the mortgagees on the date of the application (a). A deposit, however, made to the account of the Estate of the deceased mortgagee is a good deposit, although one of the heirs may have been wrongly named (b).

It is submitted that this is wrong, for the summary procedure under this section is not applicable to contentious cases. For instance, in an Allahabad case (c) when there was a dispute as to who was the legal representative of a deceased mortgagee, the mortgage was held to be discharged although the Court had ordered the deposit to be paid to the claimant with the worse title. The mortgagor should make the deposit on account of the person whom he alleges to be the mortgagee. If the mortgagee is willing to accept the deposit and returns the mortgage deed the Court pays him the money; otherwise the deposit should be returned to the mortgagor and the parties referred to a regular suit (d). The mortgagee cannot be allowed to withdraw a deposit conditionally without prejudice to further contentions that he might raise. When a mortgagor successfully opposed a mortgagee's application to withdraw on such terms the opposition did not invalidate the deposit (e).

Or any other person entitled.—The summary procedure for redemption is available not only to the mortgagor but to any person entitled to redeem under sec. 91; and so a person under contract to purchase cannot make a deposit (f). A prior mortgagee who has foreclosed without making the puisne mortgagee a party may make a deposit in Court to redeem the puisne (g). In a Patna case (h) the Court said that "sec. 83 deals with the right to deposit the mortgage money in Court and not with the right to redeem". If this means that a person not entitled to redeem may make a deposit, it conflicts with the express words of the section.

At any time after the principal money has become due.—These are the same words as in sec. 60 and indicate that the summary procedure for redemption is available

(w) *Subba Rao* v. *Pakkiamma Nadathi* (1924) 46 Mad. L.J. 74, 80 I.C. 962, ('24) A.M. 453.

(x) *Vasava* v. *Kelu* (1926) Mad. W.N. 648, 97 I.C. 735, ('26) A.M. 1067.

(y) *Thevaraya Reddy* v. *Venkatachalam* (1917) 40 Mad. 804, 37 I.C. 444; *Nagathal* v. [illegible] (1923) 44 Mad. L.J. [illegible] 79 I.C. 40, ('23) A.M. 354; [illegible] *Iyer* v. *Krishnaswami Iyer* (1924) 46 Mad. L.J. 497, 84 I.C. 696, ('24) A.M. 559.

(z) *Narayan Sahu* v. *Krishna Sahu* (1934) 153 I.C. 1035, ('34) A.P. 622.

(a) *Balbhaddar Prasad* v. *Ditto* (1929) 51 All. 1016, 118 I.C. 657, ('29) A.A. 754.

(b) *Ram Gopal* v. *Lachhman Das* (1938) A.A. 423, (1938) All. 767, (1938) A.L.J. 617, 176 I.C. 509 (F.B.).

(c) *Ram Sumran* v. *Sahibzada* (1885) All. W. N. [illegible]

(d) *Ahmadullah* v. *Abdul Rahim* (1923) 45 All. 592, 74 I.C. 763, ('24) A.A. 26.

(e) *Subba Rao* v. *Savarayudu* (1924) 47 Mad. 7, 21, 72 I.C. 292, ('23) A.M. 533.

(f) *Mayappa Chettiar* v. *Kolandaivelu* (1926) Mad. W.N. 459, 92 I.C. 715, ('26) A.M. 597.

(g) *Paras Ram Singh* v. *Pandehi* (1922) 44 All. 462, 67 I.C. 533, ('22) A.A. 135.

(h) *Jagdeo Sahu* v. *Mahabir Prasad* (1934) 13 Pat. 111, 153 I.C. 602, ('34) A.P. 127.

S. 83

only when the mortgagor's right to redeem arises. A premature deposit is ineffectual. When the terms of a consent decree provided that the mortgagee was to enter into possession in default of payment of certain instalments of the mortgage money, a deposit after default and before the mortgagee had taken possession was held to be premature, and the mortgagee was entitled to take possession in spite of the deposit (*i*). The reason is that the section presupposes that the mortgagor is not exercising the right of redemption in a manner contrary to the contract between the parties (*j*). A mortgage deed provided that the mortgage could be discharged only by payment after the expiry of the fruit season. A deposit made during the fruit season was not considered premature in the absence of proof that immediate withdrawal was made a condition for the deposits, for it was quite open to the mortgagee to wait till the fruit season was over and then take out the money forthwith (*k*).

Before a suit for redemption is barred.—If a suit for redemption is barred, the summary procedure for redemption is of course not available. But it is also not available if the mortgagee has instituted a suit on his mortgage, and in that case the deposit would be treated as one made under Order 24, rule 1 of the Code of Civil Procedure (*l*). This would be so even if the mortgagor had not received notice of the mortgagee's suit (*m*). A deposit in Court pending a suit by the mortgagee was treated by the Privy Council as a deposit under O. 24, r. 1 of the Code of Civil Procedure, 1908, in *Shib Chandra* v. *Lachmi Narain* (*n*) although the judgment of the Judicial Committee refers to sec. 83.

In any Court in which he might have instituted such suit.—The deposit must be made in the same Court in which the suit for redemption would have to be instituted, *i.e.*, the lowest competent Court within the local limits of whose jurisdiction the property is situate (*o*). The deposit cannot be made in any other Court (*p*).

Deposit.—The amount of the deposit must be the whole amount due on the mortgage including interest (*q*) and the fact that the mortgagee has obtained a decree for interest will not justify tender of principal only (*r*). Sums which the mortgagee is entitled to tack to the mortgage money under sec. 72 should also be included (*s*). The deposit may be for more than is due on the principle that *omme majus continet in se minus* (*t*) but it must not be less even if the deficiency is very small (*u*); though a small deficiency has been excused when the mortgage included penal interest and the amount due could not be calculated with accuracy (*v*). Again the deposit must not be conditional and a deposit accompanied with a prayer that the mortgagee be called upon to produce certain documents is invalid (*w*), unless the documents are those which the mortgagee is bound to produce under the section (*x*). In a cace under the Regulations a deposit accompanied

(*i*) *Ram Sonji* v. *Krishnaji* (1902) 26 Bom. 312.

(*j*) *Bayya Sao* v. *Narasinga* (1912) 35 Mad. 209, 10 I.C. 393.

(*k*) *Horay Krishna* v. *Sashi Bhushan* (1941) A.C. 18, 45 C.W.N. 174 (192) I.C. 781.

(*l*) *Bayya Sao* v. *Narasinga*, *supra*; *Thevaraya Reddy* v. *Venkatachalam* (1917) 40 Mad. 804, 37 I.C. 444; *Brij Gopal* v. *Mst. Masuda Begam* (1935) 153 I.C. 263, ('35) A.O. 93.

(*m*) *Thiagaraja* v. *Ramaswamy* (1918) 35 Mad. L.J. 605, 48 I.C. 693.

(*n*) (1929) 51 All. 686, 56 I.A. 339, 119 I.C. 612, ('29) A.PC. 243.

(*o*) Sections 15 and 16 C.P.C.

(*p*) *Bayya Sao* v. *Narasinga*, *supra*.

(*q*) *Narayan Swami* v. *Rama Swami* (1939) A.M. 503, (1939) 1 M.L.J. 824, 49 M.L.W. 218, (1939) M.W.N. 455.

(*r*) *Hasanchal Singh* v. *Jawahir Singh* (1880) 16 Cal. 307 P.C.

(*s*) *Anandi Ram* v. *Dur Najaf* (1891) 13 All. 195; *Nadershaw* v. *Shirinibai* (1923) 25 Bom. L.R. 839, 87 I.C. 129, ('24) A.B. 264.

(*t*) *Subramania Aiyar* v. *Narayanaswami* (1918) 34 Mad. L.J. 439, 45 I.C. 638, and cases there cited; *Raja Baikunth* v. *Benode Behari* (1919) 29 Cal. L.J. 256, 51 I.C. 13; *Subba Rao* v. *Savarayudu* (1924) 47 Mad. 7, 72 I.C. 292, ('23) A.M. 533.

(*u*) *Subbai Goundan* v. *Palani* (1916) 30 Mad. L.J. 607, 34 I.C. 825; *Debi Prasad* v. *Kedar Singh* (1921) 19 All. L.J. 582, 63 I.C. 563, ('21) A.A. 280.

(*v*) *Ram Rao* v. *Gopala* (1932) 140 I.C. 406, ('32) A.N. 169.

(*w*) *Nanu* v. *Manchu* (1891) 14 Mad. 49; *In re Achath Sankaran* (1915) 29 I.C. 586; cf. *Anandrao* v. *Durgabai* (1898) 22 Bom. 761.

(*x*) *Kora Nayar* v. *Ramappa* (1894) 17 Mad. 267; *Goluckmonee* v. *Nabungo* (1864) W.R. 14 F.B.

with a threat of legal proceedings was held to be invalid (y). A deposit accompanied with a denial of the mortgage is invalid (z); but when the application making the deposit contained a statement that moneys were due by the mortgagee in respect of a different transaction on which the mortgagor would sue after redemption, this was not a conditional deposit (a). The section does not provide for an inquiry by the Court as to the amount due by the mortgagor to the mortgagee (b). When a defendant makes a deposit in the Court and then applies for its transfer to the credit of the suit, it was held that it was not a valid deposit under s. 83 (c).

The deposit operates as tender as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court. This includes service of notice on the mortgagee. In the case of the mortgage of an agricultural tenancy redeemable only on a fixed date a deposit which did not give the Court time to serve notice by that date was held to be ineffectual (d).

Section 67 shows that after a valid deposit the mortgagee cannot sue for foreclosure or for sale. It has been observed that after a valid deposit there is no subsisting mortgage which can be enforced or redeemed (e). But this, it is submitted, is incorrect. The deposit does not *per se* operate to discharge the mortgage and the relationship of mortgagor and mortgagee does not cease with the deposit (f). The deposit does not become the property of the mortgagee until he has presented a petition expressing his willingness to accept it and has deposited the mortgage deed in Court. Unless these two conditions have been complied with the deposit cannot be attached by the mortgagee's creditors (g); and if the mortgagee has refused to accept the deposit, it stands to the credit of the mortgagor only (h). The mere fact of making a deposit or tender does not merge the money in the mortgaged property and the money does not cease to be the property of the mortgagor (i). The withdrawal of the deposit by the mortgagee has the effect of discharging the mortgage (j) and the mortgagee is thereafter estopped from disputing the validity of the tender (k). If the mortgagee withdraws a deposit which does not include money spent by him under sec. 72 in payment of arrears of Government revenue he cannot recover it under the mortgage (l), though he might sue the mortgagor personally for reimbursement (m). In *Ram Chandra Marwari* v. *Rani Keshobati* (n) the mortgagor made a deposit of a sum which he claimed to be the whole balance due under the mortgage and it was then withdrawn by some contrivance or manœuvre by the mortgagee's agent without complying with the conditions of sec. 83 and without depositing the mortgage bond. The mortgagees then sued on their bond giving credit for the amount withdrawn as part payment. The Privy Council dismissed the suit, holding that the onus was on the mortgagees to show that their agent acted under such conditions that the statutory result of a full discharge had not ensued. But if the mortgagee refuses to accept the deposit, and the plaintiff sues in redemption and obtains a decree, and the mortgagee then withdraws the deposit, he is not estopped from prosecuting an appeal,

(y) *Prannath Roy* v. *Rookea Begum* (1859) 7 M.I.A. 323; *Makhan* v. *Jasoda* (1884) 6 All. 399.

(z) *Abdoor Ruhman* v. *Kisto Lal* (1868) 6 W.R. 225.

(a) *Salik Ram* v. *Ashik Husain* (1901) 4 O.C. 355.

(b) *Cherukuri* v. *Shri Krushi Vidyalaya* (1945) A.M. 46.

(c) *Bala Changiah* v. *Subbaya* (1939) A.M. 200, 49 M.L.W. 929 (1939) M.W.N. 76, 183 I.C. 871.

(d) *Dwarka Pershad* v. *Sheoamber* (1912) 15 I.C. 592; *Saiyid Ahmad* v. *Dharmun* (1921) 43 All. 424, 60 I.C. 760, ('21) A. A. 71.

(e) *Rugad Singh* v. *Sat Narain* (1904) 27 All. 178, 181.

(f) *Ahmadullah* v. *Abdul Rahim* (1923) 45 All. 592, 74 I.C. 763, ('24) A.A. 26; *Balasidhantam* v. *Perumal* (1914) 27 Mad. L.J. 475, 27 I.C. 162.

(g) *Mothiar Mira* v. *Ahmalli Ahmed* (1906) 29 Mad. 232.

(h) *Dal Singh* v. *Pitham Singh* (1903) 25 All. 179.

(i) *Gupte Shwar* v. *Radha Mohan* (1937) 170 I.C. 99, (1937) A.P. 253.

(j) *Minakshi* v. *Janaki* (1942) A.M. 502.

(k) *Kora Nayar* v. *Ramappa*, *supra*.

(l) *Anandi Ram* v. *Dur Najaf* (1891) 13 All. 195.

(m) Cf. *Lachman Singh* v. *Salig Ram* (1886) 8 All. 384.

(n) (1909) 36 Cal. 840, 36 I.A. 85.

S. 83 for he has withdrawn the money in execution (*o*). It is submitted that this is correct, but in *Dal Singh* v. *Pitam Singh* (*p*) the mortgagee at first refused to accept the deposit, and then after the mortgagor filed a redemption suit and obtained a decree the mortgagee changed his mind and withdrew the amount pending his appeal. The Allahabad High Court then held that the mortgagee was not competent to prosecute his appeal. But it is submitted that the proceeding under sec. 83 terminated with the mortgagee's refusal to accept the deposit and the Court had no jurisdiction to allow the mortgagee to withdraw, under that section, the money which then belonged to the mortgagor. This has been so held by the Patna High Court (*q*). No doubt the mortgagee might with the mortgagor's consent be allowed to change his mind and withdraw a deposit or the mortgagor might make a fresh deposit. In a case in which the deposit was insufficient the Court, with the consent of the mortgagor's pleader, endorsed payment on the deed and returned it to the mortgagee as discharge *pro tanto* (*r*). In another case (*s*) the mortgagor was allowed to supplement an inadequate deposit.

If the mortgagee refuses to accept a valid deposit not only does interest cease to run but he must under sec. 76 (i) account for his gross receipts from the mortgaged property from the time when he could have withdrawn the deposit (*t*). See note under sec. 76, sub-sec. (i). The mortgagee continues in possession as mortgagee and is not a trespasser (*u*).

Amount remaining due on the mortgage.—This is the whole balance due on the mortgage including interest (*v*) and sums which the mortgagee is entitled to add under sec. 72 (*w*), but not penal interest (*x*). The deposit must include interest for the day on which the deposit is made (*y*), but not interest from that day till the service of notice on the mortgagee (*z*). If the mortgage is a usufructuary mortgage in which profits are taken in lieu of interest there would be no occasion to deposit interest, and in a case where a usufructuary mortgagee was by the terms of his mortgage entitled to interest for the period for which he was out of possession, it was held that a purchaser of the equity of redemption who was not aware that interest was due made a valid deposit when he deposited only the principal (*a*).

Under sec. 171 of the Bengal Tenancy Act 8 of 1885 a mortgagee who pays money due for arrears of rent to avert a sale acquires a statutory charge and such money is not part of the amount remaining due on the mortgage and need not be deposited (*b*).

Compensation under the Malabar Compensation for Tenants Improvements Act 1 of 1900 cannot be brought under the expression "amount remaining due on the mortgage" (*c*).

(*o*) *Subba Rao* v. *Savarayudu* (1924) 47 Mad. 7, 21-22, 72 I.C. 292, ('23) A.M. 583.

(*p*) (1903) 25 All. 179.

(*q*) *Ratna Koer* v. *Nanhaki* (1923) 73 I.C. 1053, ('24) A.P. 41.

(*r*) *Har Dayal* v. *Birthisingh* (1901) 32 All. 142.

(*s*) *Deo Dat* v. *Ram Autar* (1886) 8 All. 502.

(*t*) *Nagathil* v. *Arumugam* (1923) 44 Mad. L.J. 362, 79 I.C. 40, ('23) A.M. 354; *Ayyakutti* v. *Periyaswami* (1916) 39 Mad. 579, 30 I.C. 497; *Tarachand* v. *Narayan* (1922) 18 Nag. L.R. 47, 65 I.C. 174, ('22) A.N. 199; cf. *Mst. Phool Kuer* v. *Rewari Singh* (1930) 28 All. L.J. 1020, 124 I.C. 191, ('30) A.A. 609.

(*u*) *Satyabadi Behara* v. *Harabati* (1907) 34 Cal. 223, 228; *Rukhiminibai* v. *Venkatesh* (1907) 31 Bom. 527; *Ma Nyo* v. *Maung Hla Bu* (1925) 2 Rang. 382, 384, 84 I.C. 395, ('25) A.R. 13.

(*v*) *Hewanchal Singh* v. *Jawahir Singh* (1886) 16 Cal. 307 P.C.

(*w*) *Anandi Ram* v. *Dur Najaf* (1891) 13 All. 195.

(*x*) *Ayyakutti* v. *Periyaswami* (1916) 39 Mad. 579, 24 I.C. 771; *Ram Rao* v. *Gopala* (1932) 140 I.C. 406, ('32) A.N. 169.

(*y*) *Subbai Goundan* v. *Palani* (1916) 30 Mad. L.J. 607, 34 I.C. 825; but see *Raghub Prusti* v. *Bhobui* (1903) 8 Cal. W.N. 216; *Kushal Singh* v. *Ram Kishun Singh* (1937) A.A. 706.

(*z*) *Subbai Goundan* v. *Palani*, *supra*.

(*a*) *Bhabani* v. *Kadambini* (1929) 33 Cal. W.N. 279, 119 I.C. 292, ('29) A.C. 304.

(*b*) *Manmatha Nath* v. *Sarat Chandra* (1915) 21 Cal. L.J. 429, 29 I.C. 929.

(*c*) *Chami* v. *Anu Pattar* (1916) 1 Mad. W.N. 160, 32 I.C. 861.

Notice.—The deposit is not valid until notice has been served on the mortgagee or if he is a minor, on his guardian *ad litem* (*d*). If the mortgagor has done all he can to enable the mortgagee to withdraw the money, service of notice operates as tender and stops running of interest—see sec. 84. Until notice is served the mortgagee's right of suit under sec. 67 is not taken away if he is not otherwise aware of the deposit (*e*). The amendment made in sec. 102 requires the application for issue of notice to be made in the Court in which the deposit has been made.

Cessation of interest.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or *in the case of a deposit, where no previous tender of such amount has been made* as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, *and the notice required by section* 83 *has been served on the mortgagee :*

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to a reasonable notice before payment or tender of the mortgage-money *and such notice has not been given before the making of the tender or deposit, as the case may be.*

Amendments.—The following amendments have been made by Act 20 of 1929. The words "in the case of a deposit, where no previous tender of such amount has been made" have been inserted in the middle of the first paragraph, and the words "and the notice required by sec. 83 has been served on the mortgagee" have been added at the end of that paragraph. The proviso in the second paragraph is new. The words "and such notice has not been given before the making of the tender or deposit, as the case may be" have been added at the end of the last paragraph. The amendment is not retrospective (*f*).

Cessation of interest.—A deposit under sec. 83 operates as a valid tender, but in regard to the cessation of interest the amendment makes a distinction, which was not expressed in the old section, between (1) deposit in Court after tender out of Court, and

(*d*) *Pandurang* v. *Mahadaji* (1903) 27 Bom. 23; *Sheo Saran Chaudhri* v. *Ram Lagan* (1922) 44 All. 64, 64 I.C. 413, ('22) A.A. 355; *Appa Pai* v. *Somu* (1925) 49 Mad. L.J. 327, 90 I.C. 754, ('25) A.M. 1017; *Gokul Kalwar* v. *Chander Sekhar* (1926) 48 All. 611, 96 I.C. 1, ('26) A.A. 665; *Shiva Nath* v. *Manhor Lal* (1913) 16 O.C. 261, 22 I.C. 245.

(*e*) *Sitaramayya* v. *Venkatramanna* (1888) 11 Mad. 371.

(*f*) *Munna Lal* v. *Prakash* (1940) A.A. 65, (1940) All. 79, (1939) A.L.J. 1099, 187 I.C. 73.

S. 84 (2) deposit in Court without previous tender out of Court. This distinction is necessary, as the deposit in Court is usually made after a tender out of Court has been refused and the deposit then becomes a judicial record of the tender.

If there has been a valid tender previous to the deposit which has been refused, such tender operates under the general law to stop the running of interest provided there is a continued readiness to pay (*g*). In such a case it is submitted that the withdrawal of the deposit by the mortgagor would indicate that the mortgagor was no longer ready and willing to pay, and interest would be payable from the date of withdrawal. This is in accordance with the general rule that a plea of tender before action is ineffectual to stop interest, unless accompanied by a payment into Court after action (*h*).

If there has been no previous tender, the deposit in Court stops interest running only when the mortgagor has done all that has to be done to enable the mortgagee to take the amount out of Court and when the notice under sec. 83 has been served upon the mortgagee.

In both cases, therefore, the effect of withdrawal is the same, and the mortgagor who withdraws a deposit becomes liable for interest, and it seems reasonable that if the mortgagor has the benefit of the money withdrawn, he should not be relieved of interest on the mortgage debt.

There had been conflicting decisions before the amendment of the section. In *Krishnaswami Chettiar* v. *Ramasami* (*i*) it was held that interest did not cease after withdrawal, but there were two decisions to the contrary (*j*), and a difference of opinion in a third case (*k*); while in *Ramabhadra* v. *Arunachalam* (*l*) a Full Bench of the Madras High Court decided that interest does not run after withdrawal, unless the mortgagee shows that the mortgagor was no longer ready and willing to pay. The section of this Act, as amended, in effect supersedes the Full Bench case and settles the law.

In order that the deposit in Court should operate to stop interest running two conditions must be satisfied :—

(1) The mortgagor must have done all that has to be done to enable the mortgagee to take the amount out of Court.

(2) Notice under sec. 83 must have been served on the mortgagee.

Done all that has to be done to enable the mortgagee.—If the mortgagee is a minor the deposit does not have the effect of stopping interest unless the mortgagor has procured the appointment of a guardian *ad litem* (*m*). According to the Allahabad High Court it is open to the person making the deposit to pay the difference of interest between the date of the deposit and the date of the appointment of the guardian *ad litem* (*n*).

(*g*) *Satyabadi Behara* v. *Harabati* (1907) 34 Cal. 223; *Jagat Tarini* v. *Naba Gopal* (1907) 34 Cal. 305; *Kripa Sindhu* v. *Annada Sundari* (1908) 35 Cal. 34; *Lal Batcha Sahib* v. *Arcot Naraianaswami Mudaliar* (1911) 34 Mad. 320, 12 I.C. 502; *Venkatrama Ayyar* v. *Gopalakrishna Pillai* (1929) 52 Mad. 322, 116 I.C. 844, ('29) A.M. 230. See note "Tender" under s. 60.

(*h*) *Haji Abdul Rahman* v. *Haji Noor Mahomed* (1892) 16 Bom. 141, 149-150.

(*i*) (1912) 35 Mad. 44, 8 I.C. 763, followed in *Debi Sahai* v. *Narayan Sahai* (1927) 99 I.C. 147, ('27) A.O. 103.

(*j*) *Velayuda Naicker* v. *Hyder Hussan* (1910) 33 Mad. 100, 3 I.C. 729; *Hukam Singh* v. *Babu Lal* (1922) 44 All. 198, 64 I.C. 971, ('22) A.A. 181.

(*k*) *Thevaraya Reddy* v. *Venkatachalam* (1917) 40 Mad. 804, 37 I.C. 444.

(*l*) (1926) 49 Mad. 609, 95 I.C. 108, ('26) A.M. 601; *Munna Lal* v. *Prakash* (1940) A.A. 65, (1940) All. 79, (1939) A.L.J. 1099, 187 I.C. 73 (It was a decision on the old section).

(*m*) *Pandurang* v. *Mahadaji* (1903) 27 Bom. 23; *Sheo Saran Chaudhri* v. *Ram Lagan* (1922) 44 All. 64, 64 I.C. 413, ('22) A.A. 355; *Kannu Mal* v. *Indar Pal* (1922) 44 All. 102, 64 I.C. 907, ('22) A.A. 147 on app. (1923) 45 All. 273, 71 I.C. 278, ('23) A.A. 183; *Appa Pai* v. *Somu* (1925) 49 Mad. L.J. 327, 90 I.C. 754, ('25) A.M. 1017; *Gokul Kalwar* v. *Chandar Sekhar* (1926) 48 All. 611, 96 I.C. 1, ('26) A.A. 665; *Mst. Phool Kuer* v. *Rewari Sing* (1930) 28 All. L.J. 1020, 124 I.C. 191, ('30) A.A. 609.

(*n*) *Kannu Mal* v. *Indar Pal* (1922) 44 All. 102, 64 I.C. 907, ('22) A.A. 147 on appeal (1923) 45 All. 273, 71 I.C. 278, ('23) A.A. 183.

In a case decided under the old section the mortgagor made a valid deposit, which the mortgagee refused to accept. The mortgagor then without withdrawing the deposit filed a suit for redemption and obtained a decree. He was allowed interest on his deposit from the date of the service of the summons on the defendant, and this was said to be in accordance with the principle of Order 24, rule 3, of the Code of Civil Procedure (*o*).

Notice.—The requirement of service of notice under sec. 83 is new and it overrules cases which held that it was the duty of the Court to serve notices and that it was sufficient if the mortgagor had applied to the Court for service of notice and had given a correct address (*p*). Service of notice must be in accordance with secs. 102 and 103, which provide for service on the agent of an absent person or on the curator or guardian of a person under a disability to contract.

Stipulation for notice before redemption.—Some mortgages contain a stipulation for notice before redemption after due date in order to enable the mortgagee to find another investment. Subject to certain exceptions a mortgagor in England who redeems after due date must give six months' notice. If such notice is not given the mortgagee is entitled to six months' interest in lieu of notice (*q*). The right to interest in lieu of notice is not subject to the provisions of this section as to cessation of interest.

Suits for Foreclosure, Sale or Redemption.

85. [*Parties to suits for foreclosure, sale and redemption.*] *Repealed by the Code of Civil Procedure*, 1908 (*Act V of* 1908), s. 156 *and Sch. V.*

Foreclosure and Sale.

[**86** *to* **90.**] *Repealed by the Code of Civil Procedure*, 1908 (*Act V of* 1908), *s.* 156 *and Sch. V.*

Redemption.

Persons who may sue for redemption.

91. *Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—*

(*a*) *any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ;*

(*b*) *any surety for the payment of the mortgage-debt or any part thereof ; or*

(*c*) *any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.*

(*o*) *Subramania Aiyar* v. *Narayanaswami* (1918) 34 Mad. L.J. 439, 45 I.C. 638.

(*p*) *Jiva Ram* v. *Khem Koer* (1923) 70 I.C. 811, ('23) A.A. 24 ; *Nibaran Chandra* v. *Parbati* (1921) 35 Cal. L.J. 202, 60 I.C. 454 ; but see *Deo Dat* v. *Ram Autar* (1886) 8 All. 502 (mortgagee's knowledge of deposit suffices).

Smith v. *Smith* (1891) 3 Ch. 550, 553 ; *Johnson* v. *Evans* (1889) 61 L.J. 18 C.A. ; *Nadershaw* v. *Shirinbai* (1923) 26 B L.R. 839, 87 I.C. 129, ('24) A.B. 264.

S. 91

The old section.—The above section has been substituted by the Amending Act 20 of 1929. The old section was as follows:—

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property:—

(a) Any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property;

(b) Any person having any interest in or charge upon, the right to redeem the property;

(c) any surety for the payment of the mortgage-debt or any part thereof;

(d) the guardian of the property of a minor mortgagor on behalf of such minor;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;

(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Amendments.—This section has been remodelled and amended by Act 20 of 1929. Clause (a) is a consolidation of clauses (a) and (b) of the old section. Clause (b) is clause (c) of the old section. Clause (c) is clause (g) of the old section.

Clauses (d) and (e) of the old section have been omitted as superfluous, for the guardian or curator redeems as representing the mortgagor who is under a disability. Clause (f) is omitted as an attaching judgment creditor has no interest by way of charge or otherwise in the property attached (*r*). It is submitted that the *obiter dicta* in *Ananta-padmanabhaswami* v. *Official Receiver* (*s*) have not altered the law as to the effect of an attachment. On the other hand, the editors suggest that this amendment was unnecessary. Although the attaching creditor has no charge, he has a right to bring the property to sale and as a matter of policy there is no reason why he should not be allowed to protect that right by redeeming a mortgage on the property.

Clause (a).—This clause follows the English rule that the mortgagor and all persons having any interest in the property subject to the mortgage are entitled to redeem (*t*). The sub-section excludes the mortgagee because the right to redeem is exercised against him. The right to redeem represents the mortgagor's interest in the property, and the mortgagor or any person who has any interest in or charge upon that estate can redeem. The interest must be a proprietary interest (*u*).

Landlord.—The landlord of the mortgagor may redeem if the tenancy is vested in him on the tenant's death without heirs (*v*). If the tenancy is subsisting the landlord has no present interest and so a landlord cannot redeem a mortgage by an occupancy tenant (*w*).

(*r*) *Frederick Peacock* v. *Madan Gopal* (1902) 29 Cal. 428; *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (1909) 32 Mad. 429, 2 I.C. 18; *Soobul Chunder* v. *Russick Lall* (1888) 15 Cal. 202.

(*s*) (1933) 60 I.A. 167, 174-175, 142 I.C. 552, ('33) A.PC. 134.

(*t*) *Pearce* v. *Morris* (1869) 5 Ch. App. 227, 229; *Tarn* v. *Turner* (1888) 39 Ch. D. 456 C.A.

(*u*) *Ganesh* v. *Rajaram* (1934) 58 Bom. 75, 35 Bom. L.R. 1123, 148 I.C. 1145, ('34) A.B. 32.

(*v*) *Tulshi Ram* v. *Gur Dayal Singh* (1911) 33 All. 111, 7 I.C. 231 F.B., overruling *Ram Dihal* v. *Maharaja of Vizianagram* (1908) 30 All. 488 (where it was erroneously supposed that the tenancy vested in the Crown by escheat); *Basdeo Rai* v. *Jhamongal Rai* (1931) 29 All. L.J. 914, 136 I.C. 69, ('32) A.A. 53; *Arjun Singh* v. *Mahesha Nand* (1932) 30 All. L.J. 474, 138 I.C. 366, ('32) A.A. 437; *Sri Kanta Prasad* v. *Jag Sah* (1924) 3 Pat. 818, 84 I.C. 293, ('25) A.P. 57.

(*w*) *Ganpat* v. *Bhangi* (1902) 15 C.P.L.R. 17; cf. *Jaggeswar Dutt* v. *Bhuban Mohan* (1906) 33 Cal. 425.

S. 91

Lessee.—A lessee of the mortgagor has a right to redeem. Even when the le is not binding on the mortgagee, it has been held in England that the mortgagor's l has a right to redeem (*x*). This has been followed in the case of a permanent tenant (*y*), an ex-proprietary tenant (*z*), a verumpatam tenant (*a*) and a tenant for a term of years (*b*). It is immaterial whether such a lease is valid and binding on the mortgagee (*c*).

A patnidar of the whole (*d*) or part (*e*) of the property mortgaged can redeem. In other agricultural tenancies the right to redeem depends upon the nature of the interest created by the holding. If it is not a proprietary interest the tenant cannot redeem. Thus a Bengal ryot cannot redeem (*f*), nor can a cultivating tenant in Oudh (*g*). Junior members of a Malabar Tarwad have a proprietary interest in the property, but in the absence of special circumstances are disentitled by their personal law from redeeming (*h*). An ex-proprietary tenant in Sir land in Allahabad has an interest which entitles him to redeem (*i*). If the succession to the tenancy is governed by statute it is the statutory heir and not the heir according to the personal law of the tenant who is entitled to redeem (*j*).

Purchaser under s. 88, Code of Criminal Procedure.—When property subject to a mortgage has been attached and sold under s. 88 of the Code of Criminal Procedure the purchaser has a right to redeem the mortgage (*k*).

Hindu illegitimate son.—The right of maintenance of an illegitimate son in Hindu law is a personal right and will not support a suit for redemption (*l*).

Hindu reversioner.—The interest must be a present interest so that a reversionary heir in Hindu law is not entitled to redeem (*m*). In some cases however it has been suggested that the reversioner may redeem in case of waste or of necessity for the preservation of the property (*n*).

Co-mortgagor or purchaser of the equity of redemption.—Any of several co-mortgagors can redeem (*o*). So can a purchaser or execution purchaser of the whole (*p*) or part of the equity of redemption (*q*). But a contract to purchase does not create an

(*x*) *Tarn* v. *Turner* (1888) 39 Ch. D. 456 C.A.

(*y*) *Raghunandan Prasad* v. *Ambika Singh* (1907) 29 All. 679; *Venkatesh* v. *Bhujabuli* (1933) 57 Bom. 194, 35 Bom. L.R. 60, 142 I.C. 481, ('33) A.B. 97; *Mahabir Chaube* v. *Dip Narain* (1922) 20 All. L.J. 976, 76 I.C. 862, ('23) A.A. 140; *Shankar* v. *Hukumchand* (1918) 14 Nag. L.R. 117, 47 I.C. 90.

(*z*) *Muhammad Husain* v. *Hanuman* (1918) 16 All. L.J. 796, 47 I.C. 861.

(*a*) *Paya Matathil* v. *Koramel* (1896) 19 Mad. 151.

(*b*) *Pannalal* v. *Rajaram* (1926) 96 I.C. 973, ('26) A.N. 496; *Ananda Pandurang* v. *Uttamrao* (1933) 144 I.C. 521, ('33) A.N. 44; *Tulsi Ram* v. *Muna Koer* (1936) 12 Luck. 161, 162 I.C. 225, (1937) A.O. 146.

(*c*) *Raja Kamakshya Narain Singh* v. *Ramzanali* (1945) A.P. 106.

(*d*) *Kasumunnissa* v. *Nilratna* (1882) 8 Cal. 79.

(*e*) *Jugal Kissore* v. *Kartic Chunder* (1882) 21 Cal. 116.

(*f*) *Girish Chunder* v. *Juramoni* (1900) 5 Cal. W.N. 83.

(*g*) *Kalu Singh* v. *Hansraj* (1925) 78 I.C. 47, ('25) A.O. 270.

(*h*) *Soopi* v. *Mariyoma* (1920) 43 Mad. 393, 55 I.C. 760.

(*i*) *Muhammad Husain* v. *Hanuman* (1918) 16 All. L.J. 796, 47 I.C. 861.

(*j*) *Ram Singh* v. *Baldeo Prasad* (1932) All. L.J. 605, 136 I.C. 552, ('32) A.A. 643.

(*k*) *Alagammal* v. *Sadasiva* (1930) 60 Mad. L.J. 72, 129 I.C. 47, ('30) A.M. 1017.

(*l*) *Balwant Singh* v. *Roshan Singh* (1896) 18 All. 253; *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I.A. 51.

(*m*) *Ram Chandar* v. *Kallu* (1908) 30 All. 497; *Narayana Kutti* v. *Pechiammal* (1912) 36 Mad. 426, 15 I.C. 206; *Chhotey Singh* v. *Surat Singh* (1930) 5 Luck. 691, 123 I.C. 211, ('30) A.O. 294; *Basant Singh* v. *Rampal Singh* (1919) 6 O.L.J. 248, 51 I.C. 985, overruling *Gumani Singh* v. *Chakkar Singh* (1905) 8 O.C. 349, which was however followed in *Basawan* v. *Natha* (1925) 82 I.C. 747, ('25) A.O. 30.

(*n*) *Narayana Kutti* v. *Pechiammal* (1912) 36 Mad. 426, 15 I.C. 206; *Chhotey Singh* v. *Surat Singh* (1930) 5 Luck. 691, 123 I.C. 211, ('30) A.O. 294.

(*o*) *Norender Narain* v. *Dwarka Lal* (1878) 3 Cal. 397, 408, 5 I.A. 18.

(*p*) *Periandi* v. *Angappa* (1884) 7 Mad. 423; *Radha Kishun* v. *Hem Chandra* (1906) 11 Cal. W.N. 495.

(*q*) *Nainappa* v. *Chidambaram* (1898) 21 Mad. 18; *Baikantha Nath* v. *Mohesh* (1917) 22 Cal. W.N. 128, 44 I.C. 77; *Pratap Chandra* v. *Peary Mohan* (1917) 22 Cal. W.N. 800, 48 I.C. 660; *Sri Kanta Prasad* v. *Jag Sah* (1924) 3 Pat. 818, 84 I.C. 293, ('25) A.P. 57; *Huthasanan Nambudri* v. *Parameswaran* (1899) 22 Mad. 209; *Rugad Singh* v. *Sat Narain* (1905) 27 All. 178; *Shankar* v. *Bhikaji* (1929) 53 Bom. 353, 116 I.C. 225, ('29) A.B. 139; *Jhum Lal* v. *Sham Naranjan* (1933) 140 I.C. 845, ('33) A.P. 33.

S. 91 interest in or charge on the property, and a person who has merely contracted to purchase the equity of redemption has no right to redeem (*r*). An assignee of the equity of redemption during the pendency of the mortgagee's suit may redeem before the sale is confirmed (*s*); and may be brought on the record for that purpose (*t*). A donee of the equity of redemption can redeem (*u*) and under sec. 59A all persons who derive title from the mortgagor are included in the term "mortgagor," and therefore entitled to redeem. A person erroneously believing himself to stand in the shoes of the mortgagor and paying off the mortgage-debt was held to have sufficient interest within the meaning of the section to be subrogated to the rights of the mortgagee (*v*).

Puisne mortgagee.—A puisne mortgagee is an assignee of the equity of redemption and is therefore entitled to redeem a prior mortgage (*w*).

Thus let us suppose that *A*, the mortgagor, executes successive mortgages as follows :—

First mortgage by *A* to	.. ..	*B*
Second mortgage by *A* to	.. ..	*C*
Third mortgage by *A* to	.. ..	*D*

Now *C* is assignee of part of the equity of redemption of *A* against *B* and has therefore the right to redeem *B*. For the same reason *D* can redeem *C* and *B*. On the other hand *B* can foreclose or bring to sale *A*, and, as part of *A*'s equity of redemption is transferred to *C* and to *D*, *B* can foreclose or bring to sale *C* or *D*. This is the familiar rule "redeem up and foreclose down." This clause therefore is a statement of the first part of the rule "redeem up". The second part of the rule is enacted in sec. 94.

If the puisne mortgage is invalid, the puisne mortgagee has no right to redeem a prior mortgage (*x*). So also if the puisne mortgage is time-barred, for if the puisne mortgagee, has lost all remedies of foreclosure or sale on his own mortgage, he has no right to redeem a prior mortgage (*y*).

If the mortgagor has made a tender of the mortgage money which the prior mortgagee has wrongfully refused, the puisne mortgagee redeeming the prior mortgagee will not be liable for interest from the date of the tender (*z*).

Sub-mortgagee.—As a puisne mortgagee can redeem a prior mortgage, a sub-mortgagee of the puisne mortgagee, being an assignee of the puisne mortgagee, can aslo redeem the prior mortgage (*a*). A prior mortgagee who has purchased the equity of redemption stands in the shoes of the mortgagor and can redeem a puisne mortgagee (*b*). Otherwise a prior mortgagee holds by title paramount to the puisne mortgagee, and he is not interested in the equity of redemption of a puisne mortgagee and cannot redeem it. But the Calcutta High Court has held that if he is made a party to the puisne mortgagee's suit, he may pay off the puisne mortgage in order to save the property from sale (*c*).

(*r*) *Mayappa* v. *Kolandaivelu* (1926) Mad. W.N. 459, 92 I.C. 715, ('26) A.M. 597.
(*s*) *Har Shankar* v. *Shew Gobind* (1899) 26 Cal. 966; *Sheo Narain* v. *Chunni Lal* (1900) 22 All. 243.
(*t*) *Muhammad Masihiullah* v. *Jarao* (1915) 37 All. 226, 27 I.C. 771.
(*u*) *Sitaram* v. *Khandu* (1921) 45 Bom. 105, 59 I.C. 480, ('21) A.B. 413.
(*v*) *Ramkrishna* v. *Venkat Swami* (1945) A.M. 175; *Perumal Reddiar* v. *Saffiah Thevar* (1945) A.M. 500; *Kelu* v. *Chakkara Cheffan* (1937) A.M. 451.
(*w*) *Mst. Dhanwanti* v. *Hargobind* (1924) 3 Pat. 485, 78 I.C. 614, ('24) A.P. 484; *Amba Prasad* v. *Moonga Ram* (1930) 128 I.C. 285, ('30) A.A. 523; *Abdul Hamid* v. *Ram Kumar* (1942) 200 I.C. 146, (1942) A.O. 260 (F.B.).
(*x*) *Banmali Pande* v. *Bisheshar Singh* (1907) 29 All. 129.
(*y*) *Ram Adhar* v. *Shankar Baksh Singh* (1935) 153 I.C. 808, ('35) A.O. 139.
(*z*) *A. M. K. M. Chettyar Firm* v. *A. K. M. L. Chettyar Firm* (1930) 127 I.C. 594, ('30) A.R. 255.
(*a*) *Ram Subhag* v. *Nar Singh* (1905) 27 All. 472; *Venkatanarayanasami* v. *Kani Ammal* (1913) Mad. W.N. 903, 21 I.C. 560.
(*b*) *Mangali Prasad* v. *Pati Ram* (1904) 1 All. L.J. 360; *Hassanbhai* v. *Umaji* (1903) 28 Bom. 153; *Mst. Dhanwanti* v. *Hargobind*, *supra*; *Debendra Narain* v. *Ramtaran Banerjee* (1903) 30 Cal. 599 F.B.
(*c*) *Bhajahari Maiti* v. *Gajendra* (1910) 37 Cal. 282, 5 I.C. 142.

Charge.—A charge upon the property or upon the equity of redemption will give a right to redeem. This may be illustrated by a Madras case (*d*) where a mortgagor was allowed to redeem although he had sold the equity of redemption, because he had a charge for unpaid purchase money.

Clause (b).—A surety has *a right* to redeem as he is liable for the debt and is entitled on payment of the debt to avail himself of the creditor's securities (*e*). He cannot of course redeem a mortgage for a different debt or a mortgage for one part of a debt of which he is only surety for another distinct part (*f*). This subject is also discussed under sec. 92.

Clause (c).—This clause is based on the case of *Christian* v. *Field* (*g*) where a plaintiff who had obtained a decree for sale in a suit for the administration of a mortgagor's estate was held to have a right to redeem so as to get the benefit of the decree.

Repealed clause (d).—Before the passing of the Transfer of Property Act an attaching judgment creditor was not entitled to redeem (*h*). That right was conferred by the repealed clause (f) and a judgment creditor when he attached the mortgaged property in execution was allowed to redeem (*i*). In some cases the judgment creditor attached property in execution of his money decree before the mortgagee's suit and brought it to sale during the pendency of the mortgagee's suit. As to this there was a conflict of decision as to the rights of the attaching creditor and his execution purchaser. The Allahabad High Court held that the attaching judgment creditor and the execution purchaser if not made parties to the mortgagee's suit were entitled to redeem the mortgagee (*j*). It was erroneously assumed that the attaching judgment creditor had a charge and that the charge inured for the benefit of the execution purchaser (*k*). This was questioned in a later Allahabad case (*l*). The Calcutta (*m*) and Madras (*n*) High Courts held that the attaching creditor having no charge on the property was not a necessary party to the mortgagee's suit and that *a fortiori* he could not hand on any charge or lien to the execution purchaser (*m*). And further that the attaching creditor's right to redeem was lost when the attachment was discharged either by the execution sale or by the mortgagee's sale (*n*). In a later case (*o*), however, the Allahabad High Court held that clause (f) did not apply to the redemption of a charge, and that an attaching judgment creditor who purchased property which was subject to a charge during the pendency of the suit to enforce the charge was bound by the decree of the charge holder.

Subrogation.

92. *Any of the persons referred to in section* 91 *(other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such*

(*d*) *Rutnam Pillai* v. *Kamalambal* (1925) 48 Mad. L.J. 213, 86 I.C. 793, ('25) A.M. 778.

(*e*) *Green* v. *Wynn* (1869) 4 Ch. App. 204, 207; *Forbes* v. *Jackson* (1882) 19 Ch. D. 615; *Heera Lall* v. *Syud Oozeer* (1874) 21 W.R. 347; Contract Act, ss. 140 and 141.

(*f*) *Wade* v. *Coope* (1827) 2 Sim. 155; Fisher, s. 1427; *Bhushayya* v. *Suryanarayan* (1944) A.M. 195.

(*g*) (1842) 2 Hare 177.

(*h*) *Radhey Tewari* v. *Bujha* (1881) 3 All. 413; *Soobul Chunder* v. *Russick Lall* (1888) 15 Cal. 202.

(*i*) *Ghulam Husain* v. *Dina Nath* (1901) 23 All. 467; *Venkata Seetharamaya* v. *Venkataramayya* (1914) 37 Mad. 418, 15 I.C. 334.

(*j*) *Lukpat Rai* v. *Fakiruddin* (1917) 39 All. 532, 41 I.C. 190 followed in *Chhaganlal Hiralal* v. *Ismailji* (1933) 144 I.C. 525, ('33) A.N. 333.

(*k*) *Ghulam Husain* v. *Dina Nath*, *supra*; *Ram Prasad* v. *Bhikari Das* (1904) 26 All. 464; *Fatima Begam* v. *Bansidhar* (1932) All. L. J. 89, 136 I.C. 840, ('32) A.A. 356.

(*l*) *Gopal Devi* v. *Lachhmi Shankar* (1936) A. A. 512, (1936) A.L.J. 708, 163 I.C. 966.

(*m*) *Kiernander* v. *Benimadhab* (1931) 58 Cal. 598, 134 I.C. 561, ('31) A.C. 763; *Shananda* v. *Srinath* (1913) 17 Cal. W.N. 871, 17 I.C. 432.

(*n*) *Chamyiappa Tarakan* v. *Rama Ayar* (1921) 44 Mad. 252, 62 I.C. 121, ('21) A.M. 30; *Subramania Chettiar* v. *Sinnammal* (1930) 53 Mad. 881, 127 I.C. 624, ('30) A.M. 801 overruling *Seetharamaya* v. *Venkataramayya* (1914) 37 Mad. 418, 15 I.C. 334.

(*o*) *Matlub Hasan* v. *Mt. Kalwati* (1933) 167 I.C. 302, ('33) A.A. 934.

S. 92 *property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.*

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Amendment.—This section is new and was inserted by the Amending Act 20 of 1929. The word "subrogation" was not even mentioned in the Act before its amendment in 1929; but in conjunction with the principle "redeem up and foreclose down" the doctrine of subrogation was imperfectly expressed in the repealed secs. 74 and 75 of this Act and in Order 34, rule 11, of the Code of Civil Procedure, 1908, as originally enacted These were as follows :—

Section 74.—Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Section 75.—Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Code of Civil Procedure, 1908, *Order* 34, *rule* 11.—Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

The maxim "redeem up and foreclose down," which was enacted in Order 34, rule 11, of the Code of Civil Procedure, is a matter of substantive law and was out of place in a code of procedure. Again secs. 74 and 75 were badly drafted. It might be supposed from the wording of sec. 74 that a puisne mortgagee could only redeem the next prior mortgagee (*p*), but sec. 75 made it clear that that was not the meaning to be attached to the section. Again sec. 75 referred to rights only and not to liabilities. A puisne

(*p*) *Chhote Lal* v. *Bansidhar* (1926) 24 All. L.J. 570, 95 I.C. 998, ('26) A.A. 653; *Dubey* v. *Ram Sahai* (1923) 79 I.C. 686, ('24) A.O. 56.

mortgagee has a right of redemption against a prior mortgagee but is also subject to the liability of foreclosure and sale by the prior mortgagee. Sections 74 and 75 and Order 34, rule 11, of the Code of Civil Procedure have now been repealed. The present section gives a full and extended expression to the doctrine of subrogation; while the maxim "redeem up and foreclose down" is involved in secs. 91 and 94. As already explained, the right of a puisne mortgagee to redeem a prior mortgagee, *i.e.*, to redeem up, follows from the rule enacted in sec. 91 that any person having an interest in the equity of redemption may redeem. Again, under sec. 94 a mesne mortgagee has the same right against mortgagee's posterior to himself as he has against the mortgagor, *i.e.*, he may foreclose down.

To entitle one to invoke the equitable right of subrogation under the Act as it stood before the amendment of 1929, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or must stand in such a relation to the mortgaged premises that his interest cannot otherwise be protected. Thus a mere stranger who had lent money to the mortgagor to redeem the mortgage debt but who was neither a surety of the debt nor interested in the property had in order to succeed on the equitable doctrine of subrogation to prove that there was an agreement between him and the debtor or creditor that he should receive and hold an assignment of the debt as security. After the amendment of the Act the right of subrogation can be claimed by the lender under sec. 92, para 3, only if the mortgagor has in a registered instrument agreed that he should be so subrogated. The right can no longer be claimed or granted as before, on any slight evidence or what may be described as the semblance of an agreement (*q*).

Amendment whether retrospective.—Sec. 92 is not specified in sec. 63 of the Amending Act 20 of 1929 as not having retrospective effect. The Allahabad, Bombay and Calcutta High Courts and the Oudh Chief Court have held that it has retrospective effect (*r*). But the Madras, Rangoon and Patna High Courts have held that it has not retrospective effect (*s*). In a later Full Bench decision the majority of the judges of the Patna High Court has held that sec. 92 has retrospective operation in regard to transactions effected before 1st April 1930 except in cases pending on that day and except as to rights and liabilities arising before 1st July 1882 when the Transfer of Property Act came into force (*t*). If a suit has been decided in the original Court before the enactment of the section the Nagpur Court has held that the previous law must be applied in the appeal (*u*).

Scope of the section.—The first paragraph of the section deals with subrogation by operation of law and the third paragraph with subrogation by agreement. The Nagpur High Court holds that the first paragraph is not subject to the third paragraph (*v*). According to the Allahabad High Court two paragraphs do not overlap and they are

(*q*) *Lala Manmohan* v. *Janki Prasad* (1945) A.P.C. 23, 72 I.A. 39.

(*r*) *Totaram* v. *Ram Lal* (1932) 54 All. 897, 1932 All. L.J. 627, 139 I.C. 107, ('32) A.A. 489; *Kishen Gopal* v. *Abdul Latif* (1939) 15 Luck. 175, 185 I.C. 116, (1940) A.O. 97; *Brij Bhukhan* v. *Bhagwan Dutt* (1942) 203 I.C. 285, (1942) A.O. 449 (F.B.); *Subraya* v. *Tunmanna* (1938) A.B. 508, 40 Bom. L.R. 1001, 178 I.C. 974; *Vishnu* v. *Shankareppa* (1942) A.B. 227, 44 Bom. L.R. 415, 202 I.C. 292; *Mangal Sen* v. *Kewal Ram* (1940) A.A. 75, 187 I.C. 274; *Chunilal* v. *Lakshmichand* (1940) A.A. 237, (1940) All. 141, 188 I.C. 328 (1940) A.L.J. 234; *Kundanlal* v. *Faqir Baksha* (1938) A.O. 127; *Hira Singh* v. *Jai Singh* (1937) A.A. 568 (F.B.); *Shamsudin* v. *Haidarali* (1945) A.C. 194, 48 C.W.N. 104.

(*s*) *Pichaiyappa* v. *Govindaraju* (1931) 130 I.C. 506, ('31) A.M. 910; *Jagdeo Sahu* v. *Mahabir Prasad* (1934) 13 Pat. 111, 153 I.C. 602, ('34) A.P. 127; *Bank of Chettinad* v. *Maung Aye*, 933, (1938) 177 I.C. 766, (1938) A.R. 306 (F.B.).

(*t*) *Tika Sao* v. *Hari Lal* (1940) 19 Pat. 752, 189 I.C. 513, (1940) A.P. 385 (F.B.) see also *Ramdayal* v. *Chakrapani* (1936).

(*u*) *Lakmi Chand* v. *Janardhan* (1932) 141 I.C. 144, ('32) A.N. 154.

(*v*) *Ramgopal* v. *Nanakram* (1935) 161 I.C. 651, (1936) A.N. 32; *Taibai* v. *Wasudeorao* (1937) 172 I.C. 148, (1937) A.N. 372 (F.B.); *Lal Mohan* v. *Govind Sahi* (1940) 188 I.C. 417, (1940) A.P. 620.

S. 92 mutually exclusive (*w*). See below note: "Advance to pay off a mortgage." The principle of subrogation as embodied in the section applies to the Punjab (*x*).

Subrogation.—Subrogation means substitution, for the person redeeming is substituted for the incumbrancer whom he has paid off (*y*). Subrogation is either conventional or legal (*z*).

It has been said that subrogation is conventional when there is an agreement, express or implied, that the person making the payment shall exercise the rights and powers of the original creditor (*a*), and that very slight evidence is sufficient to establish such an agreement (*b*). An agreement of subrogation seems to have been presumed in *Dinobundhu Shaw* v. *Jogmaya Dasi* (*c*) and in *Jagathdhar* v. *Brown* (*d*). But the law as to conventional subrogation has been amended by the third paragraph of this section which requires (1) that the agreement of subrogation should be in writing, and (2) that the writing should be registered (*e*) see note *infra* "Advance to pay off a mortgage."

Legal subrogation, or subrogation by operation of law, arises when a person, who has, in the property, an interest of his own to protect, discharges a prior incumbrance (*f*). Subrogation by operation of law rests therefore on the same equity of reimbursement as is enacted in sec. 69 of the Indian Contract Act, that "a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other." Such a payment sometimes carries with it an equitable charge (*g*). Hence there may arise:

(1) A personal right of reimbursement.
(2) An equitable charge.
(3) Subrogation by operation of law.

Personal right of reimbursement.—This arises in cases to which sec. 69 of the Indian Contract Act applies—see Pollock and Mulla's Contract Act, 6th Edition, p. 382. The right of reimbursement under sec. 69 of the Contract Act is personal, while the right of subrogation affects the property (*h*). An officious or voluntary payment carries with it no right of reimbursement or of subrogation. This was settled by the Privy Council in the case of *Ram Tuhul Singh* v. *Biseswar Lall* (*i*) where their Lordships said—"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt." Again in *Gurdeo Singh* v. *Chandrikah Singh* (*j*) Mookerjee, J., said—"That principle is, that subrogation, as a matter of right, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debt of the succession. Any one, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer."

(*w*) *Hira Singh* v. *Jai Singh* (1937) A.A. 588, (1937) All. 880 (F.B.).
(*x*) *Sham Lal* v. *Chajju Ram* (1941) A.L. 53, 42 P.L.R. 812, 194 I.C. 297.
(*y*) *Balchand* v. *Ratanchand* (1942) A.N. 111, (1942) Nag. 393; *Man Mohan* v. *Janki Prasad* (1945) A.PC. 23, 72 I.A. 39.
(*z*) *Gurdeo Singh* v. *Chandrikah Singh* (1909) 36 Cal. 193-218, 1 I.C. 913.
Gurdeo Singh v. *Chandrikah Singh*, *supra*. *Re Wrexham Mold, etc.* (1899) 1 Ch. 440, 463.
(1902) 29 Cal. 154, 29 I.A. 9.
(*d*) (1906) 33 Cal. 1133, 1155.
(*e*) *Chunilal* v. *Lakshimchand* (1940) A.A. 237, (1940) All. 141, (1940) A.L.J. 234, 188 I.C. 328.
(*f*) *Gurdeo Singh* v. *Chandrikah Singh*, *supra*; *Bissesswar Prosad* v. *Lala Sagnam Singh* (1907) 6 Cal. L.J. 134.
(*g*) *Hira Singh* v. *Jai Singh* (1937) A.A. 588.
(*h*) *Mt. Savitribai* v. *Nanhelal* (1934) 148 I.C. 815, ('34) A.N. 84.
(*i*) (1875) 23 W.R. 305, 2 I.A. 131, 143: *Raj Bahadur Singh* v. *Nar Singh* (1941) A.O. 226.
(*j*) (1909) 36 Cal. 193, 219, 1 I.C. 913.

S. 92

This principle was followed in an Allahabad case (*k*) where the plaintiff purchased property from a minor and discharged a prior mortgage. The minor's sale was invalid and therefore the plaintiff was treated as a volunteer, and neither subrogated to the rights of the mortgagee, nor held entitled to reimbursement. In cases to which sec. 69 of the Indian Contract Act applies the right of reimbursement is available even though there be in addition an equitable charge or an assignment of the security by subrogation (*l*).

Equitable charge.—The equitable charge is analogous to a salvage lien in maritime law but differs from it in that it is not available to a volunteer. The doctrine of salvage lien was recognized by the Privy Council in *Nugenderchunder Ghose* v. *Sreemutty Kaminee* (*m*) where their Lordships said in the case of a mortgagee paying revenue to prevent a taluq from being sold "that they would find it difficult to come to any other conclusion than that the person who had such an interest in the Talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the Talook as against all persons interested therein for the amount of the money so paid." Again in *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (*n*) a person in possession under a decree of a Court paid money to prevent a sale of the estate for arrears of revenue and was entitled to reimbursement even though the decree was afterwards set aside. The Judicial Committee said that the claim was in the nature of salvage, and that the law relating to sales for arrears of Government revenue recognises an equity of repayment in the case of a person who not being a proprietor pays the Government revenue in good faith to protect a claim which turns out to be unfounded. But this doctrine is said to have been repudiated in England in the case of *Falcker* v. *Scottish Imperial Insurance Company* (*o*). This was a case in which a mortgagor was claiming against his own mortgagee a charge for premiums paid by him and has no bearing on claims made against a mortgagor or one of several mortgagors in respect of payments made to protect the property. But this supposed repudiation has influenced the Calcutta, Allahabad and Bombay High Courts, but not the Madras High Court. Thus when one of the two co-sharers in a revenue paying estate pays the whole revenue to save the estate, he is entitled to a charge on the share of the defaulting purchaser in Madras (*p*) but not in Calcutta (*q*), Allahabad (*r*), Patna (*s*), Rangoon (*t*) or Bombay (*u*). The law on this point is therefore unsettled and there is no clear line of demarcation showing when the personal right of reimbursement carries with it also an equitable charge.

Subrogation by operation of law.—The distinguishing feature of subrogation is that the incumbrance that is paid off is not extinguished but is treated as kept alive and assigned to the person making the payment. But just as there is no clear line of demarcation showing when the charge comes to the assistance of the personal right of reimbursement, so until this section was enacted there was no clear line of demarcation between cases of equitable charge and cases of subrogation.

In the case of a mortgage before this Act was passed the Privy Council applied the English equitable rule of intention to a puisne mortgagee paying off a prior mortgage. This was the case of *Mohesh Lal* v. *Mohunt Bawan Das* (*v*). The facts were these:

(*k*) *Shiam Lal* v. *Ram Piari* (1909) 32 All. 25, 4 I.C. 706

(*l*) *Durga Charan* v. *Ambica Charan* (1927) 54 Cal. 424, 101 I.C. 130, ('27) A.C. 393.

(*m*) (1867) 11 M.I.A. 241. 258.

(*n*) (1893) 20 I.A. 160, 21 Cal. 142.

(*o*) (1886) 34 Ch. D. 234.

(*p*) *Seshagiri* v. *Pichu* (1887) 11 Mad. 452; *Srinivasa* v. *Rama* (1893) 17 Mad. 247; *Rajah of Vizianagram* v. *Setrucherla* (1902) 26 Mad. 686 F.B.; *Alayakammal* v. *Subbaraya* (1905) 28 Mad. 498; *Amman Pariyayi* v. *Pakran Haji* (1913) 36 Mad. 493, 15 I.C. 262; *Kottayya* v. *Kotappa* (1926) 49 Mad. L.J. 117, 90 I.C. 551, ('26) A.M 141; *Swaminath Iyer* v. *Ram Iyer* (1943) A.M. 573, (1944) Mad. 44, 56 M.L.W. 289, (1943) 2 M.L.J. 24.

(*q*) *Kinu Ram Das* v. *Mozaffer* (1887) 14 Cal. 809.

(*r*) *Seth Chitor Mal* v. *Shib Lal* (1892) 14 All. 273 F.B.; *Munni Bibi* v. *Triloki Nath* (1932) 30 All. L.J. 63, 136 I.C. 66, ('32) A.A. 332.

(*s*) *Bhuneshwari Kuer* v. *Manir Khan* (1928) 7 Pat. 613, 111 I.C. 84, ('28) A.P. 641.

(*t*) *U Shwe Boe* v. *Maung Thank Kya* (1928) 6 Rang. 500, 113 I.C. 801, ('28) A.R. 278.

(*u*) *Shivrao* v. *Pundlik* (1902) 26 Bom. 487.

(*v*) (1883) 9 Cal. 961, 10 I.A. 62. 71.

S. 92

Manguldas in 1869 mortgaged to Lakshmi Narayan one village belonging to himself and three villages belonging to a religious institution with authority from its head, the Mohant. Three years later in 1872 he raised money by a mortgage of the same villages to Mohesh Lal without authority from the Mohant, and paid off the mortgage to Lakshmi Narayan. Mohesh Lal sued on his mortgage and was resisted by the Mohant, the real owner of three of the villages. Mohesh Lal then sought to rely on the first mortgage to Lakshmi Narayan which had been paid off with his money—in other words, to be subrogated to the rights of the first mortgagee. The Judicial Committee disallowed this, as Mohesh Lal had not contemplated the event of Manguldas not being the proprietor of the estate and could not therefore have intended to keep alive the mortgage to Lakshmi Narayan. Their Lordships said—"It must be presumed that when the plaintiff lent the money to Mangal to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad, as regards a portion of the lands included in it."

In another case of a mortgage before the Act, the Privy Council applied the doctrine of subrogation to a purchaser of the equity of redemption. This was *Gokuldas v. Puranmal* (w). Gokuldas, a creditor of the mortgagor, purchased the equity of redemption at a sale in execution of a money decree and got possession. He then paid off a prior mortgage but was sued for possession by a puisne mortgagee. But it was held that he was subrogated to the rights of the prior mortgagee whom he had paid off and that he could not be dispossessed unless he was redeemed. Here again the Privy Council applied the equitable rule of intention. In the course of their judgment they said—"The obvious question to ask in the interests of justice, equity and good conscience is, what was the intention of the party paying off the charge. He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his own interest."

The Act recognized the equitable rule of intention in sec. 101 in connection with the rule of merger when the owner of an incumbrance acquires full ownership, but made no provision for its application to cases of subrogation. The only case of subrogation provided for was the one case of a puisne mortgagee redeeming a prior mortgage, and under sec. 74 of the Act he was subrogated to the rights of the prior mortgagee irrespective of any question of intention; and it has been expressly held that no question of benefit or intention arises under sec. 74 when a puisne mortgagee redeems a prior mortgagee (x). So that if *Mohesh Lal's* case had been decided under the Act, the decision would probably have been different, for Mohesh Lal as puisne mortgagee would have been subrogated to the rights of the prior mortgagee and would have been entitled to use the prior mortgage as a shield against the Mohant. Again the old sec. 95 confused subrogation with equitable charge in the case of redemption by a co-mortgagor. This subject is dealt with in detail in the commentary on sec. 95. There was no provision for the subrogation of a surety, nor for the subrogation of a purchaser of an equity of redemption. These defects have been rectified by the amendments made by Act 20 of 1929.

Cases of legal subrogation occur in four ways—

(1) A puisne mortgagee redeeming a prior mortgagee.

(2) A co-mortgagor redeeming the mortgage.

(3) The mortgagor's surety redeeming the mortgage.

(4) A purchaser of the equity of redemption redeeming a mortgage.

(w) (1884) 10 Cal. 1035, 11 I.A. 126, 133.

(x) *N[illegible]r v. Govindayyar* (1923) 70 I.C. ('23) A.M. 349.

Where the puisne mortgagee redeems.—Before the Act the subrogation of a puisne mortgagee paying off a prior mortgagee was determined under the rule of intention. Thus in a Madras case (*y*) a third mortgagee paid off the first mortgage in ignorance of a second mortgage represented by a registered decree, and he was held entitled to a first charge on the ground that he must be presumed to have intended to keep the first mortgage alive in accordance with the ruling of the Privy Council. But in a Bombay case (*z*) the plaintiff paid off a prior mortgage and retained the title deeds becoming an equitable puisne mortgagee, yet it was held that he was not subrogated to the prior mortgagee as that mortgage had not been assigned to him. The Act did not apply to the case, but under the Act, even before the amendment, he would have been subrogated. According to the old sec. 74 a puisne mortgagee redeeming a prior mortgagee was always subrogated (*a*) unless he was under covenant to discharge the prior encumbrance (*b*). The next case before the Privy Council of redemption by a puisne mortgagee seems to have been a case of conventional subrogation and not of subrogation by operation of law. This was the case of *Dinobundhu Shaw* v. *Jogmaya Dasi* (*c*). Property was mortgaged first to *A* and then to *B* and then attached by an execution creditor of the mortgagor. The mortgagor raised money by a third mortgage to *C* which contained the following clause:—"I promise that after repaying the money due on the aforesaid two mortgages I shall cause a reconveyance of those properties to be executed and registered, and shall make over to you the mortgage deeds which I shall get back." The mortgagor paid off the mortgages to *A* and to *B* and handed the reconveyances to *C*. *C* was unaware of the attachment but the Privy Council held that there was no intention to extinguish the two mortgages to *A* and to *B* and that the mortgagor paid his debts in pursuance of an agreement with *C* for the benefit of *C* and not for the benefit of the attaching creditor. The case seems therefore to be one of subrogation by agreement rather than by operation of law. But if the case be considered as one of subrogation by operation of law, *i.e.*, if there was no agreement with the mortgagor and the payment be treated as made by the puisne mortgagee, the conclusion is consistent both with sec. 74 and the rule of intention.

The last case of subrogation of a puisne mortgagee decided by the Privy Council was the case of *Mahomed Ibrahim Hossein Khan* v. *Ambika Persad Singh* (*d*) where the fifth mortgagee paid off the first mortgagee, and as there were three intervening mortgages the Privy Council held that he must have intended to keep it alive and to stand in the place of the first mortgagee.

Both the Privy Council cases of *Dinobundhu Shaw* v. *Jogmaya Dasi* (*c*) and *Mahomed Ibrahim Hossein Khan* v. *Ambika Persad Singh* (*d*) were decided after the Transfer of Property Act, but no reference was made to the Act.

The following are some typical instances of the subrogation of a puisne mortgagee decided under the repealed sec. 74 :

Illustrations.

(1) *A* mortgaged his property by simple mortgage to *B* and then by usufructuary mortgage to *C*. *C* redeemed *B*'s prior mortgage. *A*'s equity of redemption was purchased in execution of a money decree by *D*. *D* sought to recover possession from *C* by redemption

(*y*) *Gangadhara* v. *Sivarama* (1884) 8 Mad. 246. See also *Ghanaya* v. *Pandit Chhajju* (1894) P.R. 38.

(*z*) *Khushal* v. *Punamchand* (1897) 22 Bom. 164.

(*a*) *Nagayyar* v. *Govindayyar* (1923) 70 I.C. 286, ('23) A.M. 349; *Ram Sahai* v. *Kunwar Sah* (1932) 7 Luck. 26, 139 I.C. 626, ('32) A.O. 314; *Bappu* v. *Venkatachalapathy Ayyar & Co.* (1934) 64 Mad. L.J. 606, 148 I.C. 311, ('34) A.M. 227; *Jagarnath Prasad* v. *Chunilal* (1940) A.A. 416, (1940) All. 580, (1940) A.L.J. 511, 191 I.C. 547.

(*b*) *Said Ahmad* v. *Raja Bahadur Mahesh* (1932) 8 Luck. 40, 139 I.C. 84, ('32) A.O. 255.

(*c*) (1902) 29 Cal. 154, 29 I.A. 9, 14.

(*d*) (1912) 39 Cal. 527, 39 I.A. 68, 14 I.C. 496.

S. 92

of the usufructuary mortgage. Held that *D* was not entitled to recover possession unless he redeemd both mortgages : *Kirat* v. *Debi Singh* (1904) 27 All. 308 (facts simplified).

(2) *A* mortgaged his property first to *B*, then to *C*, and then to *D*. *D* paid off *B* and brought the property to sale by suit on his own mortgage. The auction purchaser could set up *B*'s mortgage as a shield when *C* sued to enforce his mortgage : *Matilal* v. *Banwarilal* (1900) 32 All. 138, 5 I.C. 132.

(3) *A* mortgaged his property first to *B*, then to *C*, and then to *D*. The mortgage to *D* recited that there were no prior encumbrances except the mortgage to *B*. *D* discharged *B*'s mortgage by a payment of Rs. 1,830. Although *D* was not aware of the mortgage to *C* he is subrogated to the rights of *B* and is entitled to priority over *C* in respect of the sum of Rs. 1,830 : *Pandit Durga Missir* v. *Baijnath Saran* (1929) 8 Pat. 360, 118 I.C. 730 ('29) A.P. 325 ; *Krishnamurthy Chettiar* v. *Sathappa Chettiar* (1933) 56 Mad. 517, 64 Mad. L.J. 523, 143 I.C. 780, ('33) A. M. 398. Other instances are cited in foot-note (*e*).

If the puisne mortgage is collusive or fraudulent there is of course no subrogation (*f*). If the mortgagor has sold the equity of redemption *before* executing the puisne mortgage, the latter is not entitled to subrogation (*g*). An attachment renders a subsequent alienation void only so far as it prejudices the attaching creditor, and if there is no prejudice, a puisne mortgagee (by a mortgage subsequent to the attachment) can claim to be subrogated (*h*).

Subrogation was refused under section 74 in the undermentioned cases on the ground that the section implied a tender by the subsequent mortgagee on his own account and not as an agent of the mortgagor (*i*). But it would be otherwise under the present section. There can be subrogation more than once. If *C* by redeeming off *A* can be subrogated to his right, there is no reason why *D* by paying off *C* cannot be substituted to the same right, provided the security of *A* is legally alive at the time (*j*).

It is a mistake to suppose that a new charge comes into existence with the decree and that a puisne mortgagee who discharges the decree of a prior mortgagee is subrogated to the position of decree holder. The fact that a decree has been passed makes no difference and the puisne mortgagee is subrogated to the rights of the prior mortgagee even though the debt has merged in the decree (*k*). This is well illustrated by a case of redemption by a co-mortgagor. The prior mortgage was by *A* and *B* to *C* and the puisne mortgage was by *A* alone to *C*. *C* realized the puisne mortgage by sale and bought the property himself. *C* then obtained a decree on the prior mortgage, this decree being of later date than his decree on the puisne mortgage. *A* paid off the later decree on the prior mortgage and had priority over *C*. It was the date of the mortgage, not

(*e*) *Parvati Ammal* v. *Venkataramu* (1925) 47 Mad. L.J. 316, 81 I.C. 771, ('25) A.M. 80 ; *Raghunandan Prasad* v. *Ajodhya Singh* (1931) 29 All. L.J. 214, 129 I.C. 378, ('30) A.A. 869 ; *Amba Prasad* v. *Moonga Ram* (1930) 128 I.C. 235, ('30) A.A. 523 ; *Muhammad Tabarak Ali* v. *Dalip Narain* (1927) 98 I.C. 968, ('27) A.P. 117 ; *Sibanand* v. *Jagmohan* (1922) 1 Pat. 780, 68 I.C. 707, ('22) A.P. 499 ; *Narayan* v. *Posha Jama* (1921) 45 Bom. 1112, 62 I.C. 477, ('21) A.B. 172 ; *Allisaheb* v. *Shesho* (1931) 33 Bom. L.R. 1238, 135 I.C. 489, ('31) A.B. 545 ; *Sarat Chandra* v. *Pramath Nath* (1933) 37 Cal. W.N. 113, 145 I.C. 295, ('33) A.C. 48? ; *Pal Singh* v. *Sundar Singh* (1933) 145 I.C. 719, ('33) A.L. 1000.

(*f*) *Gulzari Lal* v. *Aziz Fatima* (1919) 41 All. 372, 50 I.C. 375 ; *Bansidhar* v. *Shev Singh* (1933) 56 All. 134, 1933 All. L.J. 1564, 147 I.C. 575, ('33) A.A. 908 (mortgage void as property under Collector's execution).

(*g*) *Apaji* v. *Kavji* (1882) 6 Bom. 64.

(*h*) *Dinobundhu Shaw* v. *Jogmaya Dasi* (1901) 29 Cal. 154, 29 I.A. 9 ; *Jamil-un-nissa* v. *Pitambar* (1913) 11 All. L.J. 127, 18 I.C. 704.

(*i*) *Kalaguyyan* v. *Yanadamma* (1911) 21 Mad. L.J. 180, 9 I.C. 139 ; *Kandasami* v. *Venkata* (1925) 91 I.C. 577, ('25) A.M. 1219 ; *Shafiq Ullah Khan* v. *Sami Ullah* (1930) 52 All. 139, 123 I.C. 101, ('29) A.A. 943. But see *Muhammad Tabarak Ali* v. *Dalip Narain* (1927) 98 I.C. 968, ('27) A.P. 117.

(*j*) *Gopal Devi* v. *Ghulam Fatima* (1943) A.L. 113, 45 P.L.R. 143, 209 I.C. 75, S.C. (1940) A.L. 269, 190 I.C. 599.

(*k*) *Kotappa* v. *Raghavayya* (1927) 50 Mad. 626, 102 I.C. 316, ('27) A.M. 631 ; *Babu Lal* v. *Bendhyachalrai* (1942) 22 Pat. 187 (1943) A.P. 305 ; *Shamsuddin* v. *Haider Ali* (1945) A.C. 194, 49 C.W.N. 104 (see note below : Limitation).

the date of the decree that determined priority (*l*). A mortgagee who has obtained a decree for sale which he has not executed may use the mortgage as a shield even after execution of the decree has become time-barred. In the picturesque language of a Nagpur Judge "because the mortgagee can no longer wield his mortgage as a sword, it does not follow he cannot use it as a shield to protect his own interests (*m*)". In an Allahabad case (*n*) a puisne mortgagee paying off a decree obtained by a prior mortgagee was held to be entitled to a charge only. But this was a case of subrogation as pointed out by the Patna High Court (*o*).

Although the repealed sec. 89 professed to extinguish the equity of redemption after a decree absolute for sale, yet when a puisne mortgagee discharged a decree absolute for sale obtained by a prior mortgagee he was subrogated and entitled to priority over mesne mortgages (*p*).

Where co-mortgagor redeems.—A co-mortgagor redeeming a mortgage is a simple case of subrogation (*q*), for a co-debtor is a principal debtor in respect of his own share and a surety in respect of his co-debtor's shares, and when a surety has paid the debt he is entitled to avail himself of all the creditor's securities (*r*). In *Jagan Nath* v. *Abdulla* (*s*) there was a prior mortgage by *A* and *B* and a puisne mortgage by *A*. *A* paid off the prior mortgagee's decree and when the puisne mortgagee brought the property to sale, *A* was entitled to set up the prior mortgage as a shield. The co-mortgagor's right to subrogation was admitted even before the Act (*t*). But the old section 95 made the legal position obscure by giving the redeeming co-mortgagor a charge and apparently only in the case of a usufructuary mortgage. This subject is discussed in the commentary under sec. 95 of this Act.

On redeeming property subject to the mortgage.—These words refer to the payment out of court as well as the payment of the mortgage decree (*u*).

Where mortgagor's surety redeems.—There was one case before the Act in which a mortgagor's surety was subrogated on redemption (*v*). There were no cases under the Act, and before the amending Act of 1929 he would probably have been treated in the same way as a redeeming co-mortgagor. Under the Act as amended he would, of course, be subrogated.

Where purchaser of equity of redemption redeems.—When the purchaser of the equity of redemption redeems or pays off a mortgage, the incumbrance may be merged or drowned in the estate of ownership. This is the case of merger referred to in the old sec 101 when the rights of the mortgagee and of the owner meet in the same person. According to that section and the Privy Council case of *Gokuldas* v. *Puranmal* (*w*) already referred to, it was purely a question of the intention, express or implied, of the person paying off the mortgage. If he did not intend to keep it alive it was merged or drowned

(*l*) *Jagan Nath* v. *Abdulla* (1934) 15 Lah. 746, 150 I.C. 366, ('34) A.L. 248.

(*m*) *Ramshankar* v. *Gulab Shankar* (1933) 144 I.C. 736, ('33) A.N. 241, 242 per Bose A.J.C.

(*n*) *Shib Lal* v. *Munni Lal* (1922) 44 All. 67, 63 I.C. 604, ('22) A.A. 153, followed in *Paras Ram* v. *Mewa* (1930) 28 All. L.J. 890, 125 I.C. 754, ('30) A.A. 561.

(*o*) *Sibanand* v. *Jagmohan* (1922) 1 Pat. 780, 785, 68 I.C. 707, ('22) A.P. 499.

(*p*) *Abbas Ali Khan* v. *Chote Lal* (1927) 49 All. 162, 97 I.C. 594, ('27) A.A. 28.

(*q*) *Raushan Ali Khan* v. *Kali Mohan* (1906) 4 Cal. L.J. 79; *Khuda Buksh* v. *Ata Mahomed* (1942) A.L. 135, 44 P.L.R. 133, 201 I.C. 159; *Pashupati Nath* v. *Sachi Nath Roy* (1943) A.C. 330, (1943) 2 Cal. 180, 47 C.W.N. 405, 209 I.C. 15; *Kundan Lal* v. *Faqir Baksh* (1938) A.O. 127 F.B.; *Subraya* v. *Timmanna* (1938) A. B. 508

(*r*) *Green* v. *Wynn* (1869) 4 Ch. App. 204, 207; *Forbes* v. *Jackson* (1882) 19 Ch. D. 615; *Heera Lall* v. *Syud Oozeer* (1874) 21 W.R. 347; Contract Act, secs. 140, 141; *Abdul Guffar Khan* v. *Mangat Rai* (1938) A.L. 184, (1938) Lah. 103, 40 P.L.R. 544, 176 I.C. 778.

(*s*) (1934) 15 Lah. 746, 150 I.C. 366, ('34) A.L. 248.

(*t*) *Asansab Ravuthan* v. *Vamana* (1879) 2 Mad. 223; *Ganeshnath* v. *Raghu* (1880) P.J. 300; *Pandji* v. *Sadashava* (1881) P.J. 57; *Pancham Singh* v. *Ali Ahmad* (1884) 4 All. 58.

(*u*) *Alam Ali* v. *Beni Charan* (1936) A.A. 33, 58 All. 602, 160 I.C. 541.

(*v*) *Heera Lall* v. *Syud Oozeer*, *supra*.

(*w*) (1884) 10 Cal. 1035, 11 I.A. 126.

S. 92

in his estate of ownership. If he did intend to keep it alive he was subrogated to the rights of the mortgagee whom he had redeemed. This rule was reaffirmed in the Privy Council case of *Malireddi Ayyareddi* v. *Gopalakrishnayya* (x) where their Lordships observed that the rule of intention had been enacted in sec. 101 of the Transfer of Property Act, 1882. In this case there were three mortgages, the first and third of the land and the second of the crops. The second mortgagee obtained a decree on his mortgage and orders were made from time to time for sale of the crops but some of the sales were averted by one Pingala, an assignee of the equity of redemption. The third mortgage then obtained a decree for sale of the property free from incumbrances and the first mortgage was paid off out of the sale proceeds; but the balance due to the second mortgagee was paid by Pingala. The Madras High Court held that Pingala was entitled to recover this balance as well as the sums he had paid to avert the sales of crops from the surplus sale proceeds. The Privy Council affirmed this on the ground that as to all such payments he was subrogated to the rights of the second mortgagee. Their Lordships said—"It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or, to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant." The rule of intention on which these two cases were decided by the Privy Council is implied in sec. 92, for it is when there are other mortgages that it is to the benefit of the person redeeming to keep the mortgage alive for future defence.

Purchaser's covenant excludes subrogation.—The last sentence from the passage cited from the judgment in *Malireddi*'s case refers to an important exception which will be discussed later. See notes infra "Other than the mortgagor" and "Covenant excludes subrogation." For the present it is sufficient to say that when a mortgagor himself pays off the mortgage he cannot use it as a shield against a subsequent mortgage of his own, and this, for the simple reason that he cannot derogate from his own grant.

Rule in Toulmin v. Steere.—The exception which excludes a mortgagor from subrogation was extended in England to the case of a mortgagee purchasing the equity of redemption and discharging other mortgages. This was the case of *Toulmin* v. *Steere* (y). The Master of the Rolls, Sir William Grant, held that such a mortgagee was in no better position than the mortgagor would be if he had discharged the mortgages and that the purchaser could not use either his own mortgage or the mortgages he had redeemed against a subsequent incumbrance of which he had notice. The effect of *Toulmin* v. *Steere* is that when a purchaser of the equity of redemption is redeeming a mortgage there is no presumption that he intends to keep it alive against a subsequent incumbrance of which he had no knowledge but may have had constructive notice. The practice of English conveyancers is therefore to assign the mortgage that is paid off to trustees to be kept alive expressly for his benefit, or to insert an express declaration that the mortgage shall not merge but shall be kept on foot.

Rule inapplicable in India.—*Toulmin* v. *Steere* though not formally overruled is obsolete in England (z) and was declared by the Privy Council in *Gokuldas*' case to be

(x) (1924) 47 Mad. 190, 51 I.A. 140, 79 I.C. 592, ('24) A.PC. 36, followed in *Pichai Konar* v. *Narasimha* (1930) 58 Mad. L.J. 1343, 125 I.C. 247, ('30) A.M. 471; *Mata Din* v. *Iftikhar Husain* (1930) 5 Luck. 53, 18 I.C. 835, ('30) A.O. 178; *Rama Krishnayya* v. *Venkata Somayajulu* (1934) 148 I.C. 467, ('34) A.M. 31; *Subraya* v. *Timmanna supra*.

(y) (1817) 3 Mer. 210.

(z) *Watts* v. *Symes* (1851) 1 De G.M. & G. 240, 244 C.A.; *Thorne* v. *Cann* (1895) A.C. 11, 16; *Liquidation Estates Purchase Co.* v. *Willoughby* (1896) 1 Ch. 726 C.A. on app. (1898) A.C. 321. See also the dissenting judgment of Fletcher Moulton, L.J., in *Manks* v. *Whiteley* (1912) 1 Ch. 735 on app. *Whiteley* v. *Delaney* (1914) A.C. 132.

inapplicable to India. Their Lordships said—"The doctrine of *Toulmin* v. *Steere* is not applicable to Indian transactions, except as the law of justice, equity and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did, it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees, to whom he is not personally liable. In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere* seems to them likely, not to promote justice and equity but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation (*a*)." Their Lordships after thus repudiating *Toulmin* v. *Steere* proceed in the passage quoted in an earlier part of this note (*b*) to apply the same rule of intention as was laid down some years later by Lord Macnaghten in *Thorne* v. *Cann* (*c*). See p. 615.

Some Indian cases (*d*) before *Gokuldas* v. *Puranmal* had been influenced by *Toulmin* v. *Steere*. But as far back as 1873 Holloway, J., in Madras (*e*) had propounded the same rule of intention as was followed by the Privy Council in *Gokuldas*'s case, and West, J., had in a Bombay case (*f*) refused to follow *Toulmin* v. *Steere*.

The old section 101 was as follows :—

"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit."

The phrase "declares by express words" no doubt recalls the devices of English conveyancers to defeat the rule in *Toulmin* v. *Steere* but the last words of the section "or such continuance would be to his benefit" apply the equitable rule of intention to all cases of merger. The Privy Council seem to have taken this view of the section in *Malireddi Ayyareddi* v. *Gopalakrishnayya* (*g*), for in the course of the judgment their Lordships observed "it is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, sec. 101), that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit." Following this decision, the Calcutta High Court has observed the doctrine of subrogation or the equitable rule of giving effect to the intention of the parties to keep the security alive applies to India (*h*).

Illustrations.

(1) There was a prior mortgage to *A* in 1870 and a puisne mortgage to *B* in 1871. *A* purchased the equity of redemption in 1872. *B* then sued on his mortgage but *A* could still use his first mortgage as a shield : *Mulchand Kuber* v. *Lallu Trikam* (1882) 6 Bom. 404.

(*a*) *Gokuldas* v. *Puranmal* (1884) 11 I.A. 126, 133, 10 Cal. 1035.

(*b*) See p. 514.

(*c*) (1895) A.C. 11, 19.

(*d*) *Gaur Narayan Mazumdar* v. *Braja Nath* (1870) 5 Beng. L.R. 463 ; *Itcharam Dayaram* v. *Raiji Jaga* (1875) 11 Bom. H.C. 41 ; *Krishna* v. *Narayana* (1884) 7 Mad. 127.

(*e*) *Ramu Naikan* v. *Subbaraya Mudali* (1873) 7 Mad. H.C. 229.

(*f*) *Mulchand Kuber* v. *Lallu Trikam* (1882) 6 Bom. 404.

(*g*) (1924) 47 Mad. 190, 51 I.A. 140, 143, 79 I.C. 592, ('24) A.PC. 36.

(*h*) *Prannath Roy* v. *Janki Nath Roy* (1937) A.C. 194, S.C. on appeal 64 I.A. 82.

S. 92

(2) There was a prior mortgage to *A* in 1866 and a puisne mortgage in 1874 to *B*. In 1878 *C* purchased the equity of redemption and paid off *A* the first mortgagee. When *B* sued to enforce his mortgage *C* could use the prior mortgage as a shield: *Sirbadh Rai* v. *Raghunath Prasad* (1885) 7 All. 568.

(3) There was a first mortgage usufructuary to *A* in 1891 and a second mortgage to *B* in August 1902. The mortgagor sold the equity of redemption to *C* in October 1902 for Rs. 1,800, but *A* was a co-sharer entitled to pre-emption and he obtained a pre-emption decree, paid Rs. 800 to the mortgagor for the purchase of the equity of redemption, and discharged his own mortgage by a payment of Rs. 1,000. When *B* sued to enforce his mortgage, it was held that *A* was entitled to rely on the first mortgage: *Baldeo Prasad* v. *Uman Shankar* (1907) 32 All. 1, 4 I.C. 810.

(4) Property was mortgaged to *A*, and then attached in execution of a money decree by *B*. The mortgagor sold the property to *C* who paid off the mortgagee. Held that *C* did so for his own benefit and not that of any purchaser at the execution sale in pursuance of *B*'s attachment: *Jamil-un-nissa* v. *Pitambar* (1913) 11 All. L.J. 127, 18 I.C. 704.

(5) There was a first mortgage to *A* and a second mortgage to *B*. *A* sued on his mortgage and obtained a decree for sale, but the mortgagor sold the property to *C* and paid off the decree. When *B* sued on his mortgage, *C* was held to be entitled to rely on the prior mortgage: *Madho Singh* v. *Pancham Singh* (1927) 49 All. 233, 101 I.C. 409, ('27) A.A. 211.

(6) There were two mortgages of the same property the first to *A* and the second to *A*'s joint nephew *B*. *A* obtained a decree for sale on the first mortgage. *C* purchased part of the property and paid off *A*'s decree. *B*'s mortgage fell to *A* on a partition. When *A* sued to enforce the second mortgage *C* was entitled to use the first mortgage as a shield: *Gadiram* v. *Punamchand* (1933) 144 I.C. 326, ('33) A.N. 171.

In an Allahabad case (*i*) there was a first mortgage of two villages to *A* and a second mortgage of the same two villages to *B*. The mortgagor sold one of the villages to *C* for Rs. 6,105 to be paid in full discharge of *A* plus Rs. 395 to be paid in partial discharge of *B*. *C* delayed payment until a further sum of Rs. 114 was due to *A* for interest. *C* then paid *A* in full and deducted Rs. 114 from the sum paid in partial discharge of *B*. When *B* sued to enforce his mortgage for the balance *C* was entitled to be subrogated to the first mortgage for the full amount paid to *A*. *B* was not a party to the agreement to pay and could not claim compensation for *C*'s delay in paying. But as *C* was in possession he was not allowed interest on the amount paid to *A*.

Redemption by benamidar.—A benami purchaser is treated as a volunteer and not subrogated (*j*); and as he has acquired no interest in the property, it has been held that he has not even a personal right of reimbursement (*k*). When a person erroneously believes that he is entitled to stand in the shoes of the mortgagor and pays off the mortgage, he was held entitled to be subrogated to the rights of the mortgagee (*l*).

Interest.—The purchaser of the equity of redemption, paying off a prior mortgage is subrogated not only as to the principal sum paid for redemption but also as to interest on that sum. It has been said that the fact of his taking possession does not prejudice his right to interest (*m*). In other cases it has been said that if he is in possession, his

(*i*) *Umed Singh* v. *Babu Ram* (1934) All. L.J. 887, 150 I.C. 937, ('34) A.A. 1035.

(*j*) *Karuppan* v. *Sakuth* (1914) 26 Mad. L.J. 74, 22 I.C. 253. But see *Parvati Ammal* v. *Venkatarama* (1925) 47 Mad. L.J. 316, 81 I.C. 771, ('25) A.M. 80, where the point was not considered.

(*k*) *Govinda* v. *Lokanatha* (1921) 40 Mad. L.J. 114, 62 I.C. 291, ('21) A.M. 51.

(*l*) *Ram Krishna* v. *Venkat Swami* (1945) A.M. 175; *Perumal Reddiar* v. *Sappiah Thevar* (1945) A.M. 500; *Kelu* v. *Chekkara Cheppan* (1937) A.M. 451.

(*m*) *Malireddi Ayyareddi* v. *Gopala Krishnayya* (1919) 53 I.C. 493 affirmed in (1924) 51 I.A. 140, 47 Mad. 190, 79 I.C. 592, ('24) A.PC. 36; *Pichai Konai* v. *Narasimha* (1930) 58 Mad. L.J. 348, 125 I.C. 247, ('30) A.M. 471.

claim to interest is inadmissible (*n*), or admissible only so far as the profits fall short of interest (*o*).

Redemption by claimant under invalid purchase.—If the purchase is invalid, the purchaser is a volunteer and there is no right of subrogation (*p*).

Illustration.

A mortgages property to *B* in 1912 and then sells the equity of redemption to *C* in 1918. After *A*'s death his widow in 1920 purports to sell the property to *D* who retains part of the consideration and pays off *B*'s mortgage. *D* had acquired no interest in the property by his professed purchase from *A*'s widow. His payment was that of a volunteer and he was not subrogated to the rights of the mortgagee *B*: *Pichaiyappa* v. *Govindaraju* (1931) 130 I.C. 506, ('31) A.M. 110.

Redemption by purchaser whose purchase is set aside.—If the purchase is subsequently set aside the purchaser may still claim the benefit of the securities he has discharged. Thus in *Mahomed Shumsool* v. *Shewukram* (*q*) a reversioner set aside a sale by a Hindu widow, but the purchaser was held to be entitled to claim redemption of a prior valid mortgage that he had discharged. In *Nasiruddin* v. *Ahmad Husain* (*r*), when a sale was set aside in a suit for specific performance of a prior contract of sale, and the purchaser had discharged mortgages on the property, the Privy Council said: "It seems that the appellants have, in virtue of their claim to be purchasers, discharged mortgages upon the property. In respect of any money paid by way of such discharge they are entitled to stand in the shoes of the mortgagees whom they have paid off." Other instances are cited in the footnote (*s*). A very extreme instance of the application of this rule was the case of *Syamalarayudu* v. *Subbarayudu* (*t*). The owner agreed to sell land to the defendant, but the plaintiff got the owner to give him an antedated deed and took possession. Defendant sued for specific performance, and pending the suit the plaintiff paid off a mortgage in order to strengthen his title. Defendant succeeded in the suit and dispossessed the plaintiff, who then sued to recover the amount of the mortgage. The suit was decreed on the ground that the payment of the mortgage debt was not illegal. In *Karupan* v. *Sakuth* (*u*) a collusive transferee was refused subrogation as he did not come into Court with clean hands. So also in *Gulzari Lal* v. *Aziz Fatima* (*v*) when a prior mortgage was paid off by a collusive and fraudulent puisne mortgagee.

(*n*) *Bappu* v. *Venkatachalapathi Ayyar* (1934) 64 Mad. L.J. 606, 148 I.C. 311, ('34) A.M. 227.

(*o*) *Ramchandra* v. *Panalayammal* (1935) 68 Mad. L.J. 717, ('35) A.M. 360.

(*p*) *Pichaiyappa* v. *Govindaraju* (1931) 130 I.C. 506, ('31) A.M. 110; *Govinda Padayachi* v. *Lokanatha Aiyar* (1921) 40 Mad. L.J. 114, 62 I.C. 291, ('21) A.M. 51; *Velayudhan* v. *Nallathambi* (1928) 111 I.C. 690, ('28) A.M. 541.

(*q*) (1874) 2 I.A. 7, 22 W.R. 409, in appeal from (1870) 14 W.R. 315; *Baban* v. *Bishwanath* (1934) ('34) A.P. 681.

(*r*) (1926) 25 All. L.J. 20, 22, 97 I.C. 543, ('26) A.PC. 109.

(*s*) *Nilo Pandurang* v. *Rama* (1885) 9 Bom. 35 (purchaser's title barred by limitation); *Narayan Lakshman* v. *Bapu* (1893) 17 Bom. 741 (purchaser's title defeated by registered deed); *Kesri Mal* v. *Mubarak Hussain* (1911) 8 All. L.J. 663, 10 I.C. 556 (purchase at auction sale set aside); *Chama Swami* v. *Padala* (1908) 31 Mad. 439 (purchase at sale held invalid); *Palamalai Mudaliyar* v. *South Indian Export Co.* (1910) 33 Mad. 334, 5 I.C. 33 (purchase at sale voidable against creditors); *Sibanand Misra* v. *Jagmohan Lall* (1922) 1 Pat. 780, 68 I.C. 707, ('22) A.P. 499 (purchase at Court sale set aside); *Subramania* v. *Palaniappa Mudali* (1913) 26 Mad. L.J. 94, 21 I.C. 978; *Appana* v. *Velamarti* (1926) 51 Mad. L.J. 358, 97 I.C. 932, ('26) A.M. 1082 (purchase invalid against attaching creditor); *Dwarka* v. *Ali Muhammad* (1930) 127 I.C. 17, ('30) A.O. 397 (purchase invalid against attaching creditor); *cf. Ram Charan Lonia* v. *Bhagwan Das* (1926) 48 All. 443, 53 I.A. 142, 95 I.C. 898, ('26) A.PC. 68; *Ammani Ammal* v. *Ramasawmi* (1919) 37 Mad. L.J. 113, 51 I.C. 57 (purchase from guardian held invalid); *Ganga Prasad* v. *Hardei* (1931) 29 All. L.J. 601, 133 I.C. 536, ('32) A.A. 32; *Govinda* v. *Marugesa* (1931) 135 I.C. 529, ('31) A.M. 720; *Jagdeo Sahu* v. *Mahabir Prasad* (1934) 13 Pat. 111, 153 I.C. 602, ('34) A.P. 127.

(*t*) (1898) 21 Mad. 143.

(*u*) (1914) 26 Mad. L.J. 74, 22 I.C. 253.

(*v*) (1919) 41 All. 372, 50 I.C. 375.

S. 92

Rule of intention implied in the section.—Under the present section the rights of the purchaser of the equity of redemption when he redeems are the same, but they are stated more simply and directly. The case of a purchaser of the equity of redemption redeeming a mortgage, and the converse case of the mortgagee purchasing the equity of redemption, were both covered by the old sec. 101 and governed by the equitable rule of intention. Under the present Act a purchaser of the equity of redemption redeeming is a case of subrogation under sec. 92, but the mortgagee acquiring the ownership or the mortgagor's interest is a case of merger or non-merger under sec. 101, and in neither section is there any reference to the rule of intention. The reason is not far to seek. The English Common Law rule was one of merger and upon this, equity engrafted, as an exception the rule of intention (*w*). In India there is no common law rule of merger so that it is unnecessary to state the case of non-merger as an exception. Again the equitable rule of intention is an artificial one, for it is applied even when the party does not know that non-merger would be beneficial to him, as, for instance, in *Dinobundhu Shaw* v. *Jogmaya Dasi* (*x*), where the third mortgagee was not even aware of the existence of the attachment when he supplied the money to discharge the first and second mortgages. The only case in which non-merger is beneficial and when it is necessary to apply the equitable rule of intention is when the property is subject to other incumbrances (*y*). So sec. 92 gives rights of subrogation only as against a mortgagor or any other mortgagee. In the case of a purchase of the whole of the equity of redemption there are no rights of subrogation against the mortgagor, for the purchaser is himself the mortgagor (*z*). In the case of a purchase of a share of the equity of redemption the purchaser has a right of subrogation against his co-mortgagor recognized in sec. 95. There would be no right of subrogation against a mortgagee unless there was another mortgage. The result is therefore the same that the purchaser of the equity of redemption redeeming a mortgage is subrogated only when there is a co-mortgagor or when there are other incumbrances. So also in the case of a puisne mortgagee redeeming a prior mortgage there is no change in the law, for under the present Act subrogation is irrespective of the existence of other incumbrances. A puisne mortgagee who has redeemed a prior mortgage would have the rights of a prior mortgagee against a mortgagor. In the case of the mortgagee purchasing the rights of the owner or mortgagor, sec. 101 expressly says that this does not effect merger as between such mortgagee and a subsequent mortgagee. The law remains the same, but the fiction of intention which is not necessary in India has been dispensed with.

"Other than the Mortgagor."—These words indicate that a mortgagor is not subrogated. The discharge of a prior incumbrance by a mortgagor stands on a different footing to redemption by a purchaser or by a puisne mortgagee. When a mortgagor pays a mortgage debt for which he is liable he is not allowed to set up the charge against a subsequent incumbrancer. This is a rule of equity in England (*a*), and it has been followed in India (*b*). The rule rests upon the same principle as sec. 43 of this Act, for the mortgagor cannot use his subsequently acquired interest to defeat his grant to the puisne mortgagee (*c*), and the enlarged estate enures for the benefit of the puisne mortgagee increasing the value of the security.

(*w*) *Forbes* v. *Moffatt* (1811) 18 Ves. 384; *Thorne* v. *Cann* (1895) A.C 11, 18, 19.

(*x*) (1902) 29 Cal. 154, 29 I.A. 9; see also *Girdhar Das* v. *Ram Autar Singh* (1903) 8 Cal. W.N. 690; *Tara Sundari* v. *Khedan Lal* (1909) 14 Cal. W.N. 1089, 7 I.C. 980.

(*y*) *Rajah of Kalahasti* v. *Sree Mahant Prayag* (1916) 30 Mad. L.J. 391, 400, 35 I.C. 224.

(*z*) *Peary Lal* v. *Dina Nath* (1939) A.A. 190.

(*a*) *Otter* v. *Vaux (Lord)* (1856) 6 DeG. M. & G. 638; *Platt* v. *Mendal* (1884) 27 Ch. D. 246, 251.

(*b*) *Syed Lutf Ali Khan* v. *Futteh Bahadoor* (1890) 17 Cal. 23, 16 I.A. 129; *Raghunath Sahay* v. *Lalji Singh* (1896) 23 Cal. 397; *Bhaju Chowdhury* v. *Chuni Lal* (1906) 11 Cal. W.N. 284; *Fazal Rab* v. *Manzoor* (1930) 28 All. L.J. 1222, 133 I.C. 142, ('31) A.A. 76; *Audinatha* v. *Bharathi* (1929) 30 Mad. L.W. 981, 124 I.C. 194, ('29) A.M. 890.

(*c*) *Manjappa Roi* v. *Krishnayya* (1906) 29 Mad. 113; *Badan* v. *Murari Lal* (1915) 37 All. 309, 28 I.C. 273.

Illustration.

S. 92

A mortgaged his property first to *B* and then to *C*. *B* obtained a decree for sale on his mortgage without joining *C*. *B* assigned his decree to *A*'s brother. *C* then obtained a decree for sale on his mortgage without joining *B*. *A*'s brother died leaving *A* as his sole heir. *C* was entitled to sell the property free of the prior mortgage incumbrance, for it would be inequitable to allow *A* to set up a prior mortgage against a mortgage he had himself granted: *Badan* v. *Murari Lal* (1915) 37 All. 309, 29 I.C. 973.

The rule was applied in an *obiter dictum* in an Allahabad case (*d*), where a puisne mortgagee paid off a prior mortgage at the mortgagor's request and it was said that he paid as the agent of the mortgagor and such payment could not be regarded as tender by him under sec. 74 and therefore he could not be regarded as the representative of the mortgagee within the meaning of sec. 244 C.P.C. See note *infra*—"Advance to pay off a mortgage."

Exception to the rule against subrogation of the Mortgagor.—It has been said that the rule that a mortgagor cannot derogate from his grant has no application when the second mortgage is made expressly subject to the first, and in such a case if the mortgagor redeems the prior mortgage he is not estopped, for the second mortgage was made expressly of what was left after the first was satisfied (*e*). In a Nagpur case (*f*) the puisne mortgagee had expressly covenanted to redeem the prior mortgage but failed to do so. The prior mortgagee foreclosed and made a grant of a rent free tenancy of part of the property to the mortgagor. The Court held that the mortgagor was entitled to retain this tenancy against the puisne mortgagee. If a puisne mortgagee retains part of the mortgage money to redeem a prior mortgage and fails to do so, he is liable in damages to the mortgagor (*g*).

If the mortgagor had sold the property itself, *i.e.*, free from incumbrances he is under a liability to discharge the mortgage for the benefit of his purchaser and cannot claim subrogation when he does so. On the other hand if the mortgagor has sold the equity of redemption, the purchaser buys subject to the mortgage and although as between the mortgagor and the mortgagee, the liability to pay the debt is still on the mortgagor he (the mortgagor) is entitled to be subrogated if he is afterwards compelled to pay it (*h*). It has to be considered whether, in view of the section as it now stands, these principles can be given effect to. Under the section the disability of the mortgagor appears to be absolute and it is doubtful if any exception may now be made in favour of the mortgagor as regards subrogation.

Although the word "mortgagor" includes a purchaser of the equity of redemption (see sec. 59A), yet the purchaser of an equity of redemption is not excluded from the right of subrogation. This is because (1) he is under no covenant or personal liability to the mortgagee whose mortgage he discharges, and (2) the principle that the mortgagor cannot derogate from his grant has no application to him.

Covenant excludes subrogation.—The rule against the subrogation of a mortgagor is extended to any purchaser of the equity of redemption or incumbrancer who discharges a prior incumbrance which he is by contract express or implied bound to discharge. A person cannot claim subrogation when he simply performs his own obligation or covenant (*i*).

(*d*) *Tufail Fatman* v. *Bitola* (1905) 27 All. 400 followed in *Baijnath* v. *Murlidhar* (1907) 4 All. L.J. 349 but dissented from in *Gur Narain* v. *Shadi Lal* (1912) 34 All. 102, 12 I.C. 607.

(*e*) Ghose 325; Jones 679.

(*f*) *Amarchand* v. *Sardar Singh* (1925) 82 I.C. 190, ('25) A.N. 90.

(*g*) *Hakim Ali* v. *Dalip Singh* (1913) 11 All. L.J. 478, 19 I.C. 670.

(*h*) Ghose, p. 373; Jones, pp. 678, 863.

(i) *Surjiram Marwari* v. *Barhamdeo Persad* (1905) 2 Cal. L.J. 288; *Satnarain Tewari* v. *Chowdhuri* (1911) 14 Cal. L.J. 500, 11 I.C. 649; *Mt. Jaidevi* v. *Sripal* (1934) 147 I.C. 628, ('34) A.O. 129.

S. 92 So also if the purchaser has covenanted to discharge the puisne mortgagee he cannot on redeeming the prior mortgage use it as a shield against the puisne mortgagee (*j*); and this rule has been applied to a transferee from the purchaser with notice of the covenant (*k*). If a prior mortgagee purchasing the equity of redemption covenants to discharge a puisne mortgage he cannot use the prior mortgage as a shield against the puisne (*l*). See also note *infra*—Advance to pay off a mortgage.

The rule that covenant excludes subrogation was applied in the following case (*m*). The facts simplified were as follows. *A* and *B* effected a partition of property subject to a mortgage of Rs. 11,000. By the terms of the partition *A* covenanted to pay Rs. 1,000 and *B* covenanted to pay Rs. 10,000 of the mortgage debt. *B* also covenanted that if any excess over Rs. 1,000 were levied from *A* he would pay the excess and that *A* should have a charge for the excess on *B*'s share. *B* sold his share to *C* and paid part of the mortgagee's decree. There was a deficit of Rs. 5,000 which *A* paid. *A* then sued to enforce his charge for this amount from *C* who had purchased with notice of the charge. *C* claimed to be subrogated to the mortgage which had been partly discharged with the purchase money. The Court held that as *C* had notice of the covenant in the partition deed to pay the excess, he could not claim subrogation. Apart from this, it is submitted that subrogation was excluded by the rule against partial subrogation. See note *infra*—'Partial subrogation abolished.'

In *Bisseswar Prosad* v. *Lala Sarnam Singh* (*n*) this exception to subrogation was explained to be on the ground that the doctrine of subrogation being a doctrine of equity jurisprudence it " will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities." In *Malireddi Ayyareddi* v. *Gopalakrishnayya* (*o*) the Privy Council said that the rule of subrogation would not apply if the owner of the property had covenanted to pay the later debt. In *Muhammad Sadiq* v. *Ghaus Muhammad* (*p*) the purchaser of the equity of redemption undertook to discharge two mortgages, but discharged only the prior and not the puisne mortgage. When the puisne sued, it was held that the purchaser was not entitled to use the prior mortgage as a shield.

Illustrations.

(1) *A* gave a first mortgage to *B*, a second mortgage to *C* and a third mortgage again to *B*—out of the consideration for the third mortgage *B* retained Rs. 499 for the discharge of the first mortgage and Rs. 790 with which he agreed to pay off *C*'s mortgage. *B* did not pay off *C*'s mortgage. *C* sued on his mortgage and *B* was not entitled to use the first mortgage as a shield: **Balbhaddra v. Sheomangal** (1931) 130 I.C. 301, ('31) A.A. 347 on app. 1932 All. L.J. 413, 136 I.C. 824.

(2) *A* purchased a half share in certain villages and covenanted to pay half the amount due on a mortgage of those villages, and retained part of the price for that purpose. He did not pay until the mortgagee had brought the villages to sale. He then paid the whole decretal amount *plus* 5 per cent. to set aside the sale. He was subrogated as to the

(*j*) *Bisseswar Prosad* v. *Lala Sarnam Singh* (1907) 6 Cal. L.J. 134; *Govindasami Tevan* v. *Dorasami* (1910) 34 Mad. 119, 6 I.C. 781; *Mulchand* v. *Radhakisan* (1927) 100 I.C. 272, ('27) A.N. 100; *Bansidhar Dhandania* v. *Kalroo Mandar* (1938) 17 Pat. 666, 176 I.C. 655, (1938) A.P. 532.

(*k*) *Lakshmi Achi* v. *Narayanasami* (1930) 53 Mad. 188, 124 I.C. 497, ('30) A.M. 51.

(*l*) *Thiruvadi Ayyangar* v. *P. Janaki* (1923) 45 Mad. L.J. 693, 75 I.C. 1016, ('34) A.M. 103.

(*m*) *Abdul Razak Rowther* v. *Abdul Rahiman Sahib* (1933) 65 Mad. L.J. 390, 149 I.C. 287, ('33) A.M. 715.

(*n*) (1907) 6 Cal. L.J. 134, 138.

(*o*) (1924) 47 Mad. 190, 51 I.A. 140, 79 I.C. 592, ('24) A.PC. 36.

(*p*) (1911) 33 All. 101, 7 I.C. 200 F.B.; *Dalip Rai* v. *Birnaik* (1909) 6 All. L.J. 549, 2 I.C. 207; *Makkhan Lal* v. *Natthi* (1923) 21 All. L.J. 382, 74 I.C. 640, ('23) A.A. 509; *Maqsud Ali Khan* v. *Abdullah Khan* (1928) 50 All. 218, 108 I.C. 728, ('28) A.A. 77; *Tulsi Ram* v. *Radha Kishan* (1933) 146 I.C. 679, ('33) A.L. 810.

half share he had not covenanted to pay. But he was not subrogated as to the half he had covenanted to pay, nor as to the 5 per cent. paid to the auction purchaser: *Jag Mohan* v. *Jugal Kishore* (1932) 36 Cal. W. N. 4, 54 Cal. L. J. 407, 137 I. C. 475, ('32) A. PC. 99. **S. 92**

The rule that covenant excludes subrogation was overlooked in some cases decided under sec. 74 in which a puisne mortgagee was subrogated to a prior mortgage he had covenanted to discharge (*q*).

In a Calcutta case (*r*) property subject to three mortgages was sold on a false representation that it was subject only to the second and third mortgages. The purchaser covenanted to pay these and retained part of the price for that purpose. But when he discovered the first mortgage he paid the first and second but not the third mortgage. When the third mortgagee sued to enforce his mortgage the purchaser was allowed to use the first mortgage as a shield but not the second. In this case the purchaser was allowed to use a prior mortgage as a shield against a later mortgage which he had covenanted to discharge, but this was an exceptional case, for the judgment shows that the third mortgagee was privy to the fraud on the purchaser.

A purchaser at a Court sale of property subject to a mortgage is not under an implied covenant to discharge the mortgage and when he pays it off, he is entitled to subrogation (*s*).

So far as regards redemption, foreclosure or sale.—The section gives the puisne mortgagee redeeming a prior mortgage the same rights as regards redemption, foreclosure and sale as the prior mortgagee. In the old section 74 the same idea was expressed by the words "all the rights and powers of the mortgagee as such." The rights are the same rights as the prior mortgagee had at the time he was redeemed. He is entitled to the same rate of interest as the prior mortgagee (*t*); and if any part of the property mortgaged to the prior mortgagee has ceased to be subject to his mortgage the subrogated mortgagee acquires only the prior mortgagee's rights in what is left (*u*). The case of *Delhi and London Bank* v. *Bhikari* (*v*) is an illustration of the section. Two properties X and Y were mortgaged to *A*, and then Y was mortgaged to *B*. *A* and *B* each sued for sale without making the other a party, and purchased at the sales. *B* then redeemed *A*. *B* having purchased Y and cleared off the mortgage, he is owner of Y; but he has only the mortgagee rights of *A* in X and not the rights of *A* as the purchaser of the equity of redemption of X. Therefore *B* is liable to be redeemed by *A* as to X.

When a puisne mortgagee redeems a prior mortgagee, he acquires the rights of the prior mortgagee qua mortgagee. If the prior mortgagee has granted a lease, the puisne mortgagee does not acquire by subrogation any rights as landlord. Any subsidiary rights such as leasehold rights created by the mortgagee come to an end ipso facto on redemption (*w*).

"Against the mortgagor or any other mortgagee."—The effect of these words is that a puisne mortgagee or a co-mortgagor redeeming is always subrogated, and a purchaser of the equity of redemption is subrogated if there is another mortgagee, while a purchaser of part of the equity of redemption is subrogated as against the mortgagor.

(*q*) *Mohanlal* v. *Mahomed Sujat* (1933) 144 I.C. 969, ('33) A.N 155; *Krishnamurthy Chettiar* v. *Sambasiva Ayyar* (1933) 56 Mad. 517, 64 Mad. L.J. 523, 143 I.C. 780, ('33) A.M. 398; *Jagdeo Sahu* v. *Mahabir Prasad* (1934) 13 Pat. 111, 153 I.C. 602, ('34) A.P. 127.

(*r*) *Har Shyam* v. *Shyam Lal* (1916) 43 Cal. 69, 31 I.C. 22.

(*s*) *Ramamurthi* v. *Bangaru* (1934) M.W.N 218, 148 I.C. 735, ('34) A.M. 268; *Narayan* v. *Parameshwarappa* (1942) A.B. 98, (1942) Bom. 169, 44 Bom. L.R. 20, 199 I.C. 718.

(*t*) *Narayan* v. *Nathmal* (1922) 65 I.C. 275, ('22) A.N. 155.

(*u*) *Muhammad* v. *Kalyan Das* (1896) 18 All. 189.

(*v*) (1902) 24 All. 185.

(*w*) *Alagirisami Mudali* v. *Akkalu Naidu* (1921) 41 Mad. L.J. 462, 69 I.C. 651, ('21) A.M. 393.

S. 92 This as explained above is the same result as is achieved in the case of a purchaser by the rule of intention enacted in the old sec. 101 and applied in the case of *Gokuldas* v. *Puranmal* (x).

Mortgages of a different class.—In the case of a puisne mortgagee redeeming a prior mortgage of a different class there was under the repealed sec. 74 some difficulty in applying the doctrine of subrogation. In an Allahabad case (y) the puisne mortgagee was a usufructuary mortgagee who paid off a prior simple mortgage and the Court dealt with the case under sec. 72, and held that having preserved the security he was entitled to tack the amount paid on to his usufructuary mortgage and retain possession until the whole amount was discharged. Under this section he would have the rights both of simple and usufructuary mortgagee. He could enforce these rights separately, for, the remedies being different, sec. 67A would not apply. He could sue for sale on the simple mortgage, subject to his right of possession under the usufructuary mortgage. There was a curious case in Madras (z) where the prior mortgage was simple and the puisne mortgagee was a usufructuary mortgagee who had not been put in possession. One Marudai had a decretal charge on the property which put him in the position of a simple mortgagee with a decree for sale. The plaintiff advanced Rs. 190 on a usufructuary mortgage to pay off the charge but did not get possession. The owner did not utilize the money for that purpose, for the amount of the charge was increased in appeal to Rs. 296-10. Marudai attached the land in execution of his decree and the plaintiff paid the decretal amount into Court and saved the land from being sold. Plaintiff was therefore a puisne usufructuary mortgagee out of possession for Rs. 190 and a prior simple mortgagee by subrogation to Marudai. There was no dispute about the Rs. 190 but the plaintiff's suit to recover Rs. 296-10 by sale of the property was dismissed. The principle of subrogation was not applied, and the *ratio decidendi* was that he had no charge on the mortgaged property under sec. 68 (c) as he did not get possession and therefore could not claim a charge for the further expenses incurred to save the property from sale. The foundation of this decision was a case (a) where a Full Bench of the Madras High Court held that a usufructurary mortgagee who had not got possession had no charge under sec. 68 (c). This case is not law since the amended definition of usufructuary mortgage. Under the present section he could have brought the property to sale as simple mortgagee subject to his usufructuary mortgage.

In another Madras case (b) the Court said that subrogation is not applicable when the mortgagor gives two successive usufructuary mortgages. But it is submitted the puisne usufructuary mortgagee can redeem the prior usufructuary mortgage and take possession until he is paid the amount due on both mortgages. In the case cited however the puisne mortgagee had covenanted to discharge the prior mortgage, and the Court omitted to notice that he was excluded from subrogation by his own covenant.

Advance to pay off a mortgage; third paragraph.—The third clause of this section makes a very important alteration in the law. "A person who has advanced to a mortgagor money with which the mortgage has been redeemed" may come within one of three categories, namely he may be (a) a simple money creditor, (b) a person who has an agreement with the mortgagor that the mortgage redeemed with his money will be kept alive for his benefit or (c) a purchaser or puisne mortgagee by the same transaction. As will be seen presently the rights of such person are different according as he comes within one or the other of the categories.

(a) Simple Money Creditor.—At common law a person who discharges a debt has no right to avail himself of the security unless it is assigned to him (c); but in Chancery

(x) (1884) 10 Cal. 1035, 11 I.A. 126.
(y) *Abdul Qayyum* v. *Sadruddin* (1905) 27 All. 403.
(z) *Perianna Servaigaran* v. *Marudainayagam* (1899) 22 Mad. 332.
(a) *Arunachalam Chetti* v. *Ayyavayyan* (1898) 21 Mad. 476.
(b) *Koopmia* v. *Chidambaram* (1896) 19 Mad. 105.
(c) *Haynes* v. *Forshaw* (1853) 11 Hare 93.

he is treated as an equitable transferee entitled to have it kept alive for his benefit (*d*). Indeed the case of *Butler* v. *Rice* (*e*) seems almost to admit of the subrogation in respect of a voluntary payment. Mrs. Rice was the owner of two properties which were under equitable mortgage to a bank for £450. Mr. Rice asked the plaintiff Butler to lend the money to pay off the mortgage and he agreed to do so on a legal mortgage of one property for £300 and the guarantee for £150 of Mr. and Mrs. Rice's Solicitor who was to hold the deeds removed from the bank. Butler paid the money and the deeds were withdrawn, but Mrs. Rice who was unaware of the transaction refused to execute the mortgage. Butler had no previous interest in the property and had come to no agreement with Mrs. Rice. Nevertheless, Warrington J., held that he was subrogated to the equitable mortgage of the bank. The rule in India is however, narrower, for the Privy Council have held that an officious or voluntary payment carries with it no right of reimbursement or subrogation (*f*). There is no law in India by which a creditor who has advanced money is entitled to a charge on the property acquired by the debtor with the money advanced (*g*). In *Ram Het* v. *Pokhar* (*h*) the lender advanced money for the discharge of a mortgage decree. He made the advance on an agreement of mortgage but accepted a promissory note in lieu of a mortgage. He was not entitled to subrogation although two years later he made a fresh advance on a mortgage for the consolidated amount of the fresh note and the promissory note. The Court held that the mere fact that money is borrowed and is used for the purpose of paying a previous charge does not entitle the lender to the benefit of the discharged security. In such a case the right to the benefit depends upon the existence of an agreement between the borrower and lender (*i*). S. 92

(b) A person who has an agreement with the mortgagor that the redeemed mortgage should be kept alive for his benefit.—It was said in an English case (*j*) that very slight evidence is sufficient to establish an agreement that the lender is subrogated to the rights of the original creditor; and Mookerje, J., in *Gurdeo Singh* v. *Chandrikah Singh* (*k*) spoke of conventional subrogation as arising by agreement express or implied. Such an agreement was presumed in *Dinobundhu Shaw* v. *Jogmaya Dasi* (*l*) and in *Jagaldhar* v. *Brown* (*m*); and seems also to have been presumed in a case (*n*) from the Punjab where the Act is not in force. It has also been implied in cases where the money has been advanced under a contract of sale or mortgage (*o*) but not if the sale goes off for the purchaser's default (*p*). In a Patna case (*q*) an invalidly registered sale deed was admitted as evidence of a covenant to pay off a mortgage and subrogation was allowed, though if the deed had been validly registered subrogation should have been refused on the ground that it was excluded by the purchaser's covenant. But these cases so far as they refer to subrogation by agreement are no longer law, for under the third clause of

(*d*) *Cracknall* v. *Janson* (1879) 11 Ch. 1.

(*e*) (1910) 2 Ch. 277 followed in *Govinda Chandra* v. *Parsa Nath* (1926) 89 I.C. 116, (1926) A.C. 231 and by Bachelor, J. in *Tanggu Fala* v. *Trimbak* (1916) 40 Bom. 646, 35 I.C. 794, but see the criticism of the case in *Narayana Kutti* v. *Pechiammal* (1913) 36 Mad. 426, 15 I.C. 206; followed also in *Shankar* v. *Bhikaji* (1929) 53 Bom. 353, 116 I.C. 225, (1929) A.B. 139 and in *Govinda* v. *Murugesa* (1931) 135 I.C. 529, (1931) A.M. 720.

(*f*) *Ram Tuhal Sing* v. *Bisesuar Lall* (1875) 23 W.R. 305, 2 I.A. 131; *Govinda Padayachi* v. *Lokanatha Aiyar* (1921) 40 M.L.J. 114, 62 I.C. 291, (1921) A.M. 51; *Adari Sanyasi* v. *Nookalamma* (1931) 54 Mad. 708, 131 I.C. 487, (1931) A.M. 592; *Lala Man Mohan Das* v. *Janki Prosad* (1944) 72 I.A. 39, (1945) A.PC. 23.

(*g*) *In re Annapurna Co. Ltd.* (1926) 24 All. L.J. 347, 93 I.C. 93, (1926) A.A. 397: *Ponnammal* v. *Pichai* (1927) 52 Mad. L.J. 38, 99 I.C. 687. (1927) A.M. 204.

(*h*) (1931) 7 Luck. 237, 134 I.C. 1093, (1932) A.O. 54.

(*i*) *Gulzari Lal* v. *Aziz Fatima* (1919) 41 All. 372, 50 I.C. 375

(*j*) *In re Wrexham Mold, etc.* (1899) 1 Ch. 440, 463.

(*k*) (1909) 36 Cal. 193, 1 I.C. 913.

(*l*) (1902) 29 Cal. 154, 29 I.A. 9.

(*m*) (1906) 33 Cal. 1133, 1155.

(*n*) *Sita Ram* v. *Kartar Singh* (1933) 140 I.C. 239, ('33) A.L. 410.

(*o*) *Tangua Fala* v. *Trimbak* (1916) 40 Bom. 646, 652, 35 I.C. 794; *Ponnammal* v. *Pichai Theran* (1927) 52 Mad. L.J. 38, 99 I.C. 687, ('27) A.M. 204.

(*p*) *Ponnammal* v. *Pichai*, *supra*; *Adari Sanyasi* v. *Nookalamma* (1931) 54 Mad. 708, 131 I.C. 487, (1931) A.M. 592.

(*q*) *Jagdeo Sahu* v. *Mahabir Prasad* (1934) 13 Pat. 111, ('34) A.P. 127.

S. 92 the section the agreement of subrogation must be express and in writing registered (*r*). In an Oudh case (*s*) subrogation was refused as there was no agreement in writing registered. The old doctrine of conventional subrogation was opposed to sec. 54 of this Act that a mere contract does not create any interest in or charge on property.

(c) A purchaser or puisne mortgagee by the same transaction.—Very often when a person advances money to a mortgagor to pay off an earlier mortgage he secures the loan by a puisne mortgage or he becomes the purchaser. Usually in such cases the purchaser or puisne mortgagee retains in his own hands out of the consideration money the sum required for redeeming the prior mortgage and a covenant or acknowledgment is inserted in the deed of sale or puisne mortgage that the money so retained will be paid over to the prior mortgagee. When such a purchaser or puisne mortgagee pays the money either himself or through the mortgagor to the prior mortgagee the question arises whether he is entitled to the benefit of the prior mortgage. If there is an express agreement in writing registered contained in the deed of sale or mortgage or in a separate written and registered instrument that he shall have the right of subrogation then clearly he comes under the third paragraph of the section. The difficulty arises where there is no such agreement in writing registered. Can such a person claim to be entitled to subrogation as a purchaser of the equity of redemption or as a puisne mortgagee under the first paragraph of the section? Can such a person be said to have redeemed the mortgage at all? When money retained in the hands of such a person is paid to the prior mortgagee, is such payment made by such person on his own account or as agent of the mortgagor? Even before the new section came into force when a registered agreement was not necessary many of these questions arose. Different High Courts took different views and very often different learned Judges of the same High Court expressed conflicting views. Eventually the position has been settled for some of the High Courts by decisions of Full Bench of such High Courts. It will be convenient and instructive to refer to some of the earlier divergent views of the different High Courts before referring to the Full Bench and the later decisions.

If the person advancing money to redeem a mortgage secures the loan by a puisne mortgage or if he is a purchaser and the money is part of the price, he is subrogated either as puisne mortgagee or as purchaser of the equity of redemption (*t*). It does not matter if the puisne mortgage (*u*) or deed of sale was executed after the discharge of the prior mortgage with the money advanced, unless, of course, the person advancing the money was not aware of the prior mortgage or the purpose for which the money was being utilized (*v*). But in an Allahabad case (*w*) it was said that when a puisne mortgagee paid at the mortgagor's request he paid as agent of the mortgagor and was not subrogated and there is a similar observation as to a purchaser advancing money to redeem a mortgage in a Calcutta case (*x*). This has been held to be incorrect in the undernoted cases (*y*), for the object of the puisne mortgagee or purchaser in providing money to pay off a mortgage is to benefit himself and not any mesne incumbrancer. As far back as 1870 the Calcutta High Court said of a purchaser from a mortgagor who had advanced money to discharge a prior mortgage that though he merely acted for the debtor who had borrowed

(*r*) *Ram Het* v. *Pokhar* (1931) 7 Luck. 237, 134 I.C. 1093 (1932) A.O. 218; *Vithaldas* v. *Tukaram* (1941) A.B. 153.

(*s*) *Nawab Syed Mohammad Raza* v. *Bilquis Jehan Begam* (1934) 9 Luck. 717, 149 I.C. 84 (1934) A.O. 213.

(*t*) *Gangadhara* v. *Sivarama* (1884) 8 Mad. 246; *Rupabai* v. *Audimulam* (1887) 11 Mad. 345, 353; *Seetharama* v. *Venkatakrishna* (1891) 16 Mad. 94; *Raoji* v. *Narayan* (1896) P.J. 629; *Purnamal* v. *Venkata* (1897) 20 Mad. 486; *Har Narain* v. *Har Prasad* (1914) 12 All. L.J. 470, 23 I.C. 827; *Chhotey Lal* v. *Dharajit* (1926) 96 I.C. 1054, ('26) A.A. 744.

(*u*) *Avudai Ammal* v. *Ramasami* (1925) 82 I.C. 846, ('25) A.M. 129; *Venkatachari* v. *Karuppan Chetty* (1934) 67 Mad. L.J. 91. 150 I.C. 126, ('34) A.M. 256.

(*v*) *Jai Pragash* v. *Rup Manjari* (1923) 71 I.C. 940, ('23) A.P. 199.

(*w*) *Tufail Fatma* v. *Bitola* (1905) 27 All. 400, following *Baijnath* v. *Murlidhar* (1907) 4 All. L.J. 349, but dissented from in *Gur Narain* v. *Shadi Lal* (1912) 34 All. 102, 4 I. C. 607.

(*x*) *Lala Dilawar* v. *Dewan Bolakiram* (1885) 11 Cal. 258.

(*y*) *Ram Narayan Shah* v. *Sahdeo Singh* (1922) 1 Pat. 332, 67 I.C. 221, ('22) A.P. 181; *Narain Prasad* v. *Narain Singh* (1930) 52 All. 1037, 131 I.C. 599, ('31) A.A. 40.

the money it was sufficient if what he had done was to see that the money so borrowed was properly applied in clearing off those debts (z). More recently Seshagiri Ayyar, J., said that what must be taken into account is not the hand which pays the money but the intention (a); and in *Dinobundhu's* case (b) it was the mortgagor who paid the prior mortgagee the money provided by the puisne mortgagee.

Illustrations.

(1) The property was subject to two mortgages, the first to *A* and the second to *B*. *A* obtained a decree for sale, and the mortgagors raised money on a third mortgage to *C*, and set aside the sale under sec. 310A of the Code of Civil Procedure, 1882. *C* was subrogated to the rights of *A* and had priority over *B*: *Shyam Lal* v. *Beshiruddin* (1906) 28 All. 778; *Ram Narayan Sah* v. *Sahdeo Singh* (1922) 1 Pat. 332, 67 I.C. 221, ('22) A.P. 181.

(2) *A*, the first mortgagee, obtained a decree for sale on his mortgage, and the mortgagor raised money by a mortgage to *B* and satisfied the decree. There were, however, three intermediate mortgages of which only one was recited in *B*'s mortgage deed. Nevertheless *B* was subrogated to the first mortgage and took priority over all the mesne mortgages including those of which he was unaware: *Tara Sundari* v. *Khedan Lal* (1909) 14 Cal. W. N. 1089, 7 I.C. 980.

(3) There was a first mortgage to *A* and a second to *B*. *A* obtained a decree for sale on his mortgage and *C* advanced money on a third mortgage to satisfy it. *C* could use the first mortgage as a shield against *B*: *Purnamal Chund* v. *Venkata* (1897) 20 Mad. 486.

(4) Daughters raised money by a mortgage to the plaintiffs to pay off a prior mortgage by the widow after a decree for sale had been made against her. Held that the daughters as reversioners had sufficient interest to redeem and the plaintiffs were subrogated to the rights of the prior mortgagee: *Narayana Kutti* v. *Pechiammal* (1913) 36 Mad. 426, 15 I.C. 206.

(5) The property of a tarwad had been mortgaged in 1878 to *A*. In 1898 *B*, a member of the tarwad, advanced money to redeem the mortgage. In 1911 *B* mortgaged the property to *C*. This mortgage was not binding on the other members of the tarwad as it was not for tarwad necessity. *C* was entitled to treat the invalid mortgage to *B* as a sub-mortgage of the valid mortgage to *A*. This was because *B* being a member of the tarwad had an interest of his own in the property and was not a mere volunteer and was subrogated to the rights of *A*: *Korillamma* v. *Nedungadi* (1929) Mad. W.N. 722, 123 I.C. 364, ('29) A.M. 860.

There are various other decisions which will be found referred to in the several later Full Bench and other decisions. It will suffice to refer to those later Full Bench and other decisions.

Allahabad High Court: 1. *Totaram* v. *Ramlal* (c).—One Ramchandra, the owner of the property, mortgaged it in 1915 to one Paras Ram for Rs. 200. In 1916 Ramchandra executed a second mortgage in favour of Ram Lal for Rs. 400 out of which a portion was retained by Ram Lal to pay off the first mortgagee which he never did. Ramchandra then sold the property to Ganga Sahai. Ganga Sahai in 1926 mortgaged it to the appellants for Rs. 2,000 out of which an amount was left with the appellants for paying up the first and second mortgagees. The appellants paid up the first mortgagee but not the

(z) *Syed Wajed* v. *Hafez Ahmed* (1872) 17 W.R. 480.

(a) *Abarthoramankutti* v. *Ittikaparambila* (1920) Mad. W.N. 143, 55 I.C. 658.

(b) (1902) 29 Cal. 154, 29 I.A. 9.

(c) *Totaram* v. *Ram Lala* (1932) 54 All. 897, 20 All. L.J. 627, 139 I.C. 107, ('32) A.A. 489.

S. 92 second mortgagee. The second mortgagee filed a suit on his mortgage for the amount actually advanced by him. In this suit the appellants were impleaded as third mortgagees. The appellants took the defence that as they had paid up the first mortgage the plaintiff was not entitled to get the property sold without paying the amount of the first mortgage. The question referred to the Full Bench was: "Where a third mortgagee professes to keep in his hand a part of the mortgage money in order to pay off the first and seconed mortgages and pays off only the first mortgage, whether in a suit by the second mortgagee to enforce his mortgage it is open to the third mortgagee to insist on his being treated as a first mortgagee whose mortgage must be paid off before the plaintiff brings the mortgaged property to sale." The Full Bench consisting of three Judges answered the question in the affirmative and held that the appellants were subrogated to the position of the first mortgagee. Reference was made to the earlier Full Bench case of *Muhammad Sadiq* v. *Ghaus Muhammad* (d) and the Privy Council decision in *Mohesh Lal* v. *Bawan Das* (e) both of which were distinguished as cases of purchasers redeeming a prior mortgage and as decided on the ground of intention of the parties gathered from the peculiar facts of each case as to whether the redeemed mortgage was to be extinguished or kept alive. The argument that the money with which the third or any subsequent mortgagee pays the first mortgage is the property of the mortgagor and that the third or subsequent mortgagee acts only as agent of the mortgagor and as such is not, as the mortgagor is not, entitled to the position of the first mortgagee was repelled with the following remark: "The doctrine of agency has much to be said against it. To start with, there does not appear to be any difference in principle between a case where a purchaser or a third mortgagee advances some money to the vendor or the mortgagor, as the case may be, and then pays off the first mortgage and the case where a purchaser or a third mortgagee professes to take the transfer for a larger sum than in the earlier case and keeps with him the money needed for paying off the earliest mortgage and does not hand over the money to the vendor or the mortgagor but uses the money to pay off the first mortgage." Their Lordships held that the Privy Council cases of *Dinobundhu Shaw* v. *Jogmaya Dassi* (f) and *Mahomed Ibrahim Hossain* v. *Ambika Pershad* (g) were entirely inconsistent with the theory of agency propounded in some cases by the High Courts. After thus dealing with the matter on general principles applicable to cases before the introduction of the new sec. 92 their Lordships expressed the opinion that the question had become very much simplified and indeed had entirely disappeared from the arena of controversy owing to the amendment of the Act. Referring to paragraph 1 of sec. 92 it was pointed out the appellants were third mortgagees and were therefore persons who came within sec. 91 and as such were entitled to subrogation and the fact that a part of the so-called mortgage money was left with the third mortgagees did not destroy the fact that the appellants were the third mortgagees. Then their Lordships went on to hold that the section had retrospective effect. Their Lordships did not refer to the third paragraph of the section at all or consider if that paragraph had any bearing on the true construction of the first paragraph.

2. *Hira Singh* v. *Jai Singh* (h).—One Ram Anant Singh mortgaged seven items of properties including properties in Bisaura and Binauli to Radhacharan for Rs. 9,000 in 1925. Next year five out of these seven properties were mortgaged to the plaintiff. After the death of the mortgagor his heirs in 1929 executed three several sale deeds in favour of three several parties for three different sums of money. Under each sale deed a portion of the consideration money was retained by the purchaser for payment to the prior mortgagee. All the three sets of purchasers in 1929 paid the money retained by them respectively to the prior mortgagee, the deficiency of Rs. 47 having been paid by

(d) (1910) 33 All. 101.
(e) (1883) 9 Cal. 961, 10 I.A. 62.
(f) (1901) 29 Cal. 154, 29 I.A. 9.
(g) (1912) 39 Cal. 527, 39 I.A. 68.
(h) (1937) All. 880, (1937) A.A. 588 (F.B.).

the mortgagor himself. The prior mortgagee was thus fully paid up. The plaintiff (the second mortgagee) brought his suit on his mortgage of 1926 against the heirs of the mortgagor and two sets of purchasers, the third purchaser being omitted because the properties purchased by him were not included in the second mortgage. The two sets of purchasers pleaded *inter alia* that having paid off the amounts left in their hands for the discharge of the prior mortgage they were subrogated to the rights of the prior mortgagee, although there was no agreement in any of the sale deeds that they would be so subrogated. The Full Bench consisting of five Judges held that the three purchasers having paid the amounts which under their contracts of sale they were bound to pay as part of their sale consideration, and not having obtained any agreement in writing registered from the mortgagor that they would be subrogated to the rights of the prior mortgagee, they were not entitled, according to the third paragraph of sec. 92, to any such benefit. Reference was made to earlier cases showing that the Privy Council had applied the English equitable rule of intention to a mortgagee paying off a prior mortgage when he was not bound by his contract to make the payment. It was pointed out that the Privy Council decisions established that where there was a contractual liability to discharge a prior debt, no subrogation could be claimed in respect of such payment, for when a purchaser or mortgagee who took the property and undertook as part of the sale consideration or the mortgage money to discharge a prior debt, made the payment out of money retained by him, he paid money which really belonged to the transferor and not to himself. It did not matter through whose hands the money was actually paid but the true test was as to whom the money which was paid belonged. Referring to the provisions of sec. 92 it was pointed out that the first paragraph dealt with subrogation by operation of law and the third paragraph with subrogation by agreement and that the two paragraphs were mutually exclusive, the basic difference underlying the two paragraphs being that the first referred to a person redeeming the property and the third paragraph to a person who advanced money with which a mortgage was redeemed. The distinction is clearly brought out in the following passages: "When a person himself redeems a mortgage, that is to say, pays the mortgage money out of his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the rights of subrogation under the first paragraph if he is one of the persons enumerated in sec. 91. But where the person does not himself redeem the mortgage, that is to say, does not himself pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilised for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is paid through the hands of the mortgagee, the latter acquires the right of subrogation only if the mortgagor has, by a registered instrument, agreed that he shall be so subrogated. In this view where a person with whom money has been left for payment to a prior mortgagee pays it off, he is really not himself redeeming the mortgage but redeeming it as agent of the mortgagor and has in substance advanced money to the mortgagor with which the mortgage has been redeemed. He cannot get the rights of subrogation unless there is a written and registered agreement to that effect. But where a person has had to pay off a prior mortgage out of his own funds and pays money in addition to any money that might have been left in his hand by the mortgagor or vendor, he himself has redeemed the mortgage, he comes under the first paragraph of the section." Their Lordships further pointed out that the words "who has advanced to a mortgagor money" in the third paragraph were very wide and included both a single money creditor and a mortgagee who took a mortgage of the property for the advance. Referring to the supposed distinction between a purchaser and a mortgagee who advanced money with which a prior mortgage was paid up, their Lordships observed: "No doubt the word 'advanced' is ordinarily not appropriate to the case of a vendor but is certainly quite appropriate to the case of a mortgagee. If a subsequent mortgagor advancing money on his mortgage for the purpose of paying

S. 92

off a prior mortgage comes under the third paragraph, then he would not come under the first paragraph, if the two paragraphs are mutually exclusive. It would be anomalous to hold that a vendor who under his contract undertakes the liability to pay a prior mortgage comes under the first paragraph and is, therefore, in a better position than a subsequent mortgagee. He should either not come in under either of these paragraphs or come in only under the third paragraph." Their Lordships then went on to consider and held that the section was retrospective at least where no action was pending on the 1st April 1930. It is quite clear that the reasoning adopted in this Full Bench case runs counter to those in the earlier Full Bench case of *Totaram* v. *Ramlal* (*supra*).

Madras High Court: 1. *Lakshmi Amma* v. *Shankara Narayan Menon* (*i*).—The appellant was a usufructuary mortgagee of property which was subject to three prior simple mortgages which he undertook to pay off. He paid off the first two mortgages but did not pay off the third. The third mortgagee brought a suit for sale on his mortgage and the appellant in defence set up a claim to be subrogated to the first two prior mortgages which he had discharged. All the mortgages were antecedent in date to the amendment. The Full Bench held that the appellant was not entitled to subrogation. The case of *Totaram* v. *Ramlal* (*supra*) was dissented from. It was held that if sec. 92 was retrospective and was applicable the third paragraph was fatal to the claim as the mortgagor had not by a registered instrument agreed that the appellant should be subrogated to the rights of the mortgagees whose debt he had discharged. The third paragraph was held to apply to all persons who acquired an interest in the mortgage property by advancing moneys to discharge prior encumbrances and was not restricted to persons other than purchasers or mortgagees. Varadachariar, J., observed: "There is a well-established distinction between cases in which a person who has a pre-existing interest in the property pays off a prior charge on that property for the protection of his own interest and the cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt. It seems to me that the first clause of sec. 92 must be held to relate to the first type of cases above referred to and the third clause to the second type." To the same effect are the observations of Venkataramana Rao, J. It was further held that if sec. 92 did not apply the appellant's claim would equally fail on general principle.

2. *Subbarayuddu* v. *Lakshminarasamma* (*j*).—A Division Bench of the Madras High Court of which Venkataramana Rao, J., was a member further clarified the principle established by the preceding Full Bench decision.

Nagpur High Court: *Taibai* v. *Wasudeorao* (*k*).—There were two successive mortgages. The first mortgagee sued the mortgagor and the second mortgagee and obtained a decree for sale and the property was sold but the sale was not yet confirmed. The mortgagor then sold the property to another person for Rs. 2,000. Out of this amount Rs. 1,700 was retained by the purchaser to pay the mortgagee decree-holder and the auction purchaser. The purchaser and mortgagor appeared in Court and through the mortgagor the sum of Rs. 1,700 was paid into Court and the sale was set aside. The question was whether the purchaser, in whose favour there was no agreement in writing registered, could claim subrogation as against the second mortgagee. The Full Bench negatived the claim. Their Lordships expressed the view that the word "mortgagor" in sec. 92 was not limited to the very person who effected the mortgage but included those persons deriving title from him by transfer. Therefore where the mortgagor sold his right of redemption and the purchaser then redeemed a prior mortgage he was not entitled to subrogation, for the purchaser was in the position of the mortgagor. Again,

(*i*) (1935) 59 Mad. 359, (1936) A.M. 171, 160 I.C. 137, 70 M.L.J. 1 (F.B.).

(*j*) (1939) A.M. 949, 189 I.C. 485, (1939) 2 M.L.J. 583.

(*k*) (1937) A.N. 372, (1938) Nag. 206 (F.B.).

when the mortgagor sold an unencumbered freehold on terms that a disclosed prior mortgage was to be paid off out of the sale price, then the mortgagor vendor was not really borrowing any money from the purchaser but was contracting with the purchaser that the prior mortgage should be paid off out of the price due to him in a particular way, *i.e.*, by the purchaser for and on behalf of the mortgagor. In such a case when the prior mortgagee was paid off it was the mortgagor who redeemed and the purchaser could not claim subrogation. The broad proposition that the purchaser of the equity of redemption is within the meaning of the word "mortgagor" in sec. 92 and cannot claim subrogation appears to run counter to the Privy Council cases referred to in note *supra* where purchaser of equity of redemption redeems and is, it is submitted, open to doubt.

Oudh Chief Court: *Abdul Hamid* v. *Lala Ram Kumar* (*l*).—The majority of the Full Bench (Ghulam Hasan and Agarwal, J.J., Bennett, J., contra) held that a subsequent mortgagee who redeemed a prior mortgage with money left with him for that purpose was subrogated to the rights of the prior mortgagee. The earlier Allahabad Full Bench case of *Totaram* v. *Ramlal* (*supra*) was approved and the later Allahabad Full Bench case of *Hira Singh* v. *Jai Singh* (*supra*) and the Madras Full Bench case of *Lakshmi Amma* v. *Shankara Narayan* were disapproved. The case of *Hira Singh* v. *Jai Singh* was also distinguished as being the case of a purchaser and not a mortgagee. It was pointed out that in the case of a sale the money left with the purchaser was vendor's money which could be recovered by a suit for specific performance, but in the case of mortgage the money left with the mortgagee was not the mortgagor's money as it could not be recovered by a suit for specific performance and therefore the mortgage was really effective for the amount actually advanced. The view of the majority of the Full Bench was that a mortgagee who advanced money to pay off a prior mortgage comes within the first paragraph and they seem to have thought that the third paragraph did not apply to him. The majority of the Full Bench did not see any foundation for the difference between the case where a person having a pre-existing interest redeemed a prior mortgage to protect his own interest and the case where a person acquired interest in the property only by reason of his advancing money to pay off an existing mortgage debt.

Patna High Court: 1. *Rai Bahadur Bansidhar Dhandhania* v. *Kairoo Mandar* (*m*).—The mortgagors sold the mortgaged property to a person and left the consideration money with the purchaser for payment of a prior mortgage, without disclosing that there was another mortgage. The second mortgagee having sued, the purchaser pleaded subrogation. It was held by a Division Bench that in the absence of an express covenant in the sale-deed by the mortgagor giving him the right of subrogation the purchaser was not entitled to relief by way of subrogation under sec. 92.

2. *Dulhin Kamlapati* v. *Jageshar* (*n*) recognised the distinction between persons having pre-existing interest redeeming a prior mortgage and person who redeeming under a new contract of mortgage becomes a mortgagee.

3. *Tika Sao* v. *Hari Lall* (*o*).—The main controversy in this Full Bench case centred round the question as to whether sec. 92 was retrospective. The majority (Fazli Ali and Dhavle, J.J., Manohar Lall, J., dissenting) held that the section had retrospective operation in regard to transactions entered into prior to 1st April 1930 except in cases pending on that date and except as to rights and liabilities arising before the Transfer of Property Act came into force. The other question referred to the Full Bench related to the rights of the subrogated mortgagee, namely whether he could sue upon the prior mortgage or could only use the prior mortgage as a shield. The Full Bench decided

(*l*) (1942) A.O. 260, 200 I.C. 146 (F.B.).
(*m*) (1938) 17 Pat. 666, (1938) A.P. 532.
(*n*) (1938) 18 Pat. 342, at p. 352.
(*o*) (1940) 19 Pat. 752, (1940) A.P. 585, 189 I.C. 513 (F.B.).

S. 92 that he could do both. In this case in the registered mortgage deed of the plaintiff, there was a covenant that he should out of the money retained by him pay up certain earlier mortgages. If the matter stood there the plaintiff would not be entitled to subrogation, for the covenant would exclude it, and also because he did not redeem it for himself but did so as agent of the mortgagor. It appears, however, from the referring judgment that the mortgage deed in his favour provided for keeping the earlier mortgages alive. This clearly brought the case within the third paragraph. Therefore this case does not throw much light on the question whether, in the absence of an agreement in writing registered, there would be subrogation in such a case. It is to be noted, however, that the Court recognised the distinction between the two classes of persons entitled to subrogation, namely, persons who having a pre-existing interest in the property paid off a prior mortgage for the protection of their own rights and persons who acquired an interest in the property by reason of their advancing money to pay off an existing mortgage debt.

Bombay High Court: 1. *Narayan* v. *Parameshvarappa* (*p*).—There were two successive mortgages in 1931. Then there was a third mortgage in favour of the plaintiff in 1933 for Rs. 650 out of which Rs. 308 was to be paid to the first mortgagee. The fact of the second mortgage was also mentioned in the third mortgage. The third mortgagee (Plaintiff) did pay up the first mortgage. In 1936 a money decree-holder of the mortgagor brought the mortgaged property to sale and bought it himself at court sale subject to the second mortgage. He paid off the second mortgage. Plaintiff sued the mortgagor and the execution purchaser. The latter claimed subrogation to the second mortgage. The plaintiff disputed this and additionally claimed subrogation to the first mortgagee's rights. The lower appellate court rejected the execution purchaser's right of subrogation on the ground that under section 92 read with section 59A the purchaser was a mortgagor and hence not entitled to subrogation. It will be remembered that this was the reasoning in the Nagpur Full Bench case of *Tai Bai* v. *Wasudeorao* (*supra*). The Bombay High Court overruled this reasoning on the ground that as section 92 was to be regarded as having "otherwise provided," section 59A did not apply and therefore the execution purchaser could claim subrogation to the rights of the second mortgagee who had been paid up by him. There arose the question of the plaintiff's right of subrogation to the rights of the first mortgagee. The Bombay High Court held, in agreement with the Allahabad Full Bench case of *Hira Singh* v. *Jai Singh* (*supra*) and the Madras Full Bench case of *Lakshmi Amma* v. *Shankara Narayan Menon* (*supra*) and the earlier ruling of the same Division Bench of the Bombay High Court in the case of *Vithaldas* v. *Tukaram* (*q*) and in disagreement with the case of *Totaram* v. *Ramlal* (*supra*) that the plaintiff having paid off the first mortgage out of the mortgage money retained by him was not entitled to subrogation.

2. *Bishnu Balkrishna* v. *Sankarappa Wagarali* (*r*).—The Bombay High Court held that section 92 had retrospective operation. The Court again followed the case of *Lakshmi Amma* v. *Shankara Narayan Menon* (*supra*) and *Hira Singh* v. *Jai Singh* (*supra*) in preference to *Totaram* v. *Ramlal* (*supra*).

Calcutta High Court: *Mukaram Marwari* v. *Muhammad Hosain* (*s*).—There were three successive mortgages, the third being in favour of the plaintiff. The mortgagor then sold the mortgaged property to defendant No. 2. There was a covenant in the sale-deed that the purchaser should pay up the prior mortgages. The purchaser paid up the two prior mortgages. The plaintiff sued upon his mortgage (the third mortgage). The defence of the purchaser was that having paid up the two prior mortgages

(*p*) (1942) Bom. 169, (1942) A.B. 98, 44 Bom. L.R. 20, 199 I.C. 718.

(*q*) (1941) A.B. 58, 43 Bom. L.R. 225, 194 I.C. 632.

(*r*) (1942) A.B. 227, 44 Bom. L.R. 415, 202 I.C. 392.

(*s*) (1935) 62 Cal. 677, (1936 A.C. 42, 161 I.C. 48.

he was entitled to subrogation. It was held that the purchaser, having simply discharged his own obligation under the covenant, was not entitled to subrogation.

Privy Council: *Lala Manmohan Das* v. *Janki Prasad* (t).—The respondent and two other persons were trustees of property dedicated to an idol. The document creating the trust did not give to a single trustee any power to execute a deed of transfer of the trust property. The respondent alone purported to execute a mortgage of the property in favour of the appellant claiming in the deed that it was his own family property. He did not purport to mortgage the interest of the idol. The bulk of the mortgage money was left with the appellant to pay off a previous mortgage on the endowed property in respect of which a final decree for sale had been made against the idol through its trustees. The appellant sued for realising his mortgage as against the idol. The Privy Council held that at the date of the mortgage the respondent, not being the only trustee, was not competent by himself alone to represent the idol and did not as a matter of fact purport to do so, and, accordingly, the mortgage deed was not binding on the trust estate. The appellant fell back on the prior mortgage which was binding on the idol and the decree for sale in respect whereof had been paid up with moneys advanced by him. Without deciding whether section 92 had retrospective operation, the Privy Council held that the appellant was not entitled under the third paragraph of the section to subrogation since, as the money was not advanced to the idol through its trustees but to the respondent personally who could not alone represent the idol, it had not been proved that the money was advanced by the appellant to the "mortgagor" as required by that section and further that there was no registered instrument signed by the mortgagor, *i.e.*, all the trustees. Their Lordships also held that under the law as it existed before the amendment of 1929 the appellant being a mere stranger—neither being a surety for the debt, nor being otherwise interested in the property—had, in order to succeed on the equitable doctrine of subrogation, to prove that there was an agreement between him and the debtor or creditor that he should receive and hold an assignment of the debt as security and having failed to prove such an agreement between him and the idol or the creditor, he was not entitled to an equitable right of subrogation and that the mere fact that money borrowed from him was used for paying off a previous charge did not entitle him to the benefit of the discharged security. It is to be noted, however, that the Privy Council recognised the distinction between two classes of persons entitled under section 92 to subrogation which was made in the Madras Full Bench case of *Lakshmi Amma* v. *Shankara Narayan Menon* (*supra*), for at p. 53 their Lordships observe: "The new section deals with the rights of subrogation of two different classes of persons. The first paragraph, which deals with the rights of persons who have an existing interest in the property states that: (first paragraph is quoted in full). The third paragraph, with reference to which the case of the appellant was argued, deals with the right of strangers who acquire an interest in the property. It runs as follows: (third paragraph is quoted in full). The right mentioned above, referred to usually as 'conventional or contractual' subrogation is founded on the principle of an agreement between a borrower and a lender that the lender shall be subrogated to the rights of the original creditor." This passage seems to land support to the reasonings of the Madras Full Bench in *Lakshmi Amma* v. *Shankara Narayan Menon* (*supra*). The weight of authority clearly seems to be in favour of the view that the two paragraphs are mutually exclusive and that the first paragraph deals with persons who having a pre-existing interest in the property redeems a prior mortgage to protect his own interest and that a person who acquires interest only by advancing money with which the prior mortgage is satisfied does not come within the first paragraph even though he secures his advance by a mortgage or becomes a purchaser. Such a person comes within the third paragraph and can only claim subrogation if there be an agreement between him and the mortgagor in writing

(t) (1944) 72 I.A. 39, (1945) A.PC. 23.

S. 92

registered. The right of subrogation is denied to such a person on a variety of grounds, *e.g.*, that such a person when he pays over the retained money either himself or through the mortgagor does not pay his own money and cannot be said to redeem the prior mortgage himself or that he only performs his own obligation under his covenant, and covenant includes subrogation, or that he pays the mortgagor's money as his agent and the redemption is by the mortgagor. But the real reason seems to be that such a person having no pre-existing interest does not come within the first paragraph and that although he is a person who comes within the third paragraph he cannot claim subrogation because there is no registered agreement giving him that right as required by that section. Prior to the amendment such a person could only claim not legal but only conventional subrogation, *i.e.*, subrogation based on agreement express or implied and after the amendment he cannot claim legal subrogation as laid down in the first paragraph but can only claim conventional subrogation as modified by the third paragraph if he satisfies the requirements of that paragraph. The third paragraph has by requiring the agreement to be in writing registered has restricted the application of the doctrine of equitable or conventional subrogation.

Partial subrogation abolished.—The fourth clause of the section settles a point in which the cases were not consistent. It confirms the case of *Gurdeo Singh* v. *Chandrikah* (*u*) where Mookerjee, J., held that subrogation could only be by redemption, and that the demand of the prior incumbrancer must be entirely satisfied so that he should be relieved of all further trouble, risk and expense (*v*). The Allahabad High Court differed in *Udit Narain Misir* v. *Asharfi Lal* (*w*) holding that it was sufficient if the liability was partially discharged, for if the mortgagee accepts part payment, the mortgage is split and the puisne incumbrancer benefits in exactly the same way as he would if the entire debt had been discharged but not to the same extent. The Nagpur High Court also held that where a mortgage was split up and the transaction could be looked upon as if it were in distinct parts with different considerations assigned to different portions of the property and as independent separate mortgages, a person may acquire a right of subrogation to a part of the mortgage which has been redeemed (*x*). In *Venkataramana Reddi* v. *Rangiah* (*y*), subrogation was allowed when the charge on only one item of the property mortgaged was discharged. In theory there may be much to be said for the Allahabad view but in practice it would certainly lead to much complication and difficulty in apportioning claims arising out of subrogation. This difficulty was pointed out in *Hanumaithaiyan* v. *Meenatchi Naidu* (*z*). It was submitted in these notes that the prior mortgage must be fully discharged before the puisne mortgagee could claim subrogation. The matter is now put beyond doubt because in two recent Privy Council cases (*a*) the observations of Mookerjee, J., have been approved and it has been held that a person who claims subrogation must pay the entire amount under the incumbrance in respect of which subrogation is claimed and that payment of a portion only of the amount due under the incumbrance is not sufficient. Such a qualification of the right of subrogation, according to the Privy Council, applies whether the right is claimed under section 92 or under the pre-existing law. The Allahabad, Madras and Nagpur decisions noted above must, therefore, be regarded as having been wrongly decided. In some

(*u*) (1909) 36 Cal. 193, 1 I.C. 918, followed in *Dulhin Sonakuer* v. *Manaül Ahmad* (1919) 48 I.C. 779; *Lekhraj Mahton* v. *Jang Bahadur* (1926) 89 I.C. 822, ('26) A.P. 23; *Ma Lon* v. *Ma Nyo* (1923) 1 Rang. 714, 79 I.C. 766, ('24) A.R. 204; *Kanhaiya Lal* v. *Ikram Fatima* (1938) 8 Luck. 103, 9 O.W.N. 557, 139 I.C. 358, ('32) A.O. 268.

(*v*) *Kanhaiya Lal* v. *Ikram Fatima*, *supra*.

(*w*) (1916) 38 All. 602, 35 I.C. 782; *Premshukdas* v. *Peerkhan* (1926) 23 Nag. L.R. 66, 95 I.C. 979, ('26) A.N. 21.

(*x*) *Janardan Sadashiv* v. *Madanlal Mangalal* (1939) 183 I.C. 651, (1939) A.N. 215.

(*y*) (1922) 41 Mad. L.J. 399, 70 I.C. 212, ('22) A.M. 249.

(*z*) (1912) 35 Mad. 183, 12 I.C. 412; *Besinath Karumani* v. *Devidoss* (1915) 29 I.C. 511; *Venkata Lakshminarayana* v. *Venkayy* (1922) 43 Mad. L. J. 284, 95 I.C. 689, ('22) A.M. 441.

(*a*) *Janaki Nath* v. *Pramatha Nath* (1940) 67 I.A. 82, (1940) A.PC. 88; *Madhoram Sud* v. *Kirtyanand* (1944) 24 Pat. 89, (1944) A.PC. 98.

cases subrogation has been allowed when the prior mortgage has been discharged but only part of the money has been advanced by the subrogee (*b*). Where the prior mortgagee has been paid up by several persons the person making the final payment cannot alone, it has been held, claim the right. All persons making the payments are entitled to the benefit of the right (*c*). What is essential is that the whole debt must be paid up and not that the whole debt must be paid up by one person. It is submitted that the observations of the Privy Council in *Janaki Nath* v. *Pramatha Nath* (*supra*) and *Madhoram Sand* v. *Kirtya Nand* (*supra*) do not militate against this view, for in neither of those two cases had the whole debt been paid up. In *Malireddi Ayyareddi* v. *Gopala Krishnayya* (*d*) where an assignee of the equity of redemption made payments to avert a sale of crops the Privy Council said that such sums "should be deemed to be *pro tanto* purchases of the second mortgage," but in that case the whole of the mortgage debt was discharged by the purchaser. There is, however, a dictum in a recent judgment of the Privy Council in *Mitchell* v. *Phillips* (*e*) which would seem to imply that the sureties of part of a debt borrowed on a mortgage might be entitled to the benefit of the security before the discharge of the whole mortgage debt.

Limitation.—Under section 69 of the Indian Contract Act a person, who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other. Under the first paragraph of section 92 of the Transfer of Property Act any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The third paragraph gives a right of subrogation to a person who advances to a mortgagor money with which the mortgage is redeemed, but subject to certain conditions. Two things are clearly noticeable, namely, (1) that section 69 gives only a right personally against another person whereas section 92 gives a right against the mortgaged property and (2) that the person making the payment gets, under section 69, a right of reimbursement in his own right and independently of anybody else's right whereas the person paying up the prior mortgage is, under section 92, subrogated into the rights of the prior mortgagee. A person making the payment may well come under both sections in which case he gets both rights. The time within which such a person may enforce his two rights is, however, different and it may well happen that at the time he takes proceedings one of his rights is barred. The period of limitation for enforcing the right of reimbursement under section 69 is three years from the date of payment under article 61 of the Limitation Act (*f*). The question of limitation for a suit to enforce the right of subrogation under section 92 is of some difficulty. This right of subrogation may arise at two distinct stages, namely, (i) when the prior mortgage is paid off before the prior mortgagee has put the mortgage in suit and got a decree thereon and (ii) when after the prior mortgagee sued upon his mortgage and got his decree the decretal amount is paid off. Although section 92 in terms refers to "mortgage", "mortgagor", "mortgagee" and "mortgaged property" it is now well settled, since the decision of the Privy Council in *Gopi Narain Khanna* v. *Bansidhar* (*g*), that the right of subrogation is available even after the prior mortgage has been put in suit and a decree

(*b*) *Rupabai* v. *Audimulam* (1888) 11 Mad. 345; *Saminatha* v. *Krishna* (1915) 38 Mad. 548, 28 I.C. 966; *Ram Sarup* v. *Ram Richhpal* (1929) 51 All. 920, 119 I.C. 84, ('29) A.A. 621; *Abdul Razak Rowther* v. *Abdul Rahiman Sahib* (1933) 65 Mad. L.J. 890, 149 I.C. 287, ('33) A.M. 715.

(*c*) *Dulhin Kamlapati Devi* v. *Jageshar Dayal* (1938) 18 Pat. 342; *Sinnaswami Goundan* v. *Rama Goundan* (1941) A.M. 568, (1941) Mad. 924, (1941) M.W.N. 318, (1941) 1 M.L.J. 519, 53 M.L.W. 454.

(*d*) (1924) 47 Mad. 190, 51 I.A. 140, 144, 79 I.C. 592, ('24) A.PC. 36.

(*e*) (1931) 58 I.A. 306, 35 Cal. W.N. 986, 59 Cal. 320, 136 I.C. 407, ('31) A.PC. 224; *cf. Gedge* v. *Matson* (1858) 25 Beav. 310.

(*f*) *Sibanand* v. *Jagmohan* (1922) 1 Pat. 780, (1922) A.P. 499, 68 I.C. 707; *Tetaram* v. *Harischandra* (1937) A.M. 402; *Perumal Reddiar* v. *Suppiah Thevar* (1945) A.M. 500.

(*g*) (1905) 27 All. 325, 32 I.A. 123.

S. 92

has been passed thereon. The question of limitation will, therefore, have to be considered in respect of the two situations, namely, when the prior mortgagee is paid up before suit and when he is paid up after decree.

Before suit.—The leading case is that of *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (*h*). In that case there were six mortgages, the first one was effected by a zarpeshgi potta dated November 20, 1874, for repayment of Rs. 12,000 in 12 years, and the last one was in favour of one Mussammat Alfan for repayment of Rs. 12,000 in two years. The mortgage money was by agreement applied to paying off the amount due to the zarpeshgidar who made over the zarpeshgi deed to Alfan. This last mortgage was assigned by the heirs of Alfan to the plaintiffs appellants to whom the zarpeshgi deed was also delivered. The intermediate mortgagees filed suits separately and obtained decrees. In all the said suits except that on the fifth mortgage the representatives of Alfan, that is the assignor of the plaintiffs appellants were parties but they raised no issue and claimed no priority on the ground of having paid up the zarpeshgi deed. The plaintiffs appellants on the 22nd September 1900 filed the suit out of which the appeal arose on the mortgage dated the 17th February 1888. It will be noticed that this suit was filed more than 12 years after the term of the zarpeshgi deed expired (May or June 1887) as well as more than 12 years after the date when Alfan paid up the zarpeshgidar on the execution of her mortgage on the 17th February 1888. Their Lordships held (i) that the zarpeshgi was kept alive for the benefit of Alfan who thereby obtained priority over the intermediate mortgagees, (ii) that the claim to enforce that priority in this suit which was brought more than 12 years after the term of the zarpeshgi had expired was barred by article 132 of the Limitation Act and (iii) that as regards the purchasers at sales in execution of decrees in those intermediate mortgagees' suits in which the representatives of Alfan were parties the suit was barred by *res judicata* by reason of no claim for priority having been made by them in those suits. As regards the question of limitation the Privy Council observed: "But as the Rs. 12,000 were under the zarpeshgi deed of November 20, 1874, repayable in Jeth 1294 Fasli (September 1887) and this suit was not brought until September 22, 1900, the claim of the plaintiffs to priority is barred by article 132 of the second schedule of the Indian Limitation Act, 1877." There is a slight inaccuracy in the corresponding English date given against Jeth 1294 Fasli, for it will be May or June 1888, but that does not affect the matter for May or June 1888 was also more than 12 years before suit. In some later cases it has been pointed out that the suit was filed also after 12 years after Alfan had paid up the zarpeshgidar and therefore this case is not decisive as to the starting point of limitation. But the fact remains that their Lordships in computing the period started with the expiry of the zarpeshgi deed as the date of the accrual of the cause of action. The date of accrual of the cause of action on the mortgage has been accepted in the undernoted cases (*i*) as the starting point in cases where the prior mortgage had been paid off before suit. In *Munna Lal* v. *Chuni Lal* (*j*) the majority of a Full Bench of the Allahabad High Court held that in the case of subrogation before or after decree the limitation for enforcing the subrogee's right would begin to run from the date of payment of the prior mortgage or the decretal amount. It is submitted that, so far at least as subrogation before decree is concerned, this statement of the law is contrary to principle as well as to the weight of authority.

After decree.—It is well settled that where a subsequent mortgagee pays up the amount of the decree obtained by a prior mortgagee on his prior mortgage the

(*h*) (1911) 39 I.A. 68, 39 Cal. 527, 16 C.W.N. 505, 15 C.L.J. 411, 14 I.C. 496.

(*i*) *Sibanand* v. *Jagmohan* (1922) 1 Pat. 780, (1922) A.P. 499, 68 I.C. 707; *Bansidhar* v. *Shiv Singh* (1933) 56 All. 134; *Alam Ali* v. *Bani Charan* (1935) 58 All. 602 (F.B.); *Totaram* v. *Harischandra* (1937) A.N. 402; *Dulhin Kamlapati* v. *Jageswar Dayal* (1938) 18 Pat. 342; *Babu Lal Ray* v. *Bindhyachal Rai* (1943) 22 Pat. 187, (1943) A.P. 305.

(*j*) (1945) All. 733, (1945) A.A. 239 (F.B.).

subsequent mortgagee is subrogated to the rights of the prior mortgagee. The question has arisen as to how and within what time the subrogee is to enforce his rights. As regards the procedure to be adopted by the subrogee, in some cases (*k*) it had been held that the subrogee was to continue the suit and proceed to execute the decree. The authority of these cases is now regarded as destroyed by the pronouncement of the Privy Council in *Gopi Narain Khanna* v. *Bansidhar* (*supra*). In that case, although Gaya Prasad the subsequent mortgagee was a party, the mortgage decree was passed in the form given in section 86 of the Transfer of Property Act which *prima facie* contemplated a suit between one mortgagee and the mortgagor only. The subsequent mortgagee paid up the decretal amount and applied for decree absolute but his application was dismissed on the ground that he had not acquired the status of a decree holder and that the decree was no longer capable of execution. The subsequent mortgagee then filed a suit for foreclosure. The question was whether such a suit was maintainable. Their Lordships of the Judicial Committee held that the suit was not barred by section 244 of the Civil Procedure Code (now section 47) and that in view of the language of the decree as drawn up a separate suit was the appropriate remedy, as a new decree was required to work out the rights of the parties. The Privy Council said: "......on payment by Gaya Prasad of the sum into Court before the expiry of the enlarged time, and acceptance of that sum by the plaintiffs, the decree was spent and became discharged and satisfied. There was, therefore, nothing left to be done in the execution department. It is true that Gaya Prasad, having made that payment (as he had the right to do), acquired under section 74 of the Transfer of Property Act all the rights and powers of the mortgagee as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged."

A suit being thus held to be the proper procedure the question next arises as to the time within which the suit is to be filed and as to when the time begins to run. In *Gopi Narain Khanna*'s case (*supra*) there was no question of limitation for the suit was well within 12 years from the dates of the accrual of the cause of action on the mortgage of the decree and of the payment by Gaya Prasad. There is a good deal of divergence of judicial opinion on this question. Three different views have been expressed in th reported decisions in India. In the undernoted cases (*l*) it has been held that the limitation runs from the date of accrual of the cause of action on the mortgage deed itself and not from the date of payment of the decretal amount. On the other hand in several other cases (*m*) it has been held that time begins to run from the date of payment of the decree. A third view is that the starting point of limitation is the date fixed for payment by the decree which is paid up (*n*).

The first of the above three views was based primarily on the above quoted observations of the Privy Council in *Gopi Narain Khanna*'s case (*supra*). The reasoning was that the decree was discharged and the right of subrogation conferred by section 74 and now by section 92 would not revive or revitalise the decree and therefore the subrogee would get the right of the decree holder mortgagee under the mortgage and as the right

(*k*) *Bavanna* v. *Balagurivi* (1899) 9 M.L.J. 177; *Bansidhar* v. *Gaya Prasad* (1901) 24 All. 179.

(*l*) *Sibanand* v. *Jagmohan* (1922) 1 Pat. 780, (1922) A.P. 499, 68 I.C. 797; *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (1926) 50 Mad. 626, (1927) A.M. 631, 102 I.C. 816, 52 M.L.J. 532; *Bansidhar* v. *Shiv Singh* (1933) A.A. 906, (1933) A.L.J. 1564, (1933) 56 All. 134, 147 I.C. 575; *Halsanad Madappya* v. *Mahabala Rao* (1937) A.M. 826; *Balchand* v. *Ratan Chand* (1942) A. N. 111; *Radha Kishan* v. *Hazarilal* (1944) Nag. 383, (1944) A.N. 163 (F.B.); *Perumal Reddiar* v. *Suppiah Thevar* (1945) A.M. 500; *Sheosaran* v. *Amla Co-operative Credit Society* (1944) 23 Pat. 953 (a case of co-mortgagor).

(*m*) *Shib Lal* v. *Munni Lal* (1921) 44 All. 67, (1922) A.A. 153, 19 A.L.J. 84 (which was however doubted in 50 All. 569 and 56 All. 134); *Alam Ali* v. *Beni Charan* (1936) 58 All. 602 (F.B.); *Dulhin Kamlapati* v. *Jageshar Dayal* (1938) 18 Pat. 342; *Munna Lal* v. *Chunni Lal* (1945) All. 788, (1945) A.A. 239 (F.B.).

(*n*) *Parvati Ammal* v. *Venkatarama Iyer* (1925) All. 80. 47 M.L.J. 816, 81 I.C. 771; *Babu Lal Ray* v. *Bindhayachal Rai* (1942) 22 Pat. 187, (1943) A.P. 195; *Shyamsud-din* v. *Asadulla* (1945) 49 C.W.N. 104, (1945) A.C. 194.

S. 92

so conferred was founded on the mortgage the limitation must be that applicable to a suit on the mortgage, that is to say, time must be computed from the date of the accrual of the cause of action on the mortgage. It should, however, be remembered that in *Gopi Narain Khanna's* case (*supra*) the decree was passed in the form provided in section 86 of the Transfer of Property Act. The decree had not been made absolute. By the decree it was ordered that upon the mortgagor defendant paying to the plaintiff mortgagee the amount due on the appointed day the plaintiff mortgagee should deliver up the title deeds and retransfer the property and that if no payment was made on or before the fixed day the defendant mortgagor should be absolutely debarred of all right to redeem the property. In that case the decretal amount was paid by the puisne mortgagee and the decretal debt was fully discharged and satisfied but there had been no retransfer of the property to the mortgagor. Payment having been made there could be no question of making the decree absolute therefore the decree as drawn up had spent itself and the rights of Gaya Prasad the subsequent mortgagee defendant who had paid up the decretal amount and acquired a right of subrogation could not be worked out in that suit under that decree as drawn up. The decretal debt has been satisfied but what had happened to the decretal charge? In *Janaki Nath Roy* v. *Pramatha Nath Malia* (*o*) Lord Romer in delivering the judgment of the Board observed: "Turning now to the statute, the first thing to be observed is that the third paragraph of section 92 only applies where the mortgage has been redeemed. In the present case it is said that the mortgage has not been redeemed inasmuch as there has been no reconveyance or what in India takes the place of a reconveyance. This contention, however, loses sight of the distinction between the redemption of a mortgage and the redemption of the property mortgaged. In their Lordships' opinion, it is clear that the words in the section 'mortgage has been redeemed' refer merely to the payment off of the mortgage money and not to an extinction of the mortgagee's rights over the mortgaged property. If such rights had become extinguished there would be none to which the person advancing the money could be subrogated." This principle, it is apprehended, will also apply to the first paragraph of the section. This pronouncement makes it quite clear that there are two things in a mortgage, a debt and a security. The debt may be satisfied but the security may be kept alive and that is the very foundation of the doctrine of subrogation. When the subsequent mortgagee satisfies the mortgage debt the security is not destroyed but he gets the benefit of the security and can enforce the security. In *Batey Krishna* v. *Parsotamdas* (*p*) a puisne mortgagee *P* had paid up the decree on a prior mortgage as also the amount of another mortgage which had not been sued upon. A subsequent mortgagee *D* filed a suit impleading *P*. A foreclosure decree was passed but subject to the rights of *P* for the two sums paid by him and a final decree was also passed. *P* then brought a suit for recovery of the two sums. The point was taken that *P*'s right as subrogee was founded on the mortgages and a suit on the mortgages he had paid off was out of time. Privy Council held that the decree in the foreclosure suit gave him a charge and his rights as subrogee had merged in that decree. Said their Lordships: "The plaintiff by making the two payments mentioned above had subrogated himself to the rights of the mortgagees whom he had paid off and the right which he had thus obtained became merged in the decree passed by the Subordinate Judge in the foreclosure suit." If the subrogee's right can merge in the decree, surely the mortgagee's right may also do so. It is submitted that when a mortgagee puts his mortgage in suit and a decree is passed thereon the mortgagee's right under the mortgage merges in the decree. The mortgagee can no longer file a suit on the mortgage. His security is limited to the amount allowed by the decree. He cannot claim interest at the mortgage rate. In short his only right is what is given to him by the decree. Like a mortgage a mortgage decree has also two elements, a decretal debt

(*o*) (1939) 67 I.A. 82.

(*p*) (1944) A.PC. 85, 71 I.A. 153.

and a decretal charge. The decree may not create a new charge, but the mortgage charge becomes attached to the decree as an integral part thereof. The mortgage charge is thus transformed and assumes a new garb and a new life as regards its enforceability. If the decretal debt is paid up the debt is discharged but what has been called the decretal charge does not perish with it, for if it does there will be no shoe into which the puisne mortgagee paying up the decretal debt can get into. The payment of the decretal debt can on no sound principle revive the mortgage which has merged into decree and has become extinct as a mortgage. It is submitted that the Privy Council in *Gopi Narain Khanna*'s case (*supra*) only meant that the decree being drawn up in the form prescribed by section 86 it spent itself in the sense that the decretal debt being gone the decree could not be executed, *i.e.*, the procedure by execution was no longer open. It is submitted that Privy Council did not say or mean that the decretal charge had vanished or the mortgage charge had revived. The true principle of subrogation is that the person who becomes entitled to it gets the rights of the prior mortgagee in the form in which they are at the time when the right of subrogation arises. In *Parvati Amma* v. *Venkatarama Iyer* (*q*) Wallace, J., formulated the point for decision in the case as follows: "The point for decision is whether when she paid it off, she is to be subrogated to it in its original form as a mortgage charge, or to it in the form into which it had developed, *viz.*, the right to sell the property in discharge of the mortgage decree." The learned Judge then answered the question as follows: "The essence of subrogation is that the party paying off a charge becomes in equity the assignee of that charge. It would seem to follow that he is subrogated to the charge in the form which it has assumed when his assignor in equity is (by a legal fiction) supposed to make the assignment. It is difficult to see how an assignment can have the effect of, so to speak, setting back the hands of the clock of evolution, and reviving a form out of which the charge has already developed, so that the charge assigned is not the charge as on the date of assignment, but some previous and outworn state thereof. It is still more difficult to adopt such a theory when the charge, out of which the charge at the date of assignment has developed, has already vanished not by process of development, but by efflux of time. If the charge assigned is still a charge which has become unenforceable as a mortgage charge by efflux of time then naturally subrogation is time barred. But if it is a charge which has become unenforceable as a mortgage charge, because it has developed into a decree charge, I cannot see why the party entitled to subrogation should be relegated to the unenforceable charge and denied the enforceable one. If the unenforceability of the mortgage charge as such is the test by which the right of subrogation is to be denied, it is difficult to see why a mortgage charge unenforceable at the date of assignment because it has passed into a decree should nevertheless be held enforceable by a subrogee, while a similar charge unenforceable at the date of assignment because of efflux of time, is not enforceable by the subrogee.......It appears to me then that the proper doctrine is that the subrogee or assignee in equity steps into the shoes of the prior mortgagee at the point where he is standing and takes over whatever rights and remedies he possesses at the moment his lien on the property is paid off." Further down His Lordship further clarified the position thus: "As I have said, I find it difficult to see how, when a mortgage is no longer alive as a mortgage but has suffered a change into a decree for sale, and cannot therefore any longer be enforced as a mortgage by the prior mortgagee, it is nevertheless alive as a mortgage and enforceable as such by the puisne mortgagee who has paid it off in its shape as a decree debt, or how that payment can revise the process of conversion it has passed through and revive it again as a mortgage charge. I hold therefore that the plaintiff is subrogated to the decree charge held by the prior mortgagee, *i.e.*, the right to hold the property to sale to discharge the decree debt; and that right is free of any restriction that it should be worked out within the period of limitation for the enforcement

(*q*) (1925) A.M. 80, (1924) 47 M.L.J. 316, 81 I.C. 771.

S. 92 of the original mortgage." To the like effect are the observations of Chhatterji, J., in the Patna case and of Mukherjee, J., in the Calcutta case referred to under the foregoing footnote (*n*). It is true that in *Kotappa's* case (*supra*) Wallace, J., changed his views but the reason for the change does not appear to be convincing. The learned Judge was apparently oppressed with the supposed technical difficulties in giving effect to the views expressed in the previous case. If one keeps in view the difference between substantive rights and remedy no difficulty need arise. Section 92 is concerned with and lays down a rule of substantive law and confers a substantive right. How and within what time that right is to be enforced appertain to the domain of the law of procedure and limitation both of which are what lawyers call adjective law. Every right of a civil nature is enforceable. The courts have jurisdiction to try all suits of a civil nature except suits of which their cognisance is either expressly or impliedly barred. If a prior mortgage is paid up before it has merged into a mortgage decree, the person paying, if he comes within sec. 92, gets the right of the prior mortgagee which at that stage is wholly founded on the mortgage itself. Immediately preceding such payment the remedy of the prior mortgagee was to sue upon the mortgage. The subrogee's right is also to sue upon the mortgage. If, however, the mortgage had ripened into a mortgage decree before payment, the subrogee gets into the substantive right of the decree-holder not qua mortgagee but as a decree-holder. How was the right of the mortgagee decree-holder to be enforced ? In England a suit upon a judgment was a familiar procedure. The right of a mortgagee decree-holder is certainly a right of a civil nature. What prevents him from suing upon his decree ? It is the rule of procedure now embodied in sec. 47 of the Code of Civil Procedure that bars such a suit. Even under sec. 47 if a decree is merely a declaratory decree or is not executable, a suit is the proper remedy. Unless the decree is drawn up as suggested by the Privy Council and as now provided in Form No. 9 of App. D, Civil Procedure Code, the subrogee cannot execute the decree according to the rules of procedure but, for that reason, his right does not vanish in thin air. The right remains and as he is not affected by sec. 47 he has his ordinary remedy by way of a suit which but for the rule of procedure embodied in that section would also have been available to the mortgagee decree-holder. The law of limitation is also part of the adjective law and it regulates the remedy by prescribing periods within which particular forms of proceedings are to be initiated but does not affect or qualify or destroy the right. This is clearly recognised by the fact that even when the proceedings to enforce a right are barred by limitation the right is not extinguished, unless the case comes within section 28 of the Limitation Act. If this distinction between the substantive right which is regulated by substantive law and the remedy which is regulated by adjective law is kept in view, there can be no difficulty in giving full effect to the doctrine of subrogation, namely, that if at the time of payment the mortgage is alive as a mortgage the subrogee's right is on the mortgage and his remedy is a suit which must be brought within 12 years from the accrual of the cause of action on the mortgage but that if at the time of payment the mortgage had merged in a decree the subrogee gets the mortgagee decree-holder's right and his remedy, if the decree is not in Form 9, is by way of suit which must be brought, under article 132, within 12 years from when the money due under the decree becomes payable.

The second view mentioned above proceeds on the theory of a fresh charge or a statutory right giving the subrogee a charge. The theory of a fresh charge found favour with the Court in the case of *Shib Lal* v. *Munni Lal* (*supra*). That case was, however, doubted in two subsequent cases noted above. In *Alam Ali's* case (*supra*) Sulaiman, C.J., said that when the right of subrogation arose before the mortgage had merged into a mortgage decree the subrogee got no fresh charge, but that when it arose after decree the subrogee got a statutory right which gave him a sort of charge. The last Full Bench

case of the Allahabad High Court (*Munna Lal* v. *Chunni Lal*, *supra*) carried this reasoning to its logical conclusion, namely, that whether subrogation arose before or after decree a fresh statutory right arose and limitation began in both cases from the date of payment. If section 92 is to be regarded as a statutory right there is no reason why old section 74 was to be regarded otherwise. Nor can there be any reason why there should be any difference between a pre decree subrogation and a post decree subrogation which difference was conceded by Sulaiman, C.J. To accept the first view is to give the subrogee more than the right of the prior mortgagee for the subrogee will enforce the right under the mortgage which may be greater than the right of the mortgagee decree-holder, *e.g.*, as to interest. On the other hand, in many cases it will not give any enforceable right to the subrogee for the suit on the mortgage may be barred at the time payment of the decretal amount is made. To accede to the second view may also amount to giving the subrogee better rights, *e.g.*, when subrogation takes place say 10 days after the decree when the mortgagor has over 5 months to pay. According to the second view the subrogee will be entitled to take proceedings before the date of payment under the decree arrives. Further it is unnecessary, for the purposes of subrogation, to have recourse to the theory of a fresh charge or statutory right amounting to a fresh charge. The true principle, it is submitted, is that adopted by Wallace, J., Chatterji, J., and Mukherjee, J., in the cases noted above in which the third view has been expressed.

In *Sheosaran Singh* v. *Amta Co-operative Credit Society* (r) the Patna High Court has taken the view that after the amendment of the Transfer of Property Act in 1929 a co-mortgagor on redeeming the mortgage acquires a charge on the share of the other co-mortgagor in addition to the right of subrogation and that consequently when a co-mortgagor pays off the decretal amount due under the mortgage decree he becomes an assignee in equity of the mortgage bond and if the suit on the bond is barred and the security becomes worthless he can obtain a decree for sale in enforcement of his charge on the share of the other co-mortgagor if his suit has been filed within 12 years from the date of payment. The same view appears to have been taken by a Full Bench of the Oudh Chief Court in *Brij Bhukhan* v. *Pandit Bhagwan Datt* (s). If the period of limitation governing a suit for enforcing the right of the subrogee is as suggested above, there will be no necessity for extracting, by a process of interpretation of the provisions of the Transfer of Property Act on the basis of the supposed intention of the legislature, a statutory charge in favour of the co-mortgagor redeeming the mortgage for the co-mortgagor like any other subrogee will have a better security than a mere charge on the share of the other co-mortgagor.

93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79 no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Prohibition of tacking.

Amendment.—This is the same as sec. 80 before the Amending Act of 1929. The section has been renumbered 93 and placed after sec. 92 as the principle of tacking is closely allied to that of subrogation.

(r) (1944) 23 Pat. 953.

(s) (1943) 19 Luck. 70.

S. 93

Tacking.—If there are successive mortgages thus:—

A mortgages to	..	..	..	..	..	..	*B*,
A „ „	..	..	..	..	..	..	*C*,
and *A* „ „	..	..	..	..	..	..	*D*.

D may redeem *B* and be subrogated to the rights of *B*; but he only takes priority over *C* in respect of *B*'s mortgage and not in respect of his own mortgage (*t*). Under the English doctrine of tacking *D* on paying off *B* acquired priority over *C* not only in respect of *B*'s mortgage but also in respect of his own mortgage provided *B* had a legal mortgage and *D* had no notice of *C*'s mortgage when he lent his money to *A*. Thus *D*'s mortgage was tacked on to *B*'s and the consolidated mortgage of *B* and *D* became prior to *C* (*u*). This privilege, described by Lord Hale, C.J., as the creditor's *tabula in naufragio* (*v*), was the effect of the superiority allowed in equity to the legal estate. The first mortgagee *B* had the legal estate, and when *D* acquired the legal estate, then if he advanced his money without notice of *C*'s mortgage he was said to have as strong an equity as *C* and a right to squeeze him out.

This doctrine has been abolished in England by sec. 94 of the Law of Property Act, 1925, as from the 1st January, 1926, and it was not recognized in India (*w*). The effect of this section is to enact that the doctrine of tacking shall not apply in India except to the extent allowed by sec. 79.

The section was considered in *Mittu Lal* v. *Kishan Lal* (*x*) with reference to a question of rateable distribution under sec. 295 of the Code of Civil Procedure, 1882, corresponding to sec. 73 of the Code of 1908. The first and third mortgages were to *B* and the second to *C*. *B* obtained two decrees for sale on his mortgages and received payment of the sale proceeds. *C* obtained a decree for sale and claimed that, after deducting the amount due on the first mortgage only, the balance of the sale proceeds should be paid to him. *C*'s claim was allowed on the ground that neither the rule of rateable distribution under the Code of Civil Procedure nor sec. 80 (now sec. 93) of this Act gave priority to a subsequent encumbrancer.

With or without notice.—It matters not whether the mortgagee making the subsequent advance has or has not notice of the intermediate mortgage (*y*).

Salvage payments.—When a prior mortgagee makes payments of arrears of Government revenue to protect the property from forfeiture and sale, such payments are in the nature of salvage payment on behalf of all persons interested, and are added to the prior mortgage either under sec. 72 of this Act or sec. 9 of the Bengal Revenue Sales Law, 1859, and have priority over puisne incumbrances (*z*).

Mortgagor not affected.—The section refers to the rights of successive mortgagees *inter se* and has no bearing on the question which may arise between the mortgagor and mortgagee with reference to consolidation, or tacking or adding expenses to the mortgage debt under sec. 61 or 72. But under the old rules of administration in England, long since repealed, a mortgagee might tack an unsecured debt to a mortgage debt and thus convert a simple contract debt into a specialty as against an heir or devisee of the mortgagee under the rule in *Rolfe* v. *Chester* (*a*) though he might not do so if

(*t*) *Chhotey Lal* v. *Dharajit* (1926) 96 I.C. 1054, ('26) A.A. 744.

(*u*) *Marsh* v. *Lee* (1670) 2 Vent. 337; *Brace* v. *Marlborough* (*Duchess*) (1728) 2 P. Wms. 491.

(*v*) *i.e.*, the plank which gives security to the shipwrecked creditor.

(*w*) *Narayan Venkoba* v. *Pandurang* (1883) 7 Bom. 526; *Goluknath Misser* v. *Lalla Prem Lal* (1878) 3 Cal. 307, 309; *Sirbadhi Rai* v. *Raghunath* (1885) 7 All. 568, 573.

(*x*) (1890) 12 All. 546.

(*y*) *Imperial Bank of India* v. *U. Rai Gyaw Thu* (1923) 1 Rang. 637, 50 I.A. 283, 76 I.C. 910, ('23) A.PC. 211.

(*z*) *Monohar Das* v. *Hazarimull* (1931) 35 Cal. W.N. 1040, 58 I.A. 341, 134 I.C. 645, ('31) A.PC. 226, reversing on this point: *Hazarimull* v. *Manohar* (1930) 57 Cal. 298, 126 I.C. 125, ('30) A.C. 151.

(*a*) (1855) 20 Beav. 610—see note multiplicity of actions under s. 72.

he would thereby gain priority over other creditors (b). In a case where the mortgagor had been in possession and a suit was compromised on terms that the mortgagor should pay the arrears of rent with the mortgage debt, it was held that a transferee of the equity of redemption was not bound to pay the arrears, as the rent could not be tacked on to the mortgage debt (c).

Rights of mesne mortgagee.

94. *Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.*

The old section.—This section has been substituted by the Transfer of Property (Amendment) Act, 1929. The old section was numbered 75 and was as follows:—

"Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor."

Amendment.—This section is new. It corresponds partly to the repealed sec. 75 and the repealed Order 34, rule 11, of the Code of Civil Procedure, 1908, as originally enacted.

Redeem up, foreclose down.—This familiar rule was expressed in the repealed sec. 75. In the Act as amended it is divided between two secs. 91 (a) and 94. Section 91 (a) gives a puisne mortgagee a right to redeem a prior mortgage, and this section gives a prior mortgagee a right to foreclose a puisne mortgagee. It is not easy to understand why the section refers to a *mesne* mortgagee as it does not refer to rights against anterior mortgagees. The word "prior" would have been more appropriate and possibly the word 'mesne' is a survival of the repealed Order 34, rule 11, of the Civil Procedure Code, 1908.

The rule arises in the case of successive mortgages and is best explained by an example. Thus if there are three successive mortgages—

A mortgages to .... *B*
A „ „ .... *C*
A „ „ .... *D*

C as assignee of part of the equity of redemption of *A*, has the right to redeem *B*. For the same reason *D* can redeem *C* or *B*. On the other hand *B* can foreclose *A*, and as parts of *A*'s equity of redemption have been transferred to *C* and to *D*, *B* can foreclose *C* or *D* or both.

English and Indian law contrasted.—In English law the puisne mortgagee's right to redeem a prior mortgagee is strictly ancillary to his right to work out his remedy by foreclosure or sale of the property. Thus *D* redeems *C* and standing in *C*'s shoes redeems *B* and standing in *B*'s shoes forecloses *A*. Accordingly *D* cannot redeem *B* without first redeeming *C* (d). This is said to be because what is mortgaged to *C* is the right to redeem *B* and what is mortgaged to *B* is the right to redeem *C*. Again, the plaintiff seeking to redeem must foreclose all equities subsequent to himself as well as the mortgagor. Thus if *D* wishes to redeem *C*, he must offer to foreclose *A*, and therefore he cannot redeem *C* before he is entitled to foreclose his own mortgage. Similarly if *D* wishes to redeem *B*, he must offer to redeem *C* and claim to foreclose *A*.

(b) *Pile* v. *Pile* (1875) 23 W.R. (Eng.) 440.
(c) *Unni* v. *Nagammal* (1895) 18 Mad. 368.
(d) *Teevan* v. *Smith* (1882) 20 Ch. D. 724.

S. 94

It is recognized in Indian cases that the puisne mortgagee's right to redeem a prior mortgagee is ancillary to his right to work out his remedy by sale of the property (*e*). For this reason the Madras High Court has held that limitation for the puisne mortgagee's suit to redeem a prior mortgage is not sixty years under art. 148, but twelve years under art. 132 (*f*), although the other High Courts apply the sixty years' period under art. 148 of the Limitation Act (*g*). But the rule in India is not so strict as in England, for *D* may redeem *B* without redeeming *C*, but it is necessary under Order 34, rule 1, of the Code of Civil Procedure, 1908, that *C* should be made a party. Again *D* may redeem *C* without foreclosing *A* ; only it is necessary that *A* should be a party. On the other hand if *B* forecloses *A*, *B* should make *C* and *D* parties to the suit.

Effect of prior mortgagee's decree on puisne mortgagee.—If the prior mortgagee forecloses his mortgage, and makes the puisne mortgagees parties to the suit, liberty is given under the decree to the puisne mortgagees to redeem the prior mortgagee and foreclose or bring to sale the mortgagor, though the decree does not operate as *res judicata* between the mortgagor and the puisne mortgagee (*h*). In a case where the decree was not in proper form and did not give this liberty, the Privy Council held that the puisne mortgagee could not pay off the prior mortgagee and adopt the decree as his own (*i*). This was on the ground that the payment satisfied the decree and there was nothing left to execute and so the puisne mortgagee's remedy was by another suit. When the decree is in proper form and gives the puisne mortgagee a right to redeem which he exercises and the mortgagor makes default in payment the Court may substitute the puisne mortgagee as decree holder and pass a preliminary decree in his favour (*j*). But if the puisne does not exercise his right to redeem, the property after sale passes to the auction purchaser free from incumbrances, and the rights of the puisne mortgagee are transferred to the surplus sale proceeds (*k*). In a case where the prior mortgage was of property in Calcutta and the puisne mortgage of that property and another property in the mofussil, the prior mortgagee sued for sale and the sale proceeds were not enough to satisfy the puisne mortgage—yet the puisne mortgagee was not allowed to bring to sale the mofussil property which was not in suit (*l*).

Rights of auction purchaser at sale in execution of mortgagee's decree.—In this connection it is important to note that a purchaser at a sale in execution of a mortgage decree is in a much stronger position than a purchaser at a sale in execution of a money decree against the mortgagor. A sale in execution of a money decree passes the rights of the mortgagor existing at the date of sale. The sale in execution of the mortgagee's decree passes the rights of the mortgagee as well as of the mortgagor as they existed at the date of the mortgage (*m*). If the mortgagor has no title so that the

---

(*e*) *Muhammad Usan* v. *Abdulla* (1898) 24 Mad. 171 ; *Goverdhana Doss* v. *Veerasami Chetty* (1900) 26 Mad. 537.

(*f*) *Lakshamanan Chettiar* v. *Sella Muthu* (1925) 47 Mad. L.J. 602, 84 I.C. 301, ('25) A.M. 76 ; *Appayya* v. *Venkataramayya* (1925) 82 I.C. 864, ('25) A.M. 150.

(*g*) *Sayamali* v. *Anisuddin* (1929) 57 Cal. 704, 33 Cal. W.N. 1067, 119 I.C. 135, ('29) A.C. 609 F.B., distinguishing *Nidhiram* v. *Sarbessur* (1910) 14 Cal. W.N. 439, 5 I.C. 877 ; *Priya Lal* v. *Bohra Champa* (1923) 45 All. 268, 79 I.C. 498, ('23) A.A. 271 ; *Nathmal* v. *Nilkanth* (1932) 34 Bom. L.R. 1519, 141 I.C. 811, ('33) A.B. 25; *Sundar Das* v. *Beli Ram* (1933) 14 Lah. 596, 142 I.C. 805, ('33) A.L. 503 ; *Ramjhari Kuar* v. *Lala Kashinath* (1926) 5 Pat. 513, 94 I.C. 284, ('26) A.P. 337.

(*h*) *Vedayyasa* v. *Madura Hindu Sabha* (1919) 42 Mad. 90, 49 I.C. 36.

(*i*) *Gopi Narain* v. *Babu Bansidhar* (1905) 27 All. 325, 32 I.A. 123, which in effect overrules *Bavanna* v. *Balagurivi* (1899) 9 Mad. L.J. 177 ; cf. *Sundara Reddiar* v. *Subbiah* (1913) 24 Mad. L.J. 28, 18 I.C. 610.

(*j*) *Yamunabai* v. *Maroti* (1933) 146 I.C. 514. ('33) A.N. 163. See also C.P.C. Appendix D, Form 9, para. 5 (a).

(*k*) *Berhamdeo* v. *Tara Chand* (1906) 33 Cal. 92 on app. *Barhamdeo* v. *Tara Chand* (1914) 41 Cal. 654, 21 I.C. 961 P.C. ; *Ramasami Pillai* v. *Narayanasami* (1925) 48 Mad. L.J. 100, 86 I.C. 548, ('25) A.M. 483.

(*l*) *Sarat Chandra* v. *Nahapiet* (1910) 37 Cal. 907, 8 I.C. 1142.

(*m*) *Sheshgiri Shanbog* v. *Salvador* (1881) 5 Bom. 5 ; *Shaik Abdulla* v. *Haji Abdulla* (1881) 5 Bom. 8 ; *Dadoba Arjunji* v. *Damodhar* (1882) 16 Bom. 486 ; *Perumal* v. *Kaveri* (1896) 16 Mad. 121 ; *Desai Lallubhai* v. *Mundas* (1896) 20 Bom. 390 ; *Maganlal* v. *Shakra Girdhar* (1898) 22 Bom. 945 ; *Musst. Dhanwanti* v. *Hargobind Prashad* (1924) 3 Pat. 435, 78 I.C. 614, ('24) A.P. 484 ; *Ma Kin Kyaw* v. *R. C. Dey* (1926) 4 Rang. 96, 97 I.C. 243, ('26) A.R. 183

equity of redemption is not represented in the mortgagee's suit, the mortgage decree is so far as the property is concerned, a nullity (*n*).

Rights of auction purchaser at sale in execution of mortgagee's decree if puisne mortgagee not a party.—If the prior mortgagee suing to enforce his mortgage does not make the puisne mortgagee a party to the suit and brings the property to sale, it has been held that the auction purchaser acquires the rights both of the mortgagee and mortgagor. As assignee of the mortgagor he may sue to redeem the puisne mortgage (*o*), or as assignee of the mortgagee's rights he may sue to enforce the puisne mortgage (*p*). It has been held that the purchaser acquires the rights of the mortgagor and mortgagee free from subsequent incumbrances, but is still liable to be redeemed by the puisne mortgagee (*q*), or by an assignee of the equity of redemption who has not been made a party (*r*). In a suit to redeem the auction purchaser, the decree is ignored and the auction purchaser is entitled to interest up to redemption (*s*). The auction purchaser cannot sue for possession but may sue for sale to compel redemption (*t*).

Omission to implead puisne mortgagee does not affect his rights.—The omission to implead a puisne mortgagee does not in any way affect his rights (*u*). Not only has the puisne mortgagee the right to redeem the prior mortgagee after he has brought the property to sale (*v*), but his right to sue for sale, subject of course to the first mortgage, is not affected (*w*). Even if the puisne mortgage is of a part yet the puisne mortgagee has a right to redeem the prior mortgage of the whole (*x*). The puisne mortgagee may redeem the prior mortgage although a suit to enforce the puisne mortgage is barred by limitation. This is because limitation for a suit for redemption is 60 years under Article 148 while limitation for a suit to enforce a mortgage is 12 years under Article 132. But redemption of the prior mortgage will not give the puisne mortgagee a right to possession if the prior mortgage is not usufructuary (*y*). In a Nagpur case (*z*) a puisne mortgagee was not made a party to the prior mortgagee's suit. After the decree but before the equity of redemption was extinguished by the sale, the mortgagor sold the equity of redemption and his vendee redeemed the puisne mortgage. The vendee standing in the shoes of the puisne mortgagee was entitled to redeem the prior mortgagee's auction purchaser (*z*). The Privy Council have repeatedly said that the proceedings in the prior mortgagee's suit are not binding on the puisne so as to affect his rights under the puisne

(*n*) *Surendralal Kundu* v. *Ahmmad Ali* (1933) 60 Cal. 1193, 147 I.C. 808, ('33) A.C. 912.

(*o*) *Hassanbhai* v. *Umaji* (1904) 28 Bom. 153; *Sarvothama* v. *Raja Rao* (1921) Mad. W.N. 603, ('21) A.M. 648.

(*p*) *Sham Dei* v. *Baljit Singh* (1910) 32 All. 110, 5 I.C. 451.

(*q*) *Mohan Manor* v. *Togu Uka* (1886) 10 Bom. 224; *Gajadhar* v. *Mul Chand* (1888) 10 All. 520; *Maganlal* v. *Shakra* (1898) 22 Bom. 945, 948; *Kudratullah* v. *Kubra* (1901) 23 All. 25; *Goverdhana Doss* v. *Veerasami* (1904) 26 Mad. 537; *Dina Nath* v. *Lachmi Narain* (1903) 25 All. 446; *Pandurang* v. *Sakharchand* (1907) 31 Bom. 112.

(*r*) *Ram Prasad* v. *Bhikari Das* (1904) 26 All. 464; *Venkat Reddy* v. *Kunjappa Goundan* (1924) 47 Mad. 551, 83 I.C. 1022, ('24) A.M. 650; *Badar-ud-din* v. *Karim Baksh* (1931) 135 I.C. 200, ('31) A.L. 438.

(*s*) *Mathra Das* v. *Amichand* (1933) 141 I.C. 252, ('33) A.L. 75.

(*t*) *Radha Pershad* v. *Monohur Das* (1881) 6 Cal. 317; *Ma Kin Kyaw* v. *R. C. Dey* (1926) 4 Rang. 96, 97 I.C. 243, ('26) A.R. 183; *Redi Singh* v. *Ram Lal* (1934) All. L.J. 188, 147 I.C. 880, ('34) A.A. 73.

(*u*) *Ram Prasad* v. *Bhikari Das* (1904) 26 All. 464, 467; *Hukum Singh* v. *Lallanji* (1921) 43 All. 204, 61 I.C. 942 [F.B.]; *Jageswar Mandal* v. *Sridhar Lal* (1929) 8 Pat. 216, 114 I.C. 210, ('28) A.P. 589; *Maung Shwe* v. *Karambu* (1928) 6 Rang. 122, 110 I.C. 701, ('28) A.R. 127; *S. K. A. R. S. T. Chettyar Firm* v. *A. L. A. R. Chettyar Firm* (1931) 9 Rang. 1, 132 I.C. 281, ('31) A.R. 105; *Kaisar Khan* v. *Abdul Ghani* (1940) A.C. 138, 74 C.L.J. 1, 45 C.W.N. 705, 202 I.C. 308.

(*v*) *Mallikarjundu* v. *Linga Murti* (1903) 26 Mad. 332; *Mohan Mano* v. *Togu Uka* (1886) 10 Bom. 224, *Kudrat Ullah* v. *Kubra Begum* (1901) 23 All. 25.

(*w*) *Debendra Narain* v. *Ramtaran* (1903) 30 Cal. 599 F.B.

(*x*) *Bank of Chettinad* v. *C.T.A.C.F. Firm* (1933) 150 I.C. 892, ('33) A.R. 392.

(*y*) *Nathmal* v. *Nilkanth* (1932) 34 Bom. L.R. 1519, 141 I.C. 811, ('33) A.B. 25.

(*z*) *Lakmi Chand* v. *Janardhan* (1932) 141 I.C. 144, ('32) A.N. 15.

S. 94

mortgage (*a*). In *Sukhi* v. *Ghulam Safdar Khan* (*b*) the Judicial Committee said—"The general principle is stated rightly by the High Court. It is this: 'The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position she would have occupied if she had been a party to the former suit.'" Wallis, C.J., in a Madras case (*c*) said that the mortgagee has a right to sell the mortgagor's interest as it stood at the date of the mortgage subject to this, that he must make all subsequent mortgagees parties if he wishes the sale to be free of their incumbrances. This, it is submitted, is a correct statement of the law, but in an earlier case from Allahabad (*d*) Turner, J., said—"Of course such subsequent encumbrancers, if they are not made parties, might at any time before sale come in and redeem, and they will not be bound by the decree, but if they do not redeem and a sale takes place their liens will be defeated unless they can show something more than the existence of their subsequent encumbrances, some fraud or collusion which entitled them to defeat the first encumbrance or to have it postponed to their own." It is submitted that this is not a correct statement of the law. It is difficult to see how the lien can be defeated if the puisne mortgagee was not a party to the suit, or how property can be said to be taken by the purchaser free from incumbrances if the puisne mortgagee still has a right to redeem him.

This difference of opinion as to the precise effect of a prior mortgagee's sale without impleading the puisne has led to many conflicting decisions, when the right to possession of the property has been in issue. It has been held in some cases that a puisne mortgagee in possession, though not impleaded in the prior mortgagee's suit, may be evicted by the auction purchaser at the prior mortgagee's sale, and that the puisne mortgagee must redeem him or give up possession (*e*). The same rule has also been applied to an assignee of part of the equity of redemption who has been in possession (*f*), though in some cases it has been held that if the mortgagee's omission to join the purchaser of part of the equity of redemption was intentional, his suit for possession should be dismissed (*g*). It is submitted that the right of redemption is a right, and not a liability, and a person holding such right cannot be compelled to enforce it on pain of eviction. Again, these cases offend against the principle that a puisne mortgagee should not be prejudiced by the omission of the prior mortgagee to join him as a party. In other cases, however, it has been held that the prior mortgagee's auction purchaser cannot dispossess the puisne mortgagee (*h*) or a sharer in the equity of redemption (*i*) who has not been joined, unless

(*a*) *Umesh Chunder* v. *Zahur Fatima* (1889) 18 Cal. 164, 17 I.A. 201; *Het Ram* v. *Shadi Lal* (1918) 40 All. 407, 419, 45 I.A. 130, 133, 45 I.C. 798; *Matru* v. *Durga Kunwar* (1920) 42 All. 364, 47 I.A. 71, 55 I.C. 969; *Gobind Lal* v. *Ramjanam* (1893) 21 Cal. 70, 20 I.A. 165; *Sukhi* v. *Ghulam Safdar Khan* (1921) 43 All. 469, 48 I.A. 465, 65 I.C. 151, ('22) A.PC. 11.

(*b*) (1921) 43 All. 469, 48 I.A. 465, 473, 65 I.C. 151, ('22) A.C. 11.

(*c*) *Chinnu Pillai* v. *Venkatasami* (1917) 40 Mad. 77, 34 I.C. 507.

(*d*) *Khub Chand* v. *Kalian Das* (1876) 1 All. 240, 245 [F.B.].

(*e*) *Dadoba Arjunji* v. *Damodar* (1892) 16 Bom. 486; *Desai Lallabhai* v. *Mundas* (1896) 20 Bom. 390; *Baldeo Singh* v. *Jaggu Rama* (1901) 23 All. 1 (suit for foreclosure and puisne mortgage usufructuary); *Krishnan* v. *Chadayan* (1894) 17 Mad. 17 (but the case is complicated by an interlocutary order which has not been challenged); *Bahu Lal* v. *Jalakia* (1916) 14 All. L.J. 1146, 37 I.C. 343, but see the criticism of this case in *Lachmi Narain* v. *Hirdey Narain* (1926) 24 All. L.J. 661, 97 I.C. 4, ('26) A.A. 480.

(*f*) *Niharmala Debee* v. *Sarojbandhu Bhattacharjya* (1933) 60 Cal. 948, 37 Cal. W. N. 897, 148 I.C. 42, ('33) A.C. 728; *Birinchi Singh* v. *Sarado Prasad* (1924) 3 Pat. 114, 75 I.C. 942, ('24) A. P. 452; *Gangadas Bhattar* v. *Jogendra Nath* (1907) 11 Cal. W. N. 403; *Jugdeo Singh* v. *Habibulla* (1908) 12 Cal. W.N. 107.

(*g*) *Kristopada Roy* v. *Chaitana Charan* (1923) 49 Cal. 1048, 69 I.C. 580, ('23) A.C. 274; *Aghore Nath Banerji* v. *Deb Narain* (1906) 11 Cal. W. N. 314.

(*h*) *Makhan Lal* v. *Sohan Lal* (1930) 52 All. 471, 126 I.C. 817, ('30) A.A. 355; *Reoti Singh* v. *Ram Lal* (1934) 147 I.C. 380, 1934 All. L.J. 188, ('34) A.A. 73; *Venkata Souravazulu* v. *Kannam Dhora* (1882) 5 Mad. 184; *Perumal* v. *Kaveri* (1893) 16 Mad. 121; *Rangasamy Naiken* v. *Komarammal* (1903) 26 Mad. 484; *Mulla Vittie* v. *Achuthan* (1911) 21 Mad. L.J. 218, 9 I.C. 518 F.B.

(*i*) *Badri Prasad* v. *Sri Thakurji* (1927) 105 I.C. 969, ('27) A.A. 688; *Chandramma* v. *Seethan* (1931) 61 Mad. L.J. 316, 133 I.C. 497, ('31) A.M. 542.

as assignee of the equity of redemption he **redeems him; and the auction purchaser is not entitled to evict a lessee** of a lease **subsequently granted by the mortgagor if the lessee had not been made** a party to the suit (*j*). **Conversely an assignee of a part of the equity of redemption** was held entitled **to recover** possession **from the auction purchaser at the mortgagee's** sale (*k*). But those **cases** have been **dissented from on the ground that his only right** is that of redemption (*l*).

Possession as between auction purchasers at sales of prior and puisne mortgagees who have not made each other a party.—Again, the **dispute** for possession may arise between the auction purchaser of the prior and that of the **puisne mortgagee** who have each brought the property to sale without making the other a party. Many cases proceeded on the view that after the sale by one mortgagee there was nothing left for the other mortgagee to sell, and the right of possession was decided according to priority of sale (*m*). In some cases the right of possession was determined according to the priority of the mortgages (*n*). In one case (*o*) the prior mortgagee's auction purchaser sued the puisne auction purchaser for possession and the Court gave him a decree for sale in default of redemption (*o*). In a Madras case the Court said that the prior mortgagee not having joined the puisne mortgagee, the right of the purchaser to be treated as the owner of the equity of redemption, which is an estate of ownership, is imperfect, and the puisne mortgagee who represents the ultimate equity of redemption is entitled to retain possession (*p*). But in another case (*q*) the Madras High Court held that although the prior mortgagee not having joined the puisne his suit was imperfectly constituted, yet he was entitled to use the prior mortgage as a shield and that the puisne mortgagee's purchaser is not entitled to dispossess him unless he pays him off. The Allahabad High Court holds that if the prior mortgage is not usufructuary the prior mortgagee's auction purchaser gets no right of possession. A qualified decree for possession unless redeemed is in effect a decree for foreclosure and the prior mortgagee's auction purchaser is not entitled to such a decree either against the auction purchaser of a puisne mortgagee who has not been made a party (*r*) or against an assignee of part of the equity of redemption who has not been joined (*s*). On the other hand the

(*j*) *Radha Pershad Misser* v. *Monohur Das* (1881) 6 Cal. 317; *Jugul Kissore* v. *Kartic Chunder* (1894) 21 Cal. 116.

(*k*) *Grish Chundra* v. *Ishwar* (1898) 4 Cal. W. N. 452; *Habibullah* v. *Jugdeo* (1908) 6 Cal. L. J. 609.

(*l*) *Sheikh Kalu Sharup* v. *Akhoy Charan* (1921) 25 Cal. W.N. 253, 62 I.C. 445, ('21) A.C. 157; *Bhagaban Chandra* v. *Tarak Chandra* (1927) 45 Cal. L.J. 4, 100 I.C. 420, ('27) A. C. 259; *Bhodai Shaik* v. *Lakshminarayan Dutt* (1928) 55 Cal. 602, 107 I.C. 355, ('28) A.C. 116; *Jagatchandra De* v. *Abdul Rashid* (1935) 62 Cal. 75, 38 Cal. W. N. 1178, 154 I.C. 868, ('35) A.C. 139.

(*m*) *Venkatanarasammah* v. *Ramiah* (1879) 2 Mad. 108; *Ramanadhan Chetti* v. *Alkonda* (1895) 18 Mad. 500; *Muhammed Usan Rowthan* v. *Abdulla* (1901) 24 Mad. 171; *Akatty Moidin Katty* v. *Chiragil* (1902) 26 Mad. 486; *Kutti Chettiar* v. *Subramania Chettiar* (1909) 32 Mad. 485, 4 I. C. 1077; *Ram Narain Sahoo* v. *Bandi Pershad* (1904) 31 Cal. 737; *Venkatagiri* v. *Sadagopa* (1912) 22 Mad. L. J. 129, 10 I. C. 83; *Chinnaswamy* v. *Darmalinga* (1932) Mad. W. N. 742, 139 I.C. 809, ('32) A.M. 566; *Nanack Chand* v. *Teluckdye Koer* (1880) 5 Cal. 265; *Dirgopal Lal* v. *Bolakee* (1880) 5 Cal. 269; *Nagendra Chettiar* v. *Lakshmi Ammal* (1933) 56 Mad. 846, 65 Mad. L. J. 108, 144 I.C 833, ('33) A. M. 583 F.B.; *Ram Kinkar* v. *Hariram Hazra* (1933) 146 I. C. 175, ('33) A. C. 181; *Suramma Nayuralu* v. *Suraiyya* (1934) 67 Mad. L. J. 312, 152 I.C. 613, ('34) A.M. 585; *Mahomed Juman Mia* v. *Akali Mudiani* (1943) A.C. 577, 77 C.L.J. 162, 47 C.W.N. 682, 210 I.C. 67.

(*n*) *Bunwari Jha* v. *Ramlee Thakur* (1902) 7 Cal. W. N. 11; *Har Pershad Lal* v. *Dalmardan Singh* (1905) 32 Cal. 891; *Gangadhar* v. *Lakshman* (1930) 32 Bom. L. R. 481, 125 I. C. 905, ('30) A. B. 221; *Afsar Jehan Begum* v. *Mahomed Ahmad Amerkhan* (1937) 171 I.C. 56, (1937) A.O. 478.

(*o*) *Bhekdhari Mahton* v. *Radhika Koer* (1934) 13 Pat. 304, 155 I.C. 635, ('34) A.P. 648.

(*p*) *Chinnu Pillai* v. *Venkatasamy* (1917) 40 Mad. 77, 86, 34 I.C. 507.

(*q*) *Chinnaswami* v. *Darmalinga*, *supra*.

(*r*) *Madan Lal* v. *Bhagwan Das* (1899) 21 All. 235 F.B.; *Aghore Nath Banerji* v. *Deb Narain* (1906) 11 Cal. W. N. 314; *Ram Narain* v. *Somi* (1923) 45 All. 189, 74 I. C. 248, ('23) A. A. 449; *Lachmi Narain* v. *Hirdey Narain* (1926) 24 All. L. J. 661, 97 I.C. 4, ('26) A.A. 460.

(*s*) *Hargu Lal* v. *Gobind Rai* (1897) 19 All. 541 F.B.; *Habibullah* v. *Jugdeo* (1907) 6 Cal. L. J. 609; *Kristopada Roy* v. *Chaitanya Charan* (1922) 49 Cal. 1045, 69 I. C. 530, ('23) A.C. 274.

S. 94

right of foreclosure is recognized in the following passage from Jones (*t*) which is approved by Ghose (*u*) and which has been followed in many cases :—

> "When a party in interest other than the owner of the equity of redemption, is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity of redemption who are made parties. The sale vests the estate in the purchaser subject to redemption by the person interested in it who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening by petition in the foreclosure-suit. His only right is the right of redemption. The sale, though it fails to be effectual in every other respect, operates as an assignment of the mortgage and all the mortgagee's rights to the purchaser, who may proceed *de novo* to foreclose."

It would follow that an assignee of part of the equity of redemption or a puisne mortgagee who has not been made a party cannot dispossess a prior mortgagee's auction purchaser (*v*). The question however is one which seems to admit of a simple solution. If either of the mortgages is usufructuary, the auction purchaser at that mortgagee's sale is entitled to possession. If neither mortgage is usufructuary each auction purchaser is qually entitled to possession, and he who secures possession is entitled to keep it until redeemed, and if both are willing to redeem the auction purchaser from the prior mortgagee has the prior right to redeem. This subject is discussed in a recent Full Bench decision of the Allahabad High Court (*w*), where the conclusion is partly based on the doctrine of *lis pendens*. But as pointed out by Mukerji, J., in the same case and by the Madras High Court in a subsequent case (*x*) this is an incorrect application of the rule of *lis pendens* for the puisne mortgagee's title relates back to the date of his mortgage.

Priority of rights of redemption.—When a prior mortgagee has brought the property to sale and has himself purchased it he is entitled as assignee of the equity of redemption to redeem the puisne (*y*). If the two rights to redeem, *viz.*, the right of the puisne mortgagee to redeem the prior and the right of the prior mortgagee as assignee of the equity of redemption to redeem the puisne, conflict, the right of the prior mortgagee to redeem the puisne takes priority (*z*). In a Calcutta case (*a*) there was a first mortgage to *A* of 33 bhigas and then a second mortgage to *B* of 8 of these 33 bhigas and 4 other bhigas. *A* obtained a decree for sale on his mortgage without making *B* a party and purchased the 33 bhigas himself. *B* then sued to redeem *A* and he had the right to redeem the 33 bhigas, but if this had been allowed *A* as assignee of the equity of redemption could have again redeemed the 8 and the 4 bhigas of the puisne mortgage. The Court to avoid complications allowed *B* to redeem only the 8 bhigas. Similar decrees were made in some other cases (*b*). In *Amba Prasad* v. *Wahid-Ullah* (*c*) the puisne mortgage was of two-thirds of the property in the prior mortgage, and each

(*t*) Jones, para. 1395.

(*u*) Ghose, p. 625.

(*v*) *Bhagaban Chandra* v. *Tarak Chandra* (1927) 45 Cal. L. J. 4, 100 I.C. 420, ('27) A. C. 259.

(*w*) *Ram Sanchi Lal* v. *Janki Prasad* (1931) 29 All. L.J. 729, 134 I.C. 1, ('31) A.A. 466.

(*x*) *Chinnaswami* v. *Darmalinga* (1932) 139 I.C. 309, ('32) A. M. 566.

(*y*) *Hasanbhai* v. *Umaji* (1904) 28 Bom. 153; *Sarvothama* v. *Raja Rao* (1921) Mad. W. N. 603, ('21) A. M. 648; *Paras Ram Singh* v. *Pandohi* (1922) 44 All. 462, 67 I. C. 533, ('22) A.A. 135.

(*z*) *Hasanbhai* v. *Umaji*, *supra*; *Parsram Singh* v. *Pandohi* (1922) 44 All. 462, 67 I. C. 533, ('22) A. A. 135; *Govindrao* v. *Rukmanand* (1924) 75 I. C. 899, ('24) A.N. 198; *Ram Baran* v. *Bhagwati Pande* (1925) 47 All. 751, 89 I. C. 295, ('25) A. A. 804; contra *Kedar Prosanna* v. *Girindra Prasad* (1908) 8 Cal. L. J. 173.

(*a*) *Madhuram* v. *Bhotong* (1925) 86 I. C. 193, ('25) A. C. 59.

(*b*) *Sheo Narain Saha* v. *Ram Nire Khan* (1919) 52 I. C. 512; *Amirchand* v. *Moti Pande* (1931) 134 I. C. 959, ('31) A. P. 434; *Mst. Sheoratan Koer* v. *Kamta Prasad* (1932) 11 Pat. 415, 139 I.C. 78, ('32) A.P. 270.

(*c*) (1922) 44 All. 708, 711, 68 I.C. 261, ('22) A.A. 405.

mortgagee had sued for sale and purchased without joining the other. The prior mortgagee was in possession, but the Court allowed the puisne mortgagee to redeem two-thirds of the property for a proportionate amount of the mortgage money. The Court said: "Where the rights of the mortgagors have vested, as in this case, partly in a prior mortgagee and partly in a subsequent mortgagee, after a suit had been brought by each of them to enforce his mortgage, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired."

Prior mortgagee not necessary party to puisne mortgagee's suit.—The puisne mortgagee may sue for foreclosure or sale on his own mortgage only. In that case the prior mortgagee is not a necessary party—O. 34, r. 1 of the Code of Civil Procedure, 1908—and the property will be sold subject to the prior mortgage (*d*). He may do so even after the prior mortgagee has brought the property to sale and purchased it without making him a party (*e*), and in such a case he should make the prior mortgagee's auction purchaser a party (*f*). If he merely joins the prior mortgagee in a suit on his own puisne mortgage and claims no relief against him, the position of the prior mortgagee will be that of a paramount title outside the controversy and he will not be affected by the decree which the puisne obtains. This occurred in the Privy Council case of *Radha Kishun* v. *Khurshed Hossein* (*g*). The prior mortgage was of 1892 to *A* whose interest devolved on *B* who assigned it in September 1906 to the plaintiff. The puisne mortgage was of 1894 to *C* who sued for sale in August 1906 making *B* a party but claiming no relief against him. After *C* had obtained the decree for sale, the plaintiff sued on his prior mortgage and was met by the plea of *res judicata* on the ground that his predecessor *B* might and ought to have enforced the security in the former suit. The defence failed as *C* had not in his suit sought to displace *B*'s title and to postpone it to his own.

The prior mortgagee may consent to the property being sold free from his prior mortgage giving him the same interest in the sale proceeds as he had in the property—Civil Procedure Code, Order 34, rule 12. In such a case it is not open to the puisne mortgagee to contend that the rate of interest in the prior mortgage is excessive (*h*). Such a contention would however be open to the puisne mortgagee if he had exercised his right of redemption.

The Allahabad High Court at one time held that the puisne mortgagee could not enforce his own mortgage without redeeming the prior mortgagee (*i*). This case known as *Matadin*'s case was based on a mistaken construction of the word "property" in the repealed sec. 85 which required "all persons having an interest in the property comprised in a mortgage" to be joined as parties. This was interpreted to mean the tangible or physical property mortgaged and not merely a right in property. *Matadin's* case was overruled in 1907 by another Full Bench in *Ram Shankar Lal* v. *Ganesh Prasad* (*j*): and in the next year sec. 85 was replaced by O. 34, r. 1 of the Code of Civil Procedure, 1908, which makes the point plain (*k*). *Matadin*'s case was in conflict with previous decisions

(*d*) *Kanti Ram* v. *Kutubuddin* (1895) 22 Cal. 33.

(*e*) *Debendra Narayan Roy* v. *Ramratan Banerjee* (1903) 30 Cal. 599 F. B., overruling *Darga Churn* v. *Chandra Nath* (1899) 4 Cal. W.N. 541.

(*f*) *Chinnu Pillai* v. *Venkatasamy* (1917) 40 Mad. 77, 34 I.C. 507.

(*g*) (1920) 47 Cal. 662, 47 I. A. 11, 55 I.C. 959; cf. *Collector of Moradabad* v. *Muhammad Hidayet Ali* (1926) 48 All. 554, 94 I.C. 505, ('26) A.A. 449; *Official Assignee of Calcutta* v. *Jagabandhu Mullick* (1934) 61 Cal. 494, 38 Cal. W.N. 492, 150 I.C. 321, ('34) A.C. 552.

(*h*) *Phul Chand* v. *Shugan Chand* (1934) 155 I.C. 1116, ('34) A.L. 799.

(*i*) *Matadin* v. *Kazim Husain* (1891) 13 All. 432 F. B. (Mahmud, J., dissenting); *Maharaj* v. *Ramji Lal* (1910) 7 All. L. J. 15, 5 I.C. 177.

(*j*) (1907) 29 All. 385 F. B.

(*k*) Ghose, p. 927.

Ss. 94, 95

of the same High Court (l) and with those of other High Courts (m). It involved an obvious hardship to the puisne mortgagee, for his period of redemption might be shorter than that of the prior mortgagee (n). About the same time that *Matadin's* case was decided the Privy Council in *Umes Chander* v. *Zahoor Fatima* (o) upheld an order for sale in a case where the puisne mortgagee had sued in the alternative for sale subject to a prior mortgage or for redemption of the prior mortgage. The Allahabad High Court has since held that even if the puisne mortgagee makes the prior mortgagee a party he may sell the property subject to the prior mortgage and is not bound to redeem him (p); though it may sometimes be convenient to direct redemption of the prior mortgage as tending to prevent multiplicity of actions (q).

The puisne mortgagee may redeem up mortgages prior to his own and foreclose the mortgagor. The form of decree is that in Form 10, Appendix D to the Code of Civil Procedure, 1908. He may also foreclose down mortgages subsequent to his own.

If the puisne redeems a prior mortgagee who has brought the property to sale without joining him as a party, he acquires the rights of the prior mortgagee, and steps into his shoes by subrogation. In that case it has been held that the mortgagor's right to redeem revives (r). This is because the redemption of the prior mortgage discharges that mortgage and vacates the sale so that the equity of redemption comes again into the hands of the mortgagor (s).

Right of redeeming co-mortgagor to expenses.

95. *Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.*

Amendment.—This section was substituted for the original section by the Amending Act 20 of 1929. The old section which was described by Ghose as an "unskilfully drawn and clumsily worded section (t)" was as follows:—

"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

Amendment whether retrospective.—This section is not specified in sec. 63 of the Amending Act 20 of 1929 as one of the sections which shall not have retrospective effect. It has been treated as retrospective by the Patna High Court. A purchaser of a share in the equity of redemption paid off the mortgagee's decree in 1917 and sued to recover

(l) *Khub Chand* v. *Kalian Das* (1876) 1 All. 240 F. B.; *Sirbadh Rai* v. *Raghunath* (1885) 7 All. 568, 574; *Raghunath Prasad* v. *Jurawan Rai* (1886) 8 All. 105 F. B.

(m) *Venkatachella* v. *Panjanadien* (1882) 4 Mad. 213, 215; *Kanti Ram* v. *Kutbuddin* (1895) 22 Cal. 33; *Surjiram Marwari* v. *Barhamdeo* (1905) 1 Cal. L. J. 337; *Keshavram* v. *Ranchod* (1906) 30 Bom. 156; *Srinivasa* v. *Yamunabai* (1906) 29 Mad. 84 (point treated as doubtful).

(n) *Sirbadh Rai* v. *Raghunath* (1885) 7 All. 568.

(o) (1891) 18 Cal. 164, 17 I.A. 201.

(p) *Sarju Kumar* v. *Dwarka Prasad* (1929) 27 All. L. J. 499, 119 I.C. 507, ('29) A.A. 296.

(q) *Manohar Lal* v. *Ram Babu* (1912) 34 All. 323, 14 I.C. 674; *Venkataramana* v. *Gomaperty* (1908) 31 Mad. 425.

(r) *Dhana Koiri* v. *Ram Kewal* (1930) 129 I.C. 664, ('30) A.P. 570, citing *Lockhart* v. *Hardy* (1846) 9 Beav. 349, and *Kinnaird* v. *Trollope* (1889) 39 Ch. D. 636; *Delhi and London Bank* v. *Bhikari* (1902) 24 All. 185.

(s) *Dhana Koeri* v. *Ram Kewal*, *supra*.

(t) The Law of Mortgage in India, 5th Ed., p. 372.

a proportionate part of the purchase money from the purchaser of another share who claimed to have purchased without notice of the redeeming co-mortgagor's charge. The Patna High Court, however, held that the case was one of subrogation (u). The Oudh Chief Court holds that the section is retrospective (v). On the other hand the Calcutta High Court and the Nagpur Court have held that the section is not retrospective (w). S. 95

Defects in the old section.—The old section was based on a passage in Macpherson on mortgages (x), but in view of the definition of the word "charge" in the Act its use in the section led to much confusion, for it had the effect of repelling the doctrine of subrogation and giving the redeeming co-mortgagor not the same rights as the mortgagee but a mere charge which, however, was not available against *bona fide* purchasers for value without notice. In some cases this had been expressly held to be the effect of the section (y), and in a Patna case (z) Das, J., sought to explain the section by saying that the co-mortgagor was not subrogated but had only a right of contribution. But at the same time the Courts very naturally showed some hesitation in repudiating the doctrine of subrogation. The Allahabad High Court held that the redeeming co-mortgagor's charge took priority over subsequent mortgages (a); and in *Lachmi Narayan* v. *Roy Narayan* (b) the redeeming co-mortgagor was held entitled to the benefit of a decree, which a mortgagee had obtained, declaring the mortgage valid and binding on the mortgagor's family. Again the Nagpur Court construed the section as not affecting the co-mortgagor's right of subrogation so that a co-mortgagor paying off a mortgage had not only a charge under sec. 95 on the share of the other mortgagor but a right to enforce the mortgage as subrogated to the mortgagee (c). This was the case of a purchaser of a share in the equity of redemption, but the phrase "one of several mortgagors" in the old section was no doubt intended to mean one of several persons interested in the equity of redemption (d).

The use of the word "charge" had also led to much confusion in the application of the Law of Limitation to the suit of a mortgagor to redeem the charge of a co-mortgagor who had redeemed a mortgage. The Allahabad High Court, except in one case (e) where the charge-holder was held to have acquired title by adverse possession, had treated the mortgagor who had redeemed the mortgage as an assignee of the mortgagee and had applied the sixty years' rule under art. 148 from the date when the mortgage was redeemable (f). But the other High Courts treated the suit not as one for redemption, but for recovery of possession and applied art. 144, *i.e.*, twelve years from the time when the

(u) *Jhum Lal* v. *Sham Narayan* (1933) 140 I.C. 845, ('33) A. P. 33.

(v) *Brij Bhukan* v. *Bhagwan Dutt* (1942) 203 I.C. 285 (1942) A.O. 449 (F.B.)

(w) *Umar Ali* v. *Asmat Ali* (1931) 58 Cal. 1167. 130 I.C. 889, ('31) A.C. 251; *Ramkaran* v. *Jogeshwar* ('34) A. N. 97.

(x) 4th Ed., p. 145.

(y) *Vasudev* v. *Balaji* (1902) 26 Bom. 500; *Shankar Mahadeo* v. *Bhikaji* (1929) 53 Bom. 353, 116 I.C. 225, ('29) A.B. 139; *Iyatharai* v. *Kuppamuthu* (1919) Mad. W. N. 467, 49 I. C. 416; *Ali Akbar* v. *Saltan-ul-mulk* (1923) 69 I. C. 653, ('23) A.L. 129.

(z) *Muhammad Tabarak* v. *Dalip Narain* (1927) 98 I.C. 968, ('27) A.P. 117.

(a) *Har Prasad* v. *Raghunandan Prasad* (1909) 31 All. 166, 1 I.C. 825, practically over-ruling *Masesh* v. *Dan* (1906) All. W. N. 170; *Kashi Ram* v. *Het Singh* (1915) 37 All. 101, 26 I.C. 417.

(b) (1920) 54 I. C. 269.

(c) *Ram Karan* v. *Jogeshwar* ('34) A. N. 97.

(d) *Umar Ali* v. *Asmat Ali*, *supra*; *Ramchandra* v. *Ganesh* (1933) 57 Bom. 134, 35 Bom. L.R. 48, 144 I.C. 8, ('33) A.B. 114.

(e) *Jai Kishan Joshi* v. *Budhanand* (1916) 38 All. 138, 34 I.C. 244.

(f) *Nura Bibi* v. *Jagat* (1886) 8 All. 295; *Raghubir Sahai* v. *Banyad Ali* (1886) All. W. N. 152; *Rani* v. *Amir Baksh* (1898) All. W. N. 89; *Ashfaq Ahmad* v. *Wasir Ali* (1889) 11 All. 423; (1892) 14 All. 1 F.B.; *Saiduddin* v. *Ratan Lal* (1910) 32 All. 160, 5 I.C. 128; *Khiali Ram* v. *Taik Ram* (1916) 38 All. 540, 36 I.C. 452; *Wasir Ali* v. *Ali Islam* (1918) 40 All. 688, 47 I. C. 333; *Shiam Lal* v. *Hukum Kuer* (1929) 113 I.C. 662, ('29) A.A. 100.

S. 95

charge-holder's possession becomes adverse by the open assertion of an exclusive title (*g*) and in the absence of such open assertion or ouster it was said that the charge-holder's possession was not adverse (*h*). On the other hand art. 132 (*viz.*, 12 years from the date of redemption) was applied to a suit by the redeeming mortgagor to enforce contribution against a co-mortgagor, the redeeming mortgagor being regarded as an assignee of the mortgagee (*i*), so that time runs from the date when the whole mortgage is paid off (*j*). But in *Sreemati Raj Kumari Debi* v. *Mukunda Lal* (*k*) the Calcutta High Court applied art. 148 to the doctrine of subrogation, and, treating the redeeming mortgagor as standing in the shoes of the mortgagee, made the due date of the mortgage the *terminus a quo* for limitation. In the Full Bench case of *Umar Ali* v. *Asmat Ali* (*l*) Rankin, C.J., said that the amendment of sec. 95 made *Sreemati Kumari*'s case statute law, but that the amendment had not retrospective effect. In that case the co-mortgagor redeemed in 1923 and the Full Bench held that he had a charge and that limitation for the enforcement of the charge was under art. 132 from the date of redemption. The application of the doctrine of subrogation was repelled for various reasons, and especially because the redeeming co-mortgagor as charge-holder would always have a right of sale, which he might not have as subrogee if the mortgage were usufructuary or by conditional sale (*m*). In view of the amendment, however, these criticisms have only an academic interest.

Another difficulty in the old section arose out of the words "and obtains possession thereof". The Madras High Court said that the section gave the redeeming co-mortgagor two rights: (i) a right to obtain possession, and (ii) a charge on the interests of his co-mortgagors (*n*). The Allahabad High Court said that the words were only applicable if the mortgagee was in possession (*o*). The Privy Council in *Malik Ahmad Wali Khan* v. *Musammat Shamsi Jahan Begum* (*p*) said:—"The section might be so strictly construed as to limit its operation to mortgages under which possession passes, and, therefore on redemption properly re-passes. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption." In an Oudh case (*q*) decided under the old section the fact that a co-mortgagor obtained possession on redemption was held to entitle him to a charge.

Subrogation.—All these defects now disappear, and under the combined effect of secs. 91 and 92 the case of one co-mortgagor redeeming is merely an instance of

(*g*) *Moidin* v. *Oothumanganni* (1888) 11 Mad. 416; *Ramchandra Yeshvant* v. *Sadashiv* (1887) 11 Bom. 422; *Bhandir* v. *Sheik Ismael* (1889) 11 Bom. 425; *Faki Abas* v. *Faki Nurudin* (1892) 16 Bom. 191; *Vasudeo* v. *Balaji* (1902) 26 Bom. 500; *Bhaiji Shamrao* v. *Hajimiya* (1912) 14 Bom. L.R. 314, 15 I.C. 500; *Purna Chandra* v. *Barada* (1918) 46 Cal. 111, 45 I.C. 788; *Basanta* v. *Dhanna Singh* (1920) 55 I.C. 450; *Munia Goundan* v. *Ramasami* (1918) 41 Mad. 650, 45 I.C. 867; *Mt. Radhe* v. *Ajudhia Pershad* (1933) 141 I.C. 404, ('33) A.L. 91; *Ramchandra* v. *Ganesh* (1933) 57 Bom. 184, 35 Bom. L.R. 48, 144 I.C. 8, ('33) A.B. 114; *Nisar Ahmed Khan* v. *Manjur Ahmed Khan* (1935) 154 I.C. 267, ('35) A.O. 245.

(*h*) *Chandbhai* v. *Hasanbhai* (1921) 46 Bom. 213, 64 I.C. 205, ('22) A.B. 150.

(*i*) *Bhagwan Das* v. *Har Dei* (1904) 26 All. 227; *Raneshwar* v. *Mst. Shoorani* (1927) 2 Luck. 686, 105 I.C. 302, ('27) A.O. 552; *Raj Kamini Debi* v. *Mukunda Lal* (1920) 57 I.C. 868; *Aziz Ahmad Khan* v. *Chotte Lal* (1928) 50 All. 569, 109 I.C. 88 ('28) A.A. 241; *Jahan Begam* v. *Munney Mirza* (1925) 92 I.C. 559, ('25) A.O. 613; *Muhammad Mian* v. *Thakur Bharat Singh* (1930) 5 Luck. 727, 125 I.C. 402, ('30) A.O. 260; *Collector of Farrukhabad* v. *Kishore* (1932) 30 All. L.J. 19, 137 I.C. 86, ('32) A.A. 250.

(*j*) *Birendra Keshri Prasad* v. *Bahuria Saraswati Kuar* (1934) 13 Pat. 356, 155 I.C. 756, ('34) A.P. 612; *Brij Bhukan* v. *Bhagwan Dutt* (1942) 203 I.C. 285, (1942) A.O. 449 F.B.

(*k*) (1920) 25 Cal. W.N. 283, 57 I.C. 868. See also *Raushan Ali* v. *Kali Mohan* (1906) 4 Cal. L.J. 79, approved in *Dhakeswar Prasad* v. *Harihar Prasad* (1915) 21 Cal. L.J. 104, 27 I.C. 780.

(*l*) (1931) 58 Cal. 1167, 130 I.C. 889, ('31) A.C. 251 F.B.

(*m*) See for instance *Mamola* v. *Keder Nath* (1914) 22 I.C. 918.

(*n*) *Moidin* v. *Oothumanganni*, *supra*.

(*o*) *Bhagwan Das* v. *Har Dei* (1904) 26 All. 227; *Ibn Hasan* v. *Brighbhukan* (1904) 26 All. 407.

(*p*) (1906) 28 All. 482, 33 I.A. 81, 85.

(*q*) *Madho Singh* v. *Kalloo Singh* (1933) 140 I.C. 590, ('33) A.O. 28.

subrogation (*r*). The redeeming mortgagor has not merely a charge, but the mortgage as to his share is extinguished, and as to the shares of the other mortgagors he stands in the shoes of the mortgagee. He may stand on the mortgage he has redeemed, if he can and if he cannot, may rely on his charge (*s*), limitation to enforce his right of contribution against the co-mortgagor, and for the co-mortgagor's suit to redeem him, is the same as in a suit to enforce or to redeem the mortgage. Where a co-mortgagor redeems the entire mortgage, his right as a mortgagee relates back to the date of the mortgage which he has redeemed for the benefit of priority over subsequent mortgages (*t*). See note Limitation under section 92, *supra*.

Redemption by a co-mortgagor was a case of subrogation and was so recognized in some cases *before* the Act (*u*). Thus in *Asansab Ravuthan* v. *Vamana* (*v*) the Court said, "It has long been the recognized doctrine of Courts of Equity in England (*Cholmondely* v. *Clinton*) (*w*) that the owner of the equity of redemption of part of an estate under mortgage is entitled to redeem the whole of the mortgaged estate if the mortgagee as in this case, insists upon his right to have it so redeemed. When the former elects to pay the entire mortgage debt he thereby puts himself in the place of the mortgagee redeemed and acquires a right to treat the original mortgagor as his mortgagor, and to hold that portion of the estate in which he would have no interest but for the payment, as a security for any surplus payment he may have made." This seems to be the law that Jenkins, C.J., referred to when he said that sec. 95 gave legislative expression to what was law apart from it (*x*). In *Jauhari* v. *Tunde* (*y*) a co-mortgagor redeemed and took possession of the whole of the property mortgaged. One of the Judges said that his possession of the excess was that of a trespasser. This was of course erroneous and the other Judges held that his possession was that of the mortgagee to whose rights he was subrogated. The owners of the other shares were therefore entitled to redeem their shares from him on payment of a proportionate part of the mortgage debt. Such a case would be governed by art. 148 of the Limitation Act and the time would run from the due date of the original mortgage (*z*).

Expenses.—As the right of subrogation is provided for by secs. 91 and 92 this section is limited to the costs of redemption. For this purpose the word "expenses" which excludes the mortgage debt and items which the mortgagee is entitled to tack on the mortgage debt under sec. 72, is more appropriate than it was in the old section. The mortgagee's costs are tacked on to the mortgage debt and are covered by the doctrine of subrogation. This section allows the redeeming mortgagor to tack a proportionate share of his costs also to the mortgage debt as against the co-mortgagor. Under the old section interest from date of redemption has been allowed (*a*), but at the discretion of the Court (*b*). It has also been said that the redeeming mortgagor is not entitled to interest unless he has given express notice claiming it (*c*). When the sale of the mortgage property is set aside, the fee chargeable for poundage, so also compensation payable to the auction purchaser do not form part of the expenses (*d*).

(*r*) See note 'Co-mortgagor redeems' under s. 92; *Abdul Gaffar Khan* v. *Mangal Rai* (1938) A.L. 184, (1938) Lah. 102, 40 P.L.R. 566, 178 I.C. 778.

(*s*) *Sheosaran* v. *Amla Co-operative Credit Society* (1945) A.P. 192, 23 Pat. 958.

(*t*) *Brij Bhukan* v. *Bhagwan Dutt* (1944) A.O 114.

(*u*) *Asansab Ravuthan* v. *Vamana* (1879) 2 Mad. 223; *Ganesh* v. *Raghu* (1880) P.J. 300; *Pandji* v. *Sadasheva* (1881) P.J. 57; *Pancham Singh* v. *Ali Ahmad* (1881) 4 All. 58.

(*v*) (1879) 2 Mad. 223, 225.

(*w*) (1820) 2 Jac. and W. 1.

(*x*) *Vasudev* v. *Balaji* (1902) 26 Bom. 500.

(*y*) (1932) 54 All. 975, 1932 All. L.J. 980, 141 I.C. 91, ('33) A.A. 21.

(*z*) *Mukh Narain* v. *Ram Lochan* (1940) 19 Pat. 938, 189 I.C. 855, (1941) A.P. 147.

(*a*) *Rani* v. *Amir Baksh* (1898) All. W.N. 89; *Raushan Ali* v. *Kali Mohan* (1906) 4 Cal. L.J. 79; *Jago* v. *Arjun* (1919) 49 I.C. 280.

(*b*) *Digambar Das* v. *Harendra Narayan* (1910) 14 Cal. W.N. 617, 624, 5 I.C. 165; *Birendra Keshri Prasad* v. *Bahuria Saraswati Kuer* (1934) 13 Pat. 856, 155 I.C. 756, ('34) A.P. 612.

(*c*) *Gafur Imam* v. *Amir Iqub* (1925) 49 Bom. 591, 88 I.C. 658, ('25) A.B. 484.

(*d*) *Damodar Swami* v. *Govindrajalu* (1948) A.M. 429 F.B.

Ss. 95, 96

Mortgage decree.—This section applies when one mortgagor discharges a mortgage decree (*e*).

Mortgagors.—Even before the enactment of sec. 59A it was held that the word "mortgagors" included successors in title to the mortgagor, assignees of parts of the equity of redemption, and representatives of the original mortgagor (*f*). A Calcutta case (*g*) doubted whether representatives of the mortgagor were included in the term. Another Calcutta case (*h*) refused to admit to the benefit of the section an assignee of a leasehold interest created by one of the mortgagors. But a benamidar who had executed a mortgage with authority of the real owner and paid it off with his own money was allowed a charge under the old section (*i*). *Mahomed Fariduddin* v. *Nand Ram* (*j*) is an interesting instance of the application of the section to an assignee of part of the equity of redemption. *A* gave a usufructuary mortgage to *B* and then seven years later a simple mortgage also to *B*. *B* got a decree for sale on the simple mortgage, and during execution proceedings, *A* got a decree for redemption of the usufructuary mortgage and paid the amount in full. *B* sold ½ of the property in realization of his simple mortgage and purchased it himself. *B* thus became assignee of ½ of the equity of redemption of the usufructuary mortgage. He was treated as co-mortgagor of *A* in respect of the usufructuary mortgage and *A* was entitled to recover ½ of the mortgage money from him. In a Madras case (*k*) *A* mortgaged two properties X and Y to *B* and then mortgaged Y to *C*. *C* obtained a decree for sale on his mortgage and himself purchased Y. He then obtained an assignment of the first mortgage from *B* and sued to enforce that mortgage. The Court held that such a suit was not maintainable and that he was only entitled to contribution against *A* as co-mortgagor of the first mortgage. It is submitted that when *C* took the assignment of the first mortgage he became full owner of Y, and was entitled to recover the proportion of the mortgage debt on X from *A*. In *Jagan Nath* v. *Abdullah* (*l*) there was a first mortgage by *A* and *B* of two houses X and Y to *C*; and then a second mortgage of Y by *B* also to *C*. *C* obtained a decree for sale on the first mortgage which *A* paid off. *A* was subrogated to the rights of *C* as first mortgagee as against his co-mortgagor *B*. *C* sued for sale on the second mortgage and purchased Y. But as assignee of *B*, *C* was still subject to the rights of *A* as first mortgagee. The fact that the decree on the second mortgage was passed before the decree on the first mortgage did not affect *A*'s priority, for subrogation is to the mortgage and not to the decree. The debt merges in the judgment but not the security.

Redeems.—A mortgage is redeemed when the balance due on it is paid. If the redeeming mortgagor has done that, he is within the section, even though part has been previously paid (*m*). Under the old section it was held that as the other mortgagors had had an opportunity of redeeming the mortgage, a decree for contribution could be enforced in execution by sale and that it was not necessary to bring a fresh suit under Sec. 67 for sale (*n*).

Mortgage by deposit of title-deeds.

96. *The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.*

(*e*) *Dhakeswar Prosad* v. *Harihar Prosad* (1915) 21 Cal. L.J. 104, 27 I.C. 780, dissenting from *Nawab Jahan* v. *Mirza Shujauddin* (1904) 9 Cal. W.N. 865. See also *Danappa* v. *Yamnappa* (1902) 26 Bom. 379.

(*f*) *Nainappa* v. *Chidambaram* (1898) 21 Mad. 18; *Danappa* v. *Yamnappa*, *supra*.

(*g*) *Nawab Jahan* v. *Mirza Shuja-ud-din*, *supra*.

(*h*) *Raushan Ali* v. *Kali Mohan*, *supra*.

(*i*) *Subbamal* v. *Muthu* (1903) 13 Mad. L.J. 228.

(*j*) (1927) 103 I.C. 84, ('27) A.A. 626.

(*k*) *Ramachandra Dikshitar* v. *Narayanaswami* (1928) 51 Mad. 810, 112 I.C. 6, ('28) A.M. 950.

(*l*) (1934) 15 Lah. 746, 150 I.C. 366, ('34) A.L. 248.

(*m*) *Musst. Hira Kuer* v. *Palku* (1918) 3 Pat. L.J. 490, 46 I.C. 479.

(*n*) *Kumar Birendra* v. *Tarini Kanta* (1928) 47 Cal. L.J. 107, 107 I.C. 724, ('28) A.C. 191.

Mortgage by deposit of title-deeds.—This section is new and was inserted by the Amending Act 20 of 1929. The original sec. 96, being adjective law, was repealed by the Code of Civil Procedure, 1908, and transferred to that Code as O. 34, r. 12. After the passing of the Code of Civil Procedure, 1908, there was no sec. 96 in the Act until this section was inserted by the Act of 1929. A corresponding amendment was made at the same time in O. 34, r. 15, by the Supplementary Amending Act 21 of 1929.

A mortgage by deposit of title-deeds has been put on the same footing as a mortgage by deed by sec. 58 of this Act as explained in the Privy Council decision in *Imperial Bank of India* v. *U. Rai Gyaw Thu* (o). The right transferred by such a mortgage is the same right that is transferred by a simple mortgage, *i.e.*, a right of sale. See note under the same heading under sec. 67.

97. [*Application of proceeds.*] *Repealed by the Code of Civil Procedure*, 1908, (*Act V of* 1908).

Anomalous Mortgages.

Rights and liabilities of parties to anomalous mortgages.

98. In the case of *an anomalous mortgage*, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Amendment.—The above section has been amended by Act 20 of 1929. The old section was as follows :—

"In the case of a mortgage, not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage."

The definition of anomalous mortgages is now given in sec. 58. See note "Anomalous mortgages" under sec. 58.

Amendment whether retrospective.—The section is not specified in sec. 63 of the Amending Act 20 of 1929 as one of the sections in which the amendments shall not have retrospective effect. But it has been assumed not to be retrospective (p).

Rights and liabilities.—The rights and liabilities of the parties are governed by the contract as evidenced by the terms of the mortgage-deed (q). This was at one time thought to imply that a condition which would be invalid as a clog on redemption would be enforced in an anomalous mortgage (r). But the Privy Council has settled this point in *Mohammed Sher Khan* v. *Raja Seth Swami Dayal* (s), holding that sec. 98 is subject to sec. 60, for the provisions of one section cannot be used to defeat those of another unless

---

(o) (1923) 1 Rang. 637, 50 I.A. 253, 76 I.C. 910, ('23) A.PC. 211.

(p) *Pt. Ram Lochan Prasad* v. *Mt. Ram Raji* (1934) 10 Luck. 10, 148 I C. 1197, ('34) A.O. 255.

(q) *Chhathi Lal Sah* v. *Bindeshwari Prasad* (1929) 8 Pat. 16, 120 I.C. 82, ('29) A.P. 605 ; *Hundaldas* v. *Balukhan* (1943) A S. 59, (1942) Kar. 452, 204 I.C. 574.

(r) *Srinivasa Ayyangar* v. *Radhakrishnam Pillai* (1915) 38 Mad. 667, 22 I.C. 54 ; *Hakeem Patte* v. *Shaik Davood* (1916) 39 Mad. 1010, 30 I.C. 569 ; *Kandula Venkiah* v. *Donga Pallaya* (1920) 43 Mad., 589, 57 I.C. 724 ; *Kuttikatt* v. *Kunhikavamma* (1918) Mad. W.N. 235, 43 I.C. 989.

(s) (1922) 44 All. 185, 49 I.A. 60, 66 I.C. 853, ('22) A.PC. 17.

Ss. 98, 99

it is impossible to effect a reconciliation between them. Indeed this must be so, for if there were no right of redemption there would be no mortgage, and this was recognized in a case decided on an anomalous mortgage executed before the Act (*t*).

Sec. 67 enacts rights and liabilities in the absence of a contract to the contrary. Therefore if the terms of an anomalous mortgage show that the parties never contemplated a sale the anomalous mortgagee has no right of sale (*u*). Sec. 67 is applicable to simple mortgages usufructuary and to mortgages usufructuary by conditional sale and the inclusion of these mortgages in the definition of anomalous mortgages makes no difference in this respect. In a simple mortgage usufructuary there is a time limit and a personal covenant which imports a power of sale. In a mortgage usufructuary by conditional sale the condition imports a power of foreclosure. This is recognized in proviso (i) to sec. 67. A decree for redemption of an anomalous mortgage of the class simple mortgage usufructuary may provide that in default of payment the mortgagor is debarred from all right to redeem (*v*). See Order 34, rule 8 (3) of the Code of Civil Procedure as amended by Act 21 of 1929.

Sec. 68 is not subject to contract to the contrary and it is submitted that it does not conflict with sec. 98. There would of course be no remedy under sec. 68 (a) if there were no personal covenant, but this would be the same in the standard type of mortgage. Before anomalous mortgages were included in sec. 58 it was held that sec. 98 excluded the application of sec. 68 (d) and that an anomalous mortgagee who is entitled to possession is not entitled to sue for the mortgage money when the mortgagor fails to give him possession (*w*). It is submitted that this is erroneous, for the suit under that clause of the section is in the nature of a suit to obtain compensation. On the other hand the Oudh Court has held (*x*) that in these circumstances an anomalous mortgagee is not only entitled to sue for the mortgage money but is also entitled under a decision of the Privy Council (*y*) to a decree for sale. This is because the right to sue for the mortgage money imports a right of sale. The principle of substitution of some other property for the mortgaged property as in the case of a mortgage of an undivided share by a member of joint Hindu family, being a general principle of law, is not provided by the Transfer of Property Act and is not affected by sec. 98 (*z*).

Under the terms of an anomalous mortgage a separate suit for the recovery of interest may be maintainable (*a*).

Kanom.—This is a form of anomalous mortgage customary in Madras. See note "Kanom" under sec. 65A.

99. [*Attachment of Mortgaged property.*] *Repealed by the Code of Civil Procedure,* 1908, (*Act V of* 1908), *s.* 156 *and Sch. V.*

(*t*) *Neelakandhan* v. *Ananthakrishna* (1907) 30 Mad. 61.

(*u*) *Madho Rao* v. *Gulam Mohiuddin* (1920) 15 Nag. L.R. 134, 56 I.C. 717, ('19) A.PC. 121; *Gajadhar Agarwalla* v. *Sibananda* (1924) 28 Cal. W.N. 532, 81 I.C. 768, ('24) A.C. 592.

(*v*) *Atma Ram* v. *Surjan* (1928) 10 Lah. L.J. 198, 110 I.C. 81, ('28) A.L. 355.

(*w*) *Gajadhar Agarwalla* v. *Sibananda* (1924) 28 Cal. W.N. 532, 81 I.C. 768, ('24) A.C. 592; *Ram Sarup* v. *Gaya Prasad* (1932) 139 I.C. 61, ('32) A.O. 178.

(*x*) *Mahabir Singh* v. *Kishori* (1935) 154 I.C. 674, ('35) A.O. 254.

(*y*) *Mohammad Narsing Partab* v. *Yakub* (1929) 56 I.A. 299, 4 Luck. 363, 116 I.C. 414, ('29) A.PC. 139.

(*z*) *Ganga Prasad Sao* v. *Dulan Saran Singh* (1937) 170 I.C. 134, (1937) A.P. 345.

(*a*) *Chan Yin Sein* v. *Mg. Aung Thein* (1934) 152 I.C. 494, ('34) A.R. 159.

Charges.

S. 100

Charges.

100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained *which apply to a simple mortgage shall, so far as may be, apply to such charge.*

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, *and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.*

The old section.—This section has been amended by the Amending Act 20 of 1929. The old section was as follows:—

"Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of secs. 81 and 82 shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust."

Amendments.—Before the passing of the Code of Civil Procedure, 1908, the second clause of the first paragraph of the section was as follows:—

"And all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of secs. 81 and 82 and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge."

When the Code of Civil Procedure, 1908, was enacted the words "and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property" were omitted and a corresponding provision made in O. 34, r. 15 of that Code.

The clause was again altered to its present form by the Amending Act 20 of 1929. The amendment does not alter the law but shows more clearly what the rights and liabilities of a charge-holder are. The section as amended is retrospective (*b*).

The words occurring in the second paragraph after the word "trust" were added by the Amending Act 20 of 1929 and indicate what was already law, *viz.*, that a charge does not involve a transfer of an interest in property (*c*).

(*b*) *Rai Indra Narain* v. *Mohammad Ismail* (1939) A.A. 687; *Barhu Mahto* v. *Jusada Devi* (1945) A.P. 426, 24 Pat. 260.

(*c*) *Gooswami Mahashpuri* v. *Ramchandra* (1944) A.N. 1.

S. 100

Charge.—The difference between a mortgage and a charge has already been explained in note "Transfer of an interest" under sec. 58. In a charge there is no transfer of an interest in the property but the creation of a right of payment out of property specified (*d*). Das, J., in a Patna case (*e*) said—"The broad distinction between a mortgage and a charge is this: that whereas a charge only gives right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immoveable property." A mortgage is a *jus in rem*, a charge a *jus ad rem* and the practical distinction is that a mortgage is good against subsequent transferees and a charge is only good against subsequent transferees with notice (*f*). A charge is a 'transfer' within the meaning of sec. 9 (2) of the Electricity Act (*g*).

Does not amount to a mortgage.—The words indicate that in the case of a charge there is no transfer of the property or of any right in the property. A mortgage which is invalid for want of attestation cannot take effect as a charge (*h*). A sale deed invalid for want of registration will not operate as a charge (*i*). A sale deed which is not intended to operate until the vendee executes an agreement of reconveyance, does not on the vendee's default, become effective as a charge (*j*). A transaction intended to be a mortgage, but not reduced to writing and registered so that it cannot operate as a mortgage will not be effective as a charge (*k*). In a Calcutta case (*l*) Mookerjee, J., said—"If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge." But in a case where a judgment-debtor bought back his property at a Court auction in the name of a benamidar, and the benamidar raised the purchase money by himself giving a mortgage of the property, it was held that the mortgagee was entitled to a charge (*m*).

A security bond to the Court will not operate as a mortgage as the Court is not a juridical person (*n*); and for the same reason it will not create a charge under this section (*o*). But the security bond creates an incumbrance and a purchaser of the property subject to the incumbrance must indemnify the judgment-debtor if the liability

(*d*) *Gobinda Chandra* v. *Dwarka Nath* (1908) 35 Cal. 837, 843; *Jawahir Mal* v. *Indomati* (1914) 36 All. 201, 22 I.C. 978.

(*e*) *Raja Sri Shiva Prasad* v. *Beni Madhab* (1922) 1 Pat. 387, 392, 70 I. C. 24, ('22) A. P. 529.

(*f*) *Kishan Lal* v. *Ganga Ram* (1891) 13 All. 28, 44; *Royzuddi Sheik* v. *Kali Nath* (1906) 33 Cal. 985, 993; *Gur Dayal* v. *Karam Singh* (1916) 38 All. 254, 35 I. C. 289; *Jawahir Mal* v. *Indomati* (1914) 36 All. 201, 22 I. C. 978; *Benares Bank* v. *Har Prasad* (1936) A.L. 482.

(*g*) *U. P. Government* v. *Manmohan Das* (1941) All. 691.

(*h*) *Pran Nath* v. *Jadu Nath* (1905) 32 Cal. 729; *Tofaluddi* v. *Mahar Ali* (1899) 26 Cal. 78, 81; *Royzuddi* v. *Kali Nath*, *supra*; *Govinda Chandra Pal* v. *Dwarka Nath Pal* (1908) 35 Cal. 837, 844; *Samoo Patter* v. *Abdul Sammad* (1908) 31 Mad. 337; *Anantarama* v. *Yuzzuffi* (1916) 31 Mad. L.J. 133, 36 I.C. 903, disapproving *Neelakantam* v. *Madasami* (1907) 17 Mad. L. J. 39; *Rasum Hans* v. *Randhir Singh* (1916) 38 All. 461, 35 I.C. 748; *Collector of Mirzapur* v. *Bhagwan Prasad* (1913) 35 All. 164, 18 I. C. 311; *Narayan* v. *Lakshmandas* (1905) 7 Bom. L. R. 934; *Debendra Chandra* v. *Behari Lal* (1911) 16 Cal. W. N. 1075, 15 I.C. 666; *Sreemutty Rani* v. *Rajah Sri Nath* (1896) 1 Cal. W.N. 81; *Khemchand* v. *Malloo* (1915) 10 Nag. L. R. 81, 26 I.C. 601.

(*i*) *Maung Tun Ya* v. *Maung Aung Dun* (1924) 2 Rang. 313, 84 I.C. 1023, ('25) A.R. 1; *P. R. Somasundram Chettiar* v. *Y. P. N. Nachiappa Chettiar* (1924) 2 Rang. 429, 84 I. C. 302, ('25) A. R. 55.

(*j*) *Phattechand* v. *Uma* (1933) 35 Bom. L. R. 1138, 149 I.C. 241, ('34) A. B. 24.

(*k*) *P. R. Somasundram* v. *Y. P. N. Nachiappa* (1924) 2 Rang. 429, 84 I. C. 302, ('25) A.R. 55.

(*l*) *Gobinda Chandra* v. *Dwarka Nath* (1908) 35 Cal. 837.

(*m*) *Sarju Parshad* v. *Bir Bhaddar* (1893) 15 All. 304, 20 I.A. 108.

(*n*) *Raghubar Singh* v. *Jai Indra Bahadur Singh* (1919) 42 All. 158, 46 I.A. 228, 55 I.C. 550, ('19) A.PC. 55.

(*o*) *Syed Mehdi Ali Khan* v. *Chunni Lal* (1929) 27 All. L.J. 902, 119 I.C. 81, ('29) A.A. 834.

is enforced against him. This was so held in a Madras case (*p*) in which the bond was said to create a "charge" but no reference was made to sec. 100.

Kinds of charges dealt with in the section.—Charges dealt with in the section are :—

(1) Charges created by act of parties.
(2) Charges arising by operation of law.

The Nagpur High Court has held that a charge which is created by a decree is not created by acts of parties, nor can it be said to have been created by operation of law. Such charge does not fall under the section nor the principle underlying it applies to it (*q*). The Patna High Court has, however, held that where a charge is created by a decree which was passed in pursuance of an agreement between the parties, it is a charge by act of parties and consequently one contemplated by sec. 100 (*r*). The point raised by the Nagpur High Court above was held not to arise in that case. But in a subsequent case the Nagpur High Court has held that a charge created by a compromise decree is a charge created by the act of the parties to which sec. 100 applies (*s*). But a charge created by an ordinary decree would not be a charge created by the acts of parties and the provisions of sec. 100 would next apply (*t*). The Madras, Bombay and Oudh Courts have held that a charge created by a decree of a competent court is created by the operation of law (*u*).

Charge by act of parties.—No particular form of words is necessary for the creation of a charge. It is sufficient if having regard to all the circumstances of the transaction the document shows an intention to make the land security for the payment of the money mentioned therein (*v*). An agreement which gives immoveable property as security for the satisfaction of a debt (*w*), or for the payment of a maintenance allowance in perpetuity (*x*), without transferring any interest in the property or an agreement by which an owner of a share in a village receives in lieu of his share a lump sum out of the income (*y*), constitutes a charge on the property and is not a mortgage. A provision in a partition deed that a common family debt should be proportionately discharged by the respective sharers and that if any sharer defaults his share shall be liable constitutes a charge on the defaulting share in favour of the sharer who has paid in excess (*z*). But a creditor who is not a party to the partition cannot avail himself of this charge (*a*). Mortgages by some classes of agriculturists are forbidden by the Punjab Alienation of Land Act, 1901, but when a mortgagor took a further advance after this Act on the same terms as a mortgage before the Act, the fresh transaction was construed as a charge (*b*). When a charge is created by act of parties the specification of the particular fund or property negatives a personal liability. The remedy of the holder of the charge is against the property charged only.

(*p*) *Rama Rayanimgar* v. *Venkatalingam* (1934) 57 Mad. 218, 66 Mad. L.J. 4, 149 I.C. 379, ('34) A.M. 1.

(*q*) *Ghasiram* v. *Kundandas* (1940) A.N. 163.

(*r*) *Basumati Koer* v. *Harbansi Koer* (1940) 20 Pat. 86, 192 I.C. 866, (1941) A.P. 95; *Sheo Narain* v. *Lakhan* (1945) A.P. 434.

(*s*) *Goswami Mahashpuri* v. *Ramchandra Sitaramji* (1944) A.N. 1.

(*t*) *Debendranath* v. *Trinayani* (1945) A.P. 278.

(*u*) *Venkatacha* v. *Rajagopala* (1946) A.M. 51; *Rustamali* v. *Aftab Khan* (1943) A.B. 414; *Abdul Guffar* v. *Ishiaz Ali* (1943) A.O. 354 C.W.N. 261, 210 I.C. 326, 19 Luck. 1.

(*v*) *Janardan* v. *Anant* (1908) 32 Bom. 386; *Narain Dass* v. *Murli Dhar* (1929) 121 I.C. 81, ('29) A.O. 539; *Bholanath* v. *Sarba Mangal* (1940) A.C. 93, 44 C.W.N. 221, 186 I.C. 843.

(*w*) *Sher Singh* v. *Daya Ram* (1932) 13 Lah. 660, 139 I.C. 49, ('32) A.L. 465.

(*x*) *Hunter, Liquidator Bank of Upper India* v. *Nisar Ahmed Chaudhari* (1932) 8 Luck. 168, 143 I.C. 692, ('32) A.O. 336; *Matlub Hasan* v. *Mt. Kalawati* (1933) 147 I.C. 302, ('33) A.A. 934; *Mt. Khatun* v. *Tahira Khatun* (1918) 19 I.C. 661.

(*y*) *Rustamalli* v. *Aftabhussain Khan* (1943) A.B. 414.

(*z*) *Sesha Ayyar* v. *Sreenivasa* (1921) 41 Mad. L.J. 282, 70 I.C. 362, ('21) A.M. 459; *Abdul Razak Rowther* v. *Abdul Rahiman Sahib* (1933) 65 Mad. L. J. 390, 149 I.C. 287, ('33) A.M. 715.

(*a*) *Suryanarayan Rao* v. *Basivireddy* (1932) 55 Mad. 486, 62 Mad. L.J. 533, 139 I.C. 185, ('32) A.M. 457.

(*b*) *Remal Das* v. *Mst. Jannat* (1921) 2 Lah. 202, 62 I.C. 789, ('21) A.L. 136; *Sher Singh* v. *Daya Ram* (1932) 13 Lah. 660, 139 I.C. 49, ('32) A.L. 465 F.B.

S. 100 Where there is in addition a personal covenant the security becomes collateral to that personal covenant. In such cases the transaction is generally but not necessarily a mortgage. A mortgage is for a fixed term and redeemable, while a charge may create a liability in perpetuity not capable of redemption (*c*).

By the joint operation of this section and of O. 34, r. 15 of the Code of Civil Procedure both the substantive and adjective law as to simple mortgages applies, so far as may be, to a charge. A charge-holder has, therefore, a power of sale, but that power is only exercisable " so far as may be." It is not exercisable against a transferee for value without notice. The power of sale is merely a matter of procedure, *i.e.*, the mode in which the Court enforces the charge.

In the old Bombay and Madras cases a power of sale without the intervention of the Court was wrongly held to be the test for distinguishing a charge from a mortgage (*d*). These cases are obsolete and were based on a meaning of the word " charge " altogether different from the definition in this section.

Contingent charge.—Some cases distinguish a charge from the possibility of a charge. Thus the words " If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to one bhiga seven cottas of guzashta land," were held to create not a charge but a possibility of a charge (*e*). But these cases have been dissented from (*f*), and the proposition is obviously incorrect for as soon as the promise is made the promisee is entitled to look to the land as security for the performance of the promise. Sec. 5 recognizes a future transfer as a transfer, and future crops may be the subject of a mortgage or of a charge. Again, a charge may be given in the present to secure an indemnity or other contingent liability (*g*).

Floating charge.—A floating charge on a Company's assets is a present charge although it does not finally attach or crystallize upon any specific property until the happening of some event which puts an end to the right of the Company to deal with the property in the course of its business (*h*). It is a floating mortgage applying to every item comprised in the security but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security (*i*). The most familiar example is to be found in the debentures of trading companies. Such a debenture is a floating security reaching over all the trade assets of the mortgagor company for the time being but intended to fasten upon and bind the assets in existence when the mortgagee intervenes (*j*). The governing idea of a floating charge is that the mortgagor should carry on his business in the ordinary way. Therefore if the assets are not fluctuating or if no act or intervention of the mortgagee is necessary for the charge to crystallize the charge is not floating but specific. A charge on the leasehold property, the plant and machinery of a coal mine imposed to secure the payment of royalties to the lessor is not a floating but a specific charge (*k*). If the charge

(*c*) *Matlub Hasan* v. *Mt. Kalawati* (1933) 147 I.C. 302, ('33) A.A. 934.

(*d*) *Aliba* v. *Nanu* (1886) 9 Mad. 218; *Khemji Bhagwandas* v. *Rama* (1886) 10 Bom. 519.

(*e*) *Madho Misser* v. *Sidh Binaik* (1887) 14 Cal. 687, 690; *Rajeshwar Swami* v. *Behari* (1905) 2 All. L.J. 754; *Harjas Rai* v. *Naurang* (1906) 3 All. L.J. 220; *Abdul Samad* v. *Municipal Committee* (1922) 67 I.C. 989; *Raja Ram* v. *Jagannath* (1926) 91 I.C. 507, ('26) A.O. 209; *Mohini Debi* v. *Purna Sashi* (1932) 36 Cal. W.N. 158, 55 Cal. L.J. 198, 138 I.C. 24, ('32) A.C. 451.

(*f*) *Kesri Mal Umrao Singh* v. *Tansukh Rai Kedar Nath* (1934) 16 Lah. 137, 153 I.C. 1064, ('3) A.L. 765.

(*g*) *Balasubramania Nadar* v. *Sivaguru* (1911) 21 Mad. L.J. 562, 11 I.C. 629; *Imbichi* v. *Achampat A*[illegible] L.J. 58, 39 I.C. 367; *Murat Singh* v. *Pheku Singh* (1928) 7 Pat. 584, 110 I.C. 526, ('28) A.P. 587; *Harnam Singh* v. *Mahomed Akbar Khan* (1937) A. Pesh. 76.

(*h*) *Imperial Bank of India* v. *Bengal National Bank* (1931) 58 Cal. 136, 131 I.C. 689, ('31) A.C. 223.

(*i*) *Evans* v. *Rival Granite Quarries Ltd.* (1910) 2 K.B. 979; *Government Stock Co.* v. *Manila Rly.* (1897) A.C. 81; *Illingworth* v. *Houldsworth* (1904) A.C. 355.

(*j*) *Tailby* v. *Official Receiver* (1888) 13 A.C. 523.

(*k*) *H. V. Low & Co., Ltd.* v. *Pulin Beharilal Singha* (1932) 59 Cal. 1372, 143 I.C. 193, ('33) A.C 514.

holder is entitled to possession and control of the assets of the company, the charge, even though it include future moveables, is not a floating charge (*l*). The question whether a floating charge over immoveable property requires registration was raised before the Privy Council but not decided (*m*).

Specified property.—The property to which the charge attaches must be specified, otherwise the charge would be void for uncertainty (*n*). A provision in a partition deed that the parties should pay certain debts and that the parties in default should pay the others twice the loss from their shares of the property was held to create a valid charge, as the shares of the properties were described in the schedules to the deed (*o*). An undertaking in a deed to segregate certain property so that it would be answerable to another person, should the executant of the deed fail to give a charge bond, has the effect of making the property a security for the payment and creating a charge (*p*). A charge created by a Mahomedan on the unknown and uncertain share which one of his heirs may succeed to is not only invalid as a charge but void as an attempt to defeat the Mahomedan law of inheritance as it burdens one share while keeping the other shares free (*q*). A charge created by a decree over "all the property of the judgment debtor both moveable and immoveable" cannot be said to be void for uncertainity (*r*).

Attestation.—A charge does not require to be attested and proved in the same way as a mortgage (*s*).

Registration.—A charge need not be in writing, but if it is reduced to writing registration is necessary in the case of a non-testamentary instrument of the value of Rs. 100 or upwards, under sec. 17 (1) (b) of the Registration Act, which applies to rights not only *in*, but also *to* immoveable property (*t*). As a charge in writing requires registration if of the value of Rs. 100 or upwards, the assignment of such a charge would also need to be registered. In *Shivrao* v. *Official Liquidator* (*u*) the Madras High Court held that a deed assigning a mortgage decree required registration and in the absence of registration would not create a charge. The words "so far as may be" in the section did not save sec. 59.

Instances of charges by act of parties.—The following are illustrations of charges by act of parties :

Illustrations.

(1) *A* inherited an estate from his maternal grandmother and executed an agreement to pay his sister *B* a fixed annual sum out of the rents of the estate. *B* has a charge on the estate : *Chalamanna* v. *Subbamma* (1884) 7 Mad. 23.

(2) *A* sued *B* for a sum of money, and the compromise decree directed "that the immoveable property specified herein shall be hypothecated for the realization of the

---

(*l*) *J. D. Jones & Co., Ltd.* v. *Ranjit Roy* (1927) 54 Cal. 513, 103 I.C. 748, ('27) A.C. 682.

(*m*) *Imperial Bank of India* v. *Bengal National Bank* (1931) 58 I.A. 323, 59 Cal. 377, 35 Cal. W.N. 1034, 54 Cal. L.J. 117, 1931 All. L.J. 804, 61 Mad. L.J. 589, 33 Bom. L.R. 1388, 134 I.C. 651, ('31) A.PC. 245.

(*n*) *Mohini Debi* v. *Purna Sashi* (1932) 36 Cal. W.N. 153, 138 I.C. 24, ('32) A.C. 451.

(*o*) *Manickam Pillai* v. *Audinarayana* (1910) 34 Mad. 47, 5 I.C. 917.

(*p*) *Dau Bhairoprasad* v. *Juqulprasad* (1941) A.N. 362 (1940) N.L.J. 651, 194 I.C. 761.

(*q*) *Matlub Hasan* v. *Mt. Kalawati* (1933) 147 I.C. 302, ('33) A.A. 934.

(*r*) *Narsinhamurthi* v. *Satyanandan* (1941) A.M. 794, (1941) 2 M.L.J. 386, 54 M.L.W. 213, (1941) M.W.N. 751, 197 I.C. 259, see also *Sris Chundra Nandey* v. *Rakhalananda* (1941) A. PC. 16.

(*s*) *Rama Sami Iyengar* v. *Kuppusami* (1921) Mad. W.N. 472, 61 I.C. 554, ('21) A.M. 514 ; *Sikandar Ara Amina Begum* v. *Hasan Ara Begum* (1935) 165 I.C. 70, (1936) A.O. 196 ; but see *Shivrao* v. *Official Liquidator* (9140) A.M. 140.

(*t*) *Bengal Banking Corporation* v. *Mackertich* (1884) 10 Cal. 815 ; *Maina* v. *Bachchi* (1908) 28 All. 655, 659 ; *Amratlal* v. *Keshavlal* (1926) 28 Bom. L.R. 989, 98 I.C. 696, ('26) A.B. 495 ; *Imperial Bank* v. *Bengal National Bank* (1931) 58 Cal. 136, 131 I.C. 689, ('31) A.C. 228 ; *Rangampudi* v. *Venkateshwar* (1934) 152 I.C. 772, ('34) A.M. 713 ; *Vishwanadham* v. *Menon* (1939) A.M. 202, (1939) Mad. 199, (1939) 1 M.L.J. 185, 48 M.L.W. 952, (1938) M.W.N. 1286, 183 I.C. 639.

(1940) A.M. 140, (1940) Mad. 306, (1940) 1 M.L.J. 922, 50 M.L.W. 344, (1940) M.W.N. 313, 187 I.C. 243.

S. 100

said money and *B* shall not be able to create any incumbrance on the same." *A* has a charge on the property for the amount decree: *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (1908) 35 Cal. 837.

(3) *A* sued *B* to recover certain immoveable property. The suit ended in a compromise decree under which the property was awarded to *A* with a provision that *A* should pay *B* a monthly sum for maintenance and that if *A* should fail to pay the aforesaid monthly sum at the end of each month *B* shall have power to recover the monthly sum with interest at 1 per cent. per mensem from the property decreed. *B* has a charge for maintenance on the property decreed: *Maina* v. *Bachchi* (1906) 28 All. 655.

(4) An arbitrator was appointed by *A* and *B* to make a partition of their properties and to do all that was necessary to secure their rights. The arbitrator allotted some properties to *A* and some to *B* and as those of *A* were of greater value directed *A* to pay *B* Rs. 1,400 to make up the difference within a month, and further directed that if such payment were not made *B* should have a charge on *A*'s properties for that sum and interest at 10 annas per cent. per month. Held that a valid charge was created: *Kanhaiya Lal* v. *Jangi* (1926) 24 All. L.J. 649, 96 I.C. 39, ('26) A.A. 527.

(5) *A* sued *B* on a promissory note. The compromise decree directed the payment of the money and further directed that *B* shall not dispose of his share in a factory until satisfaction of the entire decretal amount. Held that *A* had a charge on the property specified: *Narain Das* v. *Murli Dhar* (1929) 121 I.C. 81, ('29) A.O. 539; *Jawahir Mal* v. *Indomati* (1914) 36 All. 201, 22 I.C. 973.

Charge by operation of law.—The inclusion in the definition of charges by operation of law has been criticised as inconsistent with the scheme of the Act which relates to transfers by act of parties (*v*). The Act, however, itself creates such charges, for a charge by operation of law arises in this Act under sec. 55 (4) (b) in the case of an unpaid vendor; under sec. 55 (6) (b) for purchase money paid in advance; under sec. 73 in favour of a mortgagee on surplus sale proceeds of a revenue sale. Arrears of Government revenue are a paramount charge on the land (*w*), but nevertheless a co-sharer who pays assessment to avert a sale does not get a charge on the other shares according to Calcutta, Allahabad, Bombay, Patna and Rangoon (*x*) although he does in Madras (*y*). See note "Equitable charge" under sec. 92. The charge given by the Madras decisions is on the other shares as they stood at the time of the payment and is subject to mortgages then existing on those shares (*z*).

The charge for arrears of rent under sec. 65 of the Bengal Tenancy Act has been held not to be a charge under this Act (*a*); so also *Kattubadi* which is a quit-rent payable by the tenant in Madras (*b*). But the Courts in the Central Provinces treat the word "charge" in their Revenue Acts as the equivalent to a charge under the

(*v*) *Corporation of Calcutta* v. *Arunchandra Singh* (1934) 61 Cal. 1047, 38 Cal. W.N. 917, 60 Cal. L.J. 312, 153 I.C. 972, ('34) A.C. 862 reversing 60 Cal. 1470.

(*w*) *Chatraput Singh* v. *Grindra Chunder* (1881) 6 Cal. 389.

(*x*) *Kinnu Ram* v. *Mozaffer* (1887) 14 Cal. 809 [F.B.]; *Seth Chitor Mal* v. *Shib Lal* (1892) 14 All. 273 F.B.; *Shivrao* v. *Pundlik* (1902) 26 Bom. 437; *Bhuneshwari Kuer* v. *Manir Khan* (1928) 7 Pat. 613, 111 I.C. 84, ('28) A.P. 641; *U Shwe Bwa* v. *Maung Thauk* (1928) 6 Rang. 500, 113 I.C. 801, ('28) A.R. 278.

(*y*) *Seshagiri* v. *Pichu* (1887) 11 Mad. 452; *Srinivasa* v. *Rama* (1893) 17 Mad. 247; *Rajah of Vizianagram* v. *Setrucherla* (1902) 26 Mad. 686 F.B.; *Alayakammal* v. *Subbaraya* (1905) 28 Mad. 493; *Amman Pariyayi* v. *Pakran* (1913) 36 Mad. 493, 15 I.C. 262; *Kotayya* v. *Kotappa* (1926) 49 Mad. L.J. 117, 90 I.C. 551, ('26) A.M. 141; *Swaminath Iyer* v. *Ramnath Iyer* (1943) A.M. 578, (1944) Mad. 44, (1943) 2 M.L.J. 24, 56 M.L.W. 289.

(*z*) *Vyraperumal* v. *Alagappa* (1932) 55 Mad 468, 62 Mad. L.J. 31, 135 I.C. 609, ('32) A.M. 189.

(*a*) *Fatick Chunder* v. *Foley* (1888) 15 Cal. 492; *Roysuddi* v. *Kali Nath* (1906) 33 Cal. 985; *Gopi Nath* v. *Ishur Chundra* (1895) 22 Cal. 800.

(*b*) *Lingam Krishna* v. *Vikrama* (1900) 10 Mad. L.J. 256; *Mullapudi* v. *Venkatanarasimha* (1896) 19 Mad. 329; *Gajapati* v. *Suryanarayana* (1899) 22 Mad. 11.

Transfer of Property Act (*c*). The decisions in Madras are conflicting as to whether the charge for rent under sec. 5 of the Madras Estates Land Act, Mad. Act 1 of 1908, is or is not a charge under this section (*d*). S. 100

Sec. 228 of the Calcutta Municipal Act makes the consolidated rate as it becomes due from time to time a first charge on the property subject to the payment of land revenue (*e*).

Save as otherwise provided.—These words show that where a statute provides that a particular payment shall be a first charge, such charge can be enforced against a transferee with or without notice (*f*).

Sections 7 and 8 of the Public Demands Recovery Act, Beng. Act 4 of 1914, make the debt in respect of which the certificate is issued a charge on the property certified for sale (*g*).

A creditor advancing money does not apart from special agreement acquires a charge over property purchased with the money (*h*). A covenant in a lease empowering the lessee to retain part of the rent in satisfaction of a previous loan to the lessor has been held to constitute a charge on the lessor's interest (*i*). In *Hukam Chand* v. *Radha Kishan* (*j*) the Judicial Committee have observed that an agreement between *A* and *B* providing that the executant *A* should give a regular mortgage of his immoveable property for money advanced by *B*, cannot constitute a mortgage or charge upon such property within the meaning of sec. 100 of the Transfer of Property Act.

Notice of charge.—Charges as already explained, are not enforceable against transferees for consideration without notice or a volunteer with or without notice (*k*). An oral non-possessory charge would, therefore, not have priority over a subsequent mortgage, if the mortgagee had not notice of it. Irrespective of this section, this would also be the effect of sec. 48 of the Registration Act (*l*). There are some cases in which it was held that a charge created by a decree was enforceable against a transferee for consideration without notice (*m*). They are based on a misconception of the nature of a charge which was erroneously supposed to be an interest in property and to reduce full ownership to limited ownership (*n*). These decisions have been superseded by the express provisions of this section.

(*c*) *Mangal Prasad* v. *Chandra* (1905) 1 Nag. L.R. 117; *Singai Murlidhar* v. *Lala* (1907) 3 Nag. L.R. 40; *Manoharlal* v. *Kanhailal* (1933) 140 I.C. 532, ('32) A.N. 171.

(*d*) *Saramma* v. *Suriyanarayana* (1918) 42 Mad. 114, 48 I.C. 794; *Sri Rajah Bollapragada Venkata* v. *Menda Seetayya* (1920) 43 Mad. 786, 57 I.C. 764; *Ramkati Suryanarayana* v. *Ramchandrudu* (1932) 139 I.C. 452, ('32) A.M. 716.

(*e*) *Akhoykumar* v. *Corporation of Calcutta* (1915) 42 Cal. 625, 27 I.C. 621; *Corporation of Calcutta* v. *Arunchandra Singh* (1934) 61 Cal. 1047, 38 Cal. W.N. 917, 60 Cal. L.J. 312, 153 I.C. 972, ('34) A.C. 862.

(*f*) *Lakshman* v. *Secretary of State* (1939) A.B. 183, 41 Bom. L.R. 257, 182 I.C. 635; *Lucknow Municipality* v. *Ramji Lal* (1941) A.O. 305; *Nawal Kishore* v. *Agra Municipality* (1943) A.A. 115 (1943) All. 458 [F.B.].

(*g*) *Bhekdhari Mahton* v. *Radhika Koer* (1934) 13 Pat. 364, 155 I.C. 635, ('34) A.P. 648.

(*h*) *In re Annapurna Co., Ltd.* (1926) 24 All. L.J. 347, 98 I.C. 33, ('26) A.A. 397.

(*i*) *Nathan Lal* v. *Durga Das* (1930) 52 All. 985, 130 I.C. 489, ('31) A.A. 62.

(*j*) (1930) 34 Cal. W.N. 506, 123 I.C. 157, ('30) A.P.C. 76; *Ram Hat* v. *Pokhar* (1932) 7 Luck. 237, 134 I.C. 1093, ('32) A.O. 54.

(*k*) *Kishan Lal* v. *Ganga Ram* (1891) 13 All. 28, 44; *Royzuddi* v. *Kali Nath* (1906) 33 Cal. 985, 993; *Gur Dayal* v. *Karam Singh* (1916) 38 All. 254, 35 I.C. 289; *Akhoy Kumar* v. *Corporation of Calcutta* (1915) 42 Cal. 625, 27 I.C. 621; *Hunter, Liquidator of Bank of Upper India* v. *Nisar Ahmad Chaudhari* (1932) 8 Luck. 162, 143 I.C. 692, ('32) A.O. 336.

(*l*) *Chhaganlal* v. *Chunilal* (1934) 36 Bom. L.R. 277, 152 I.C. 267, ('34) A.B. 189.

(*m*) *Maina* v. *Bachchi* (1906) 28 All. 655; *Bhoje Mahadev* v. *Ganga Bai* (1913) 37 Bom. 621, 21 I.C. 54; *Mahadeo Prasad* v. *Anandi Lal* (1925) 47 All. 90, 92 I.C. 348, ('25) A.A. 60; *Srinivasa* v. *Ranganatha* (1919) 36 Mad. L.J. 618, 51 I.C. 963; *Mollaya* v. *Krishnaswami* (1925) 47 Mad. L.J. 622, 85 I.C. 855, ('25) A.M. 95; *Kallapa* v. *Balwant* (1925) 27 Bom. L.R. 434, 87 I.C. 951, ('25) A.B. 343; *Chaudhri* v. *Gobardhan* (1930) 5 Luck. 172, 117 I.C. 405, ('29) A.O. 316; *Kuloda Prosad* v. *Jageshar* (1900) 27 Cal. 194.

(*n*) *Kallapa* v. *Balwant* (1925) 27 Bom. L.R. 434, 87 I.C. 951, ('25) A.B. 343.

S. 100 A charge is enforced by sale as in the case of a simple mortgage under this section and O. 34, r. 15, of the Code of Civil Procedure and if the charge carries with it a personal liability (as in the case of the seller's charge for price not paid) the charge holder is entitled under O. 34, r. 6, to a personal decree (*o*). A charge given in a security bond under the Code of Civil Procedure is enforced by order of sale under the procedure adopted by the Allahabad High Court in *Janki Kuar* v. *Sarup Rani* (*p*) approved by the Privy Council in *Raghubar Singh* v. *Jai Indra* (*q*), and sec. 67 is not applicable (*r*). A person who purchases a portion of a property which is subject to charge with notice of the charge is liable to pay the whole amount. He may sue for contribution (*s*).

So far as may be.—These words also occur in O. 34, r. 15, of the Code of Civil Procedure which applies to charges the provisions of that Order as to the enforcement of simple mortgages. A charge is not exactly identical with a mortgage and a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage deed. Thus in the case of a recurring charge, a charge is not extinguished by a decree for sale (*t*). The principle of Order XXXIV of the Civil Procedure Code may be applied to the execution of a decree which created a charge (*u*). In a suit for the enforcement of a charge the Privy Council observed that under sec. 100 read with O. 34, r. 15 a preliminary decree for sale, as in a suit on a mortgage, should have been passed (*v*). Limitation for the enforcement of a charge is under art. 132, twelve years from the time when the money is due. If the suit is for the enforcement of the charge by sale, the words " so far as may be " in this section and in O. 34, r. 15, indicate that the property cannot be sold if in the hands of a transferee without notice. It has been held that a charge declared in a decree must be enforced under sec. 67 by suit (*w*). Again the doctrine of subrogation has been applied to a charge. A puisne mortgagee paid off a decretal charge anterior to the prior mortgage and he was subrogated to the charge and had priority over the prior mortgagee, and as the prior mortgage was affected by *lis pendens* (having been effected while execution of the decree was pending) it mattered not that the prior mortgagee had not notice of the charge (*x*). Other provisions of the Act are not applicable to charges except those of secs. 81 and 82 as to marshalling and contribution; and a charge holder cannot avail himself of sec. 68 (*y*); nor does the principle of consolidation of securities enacted in sec. 67A apply to charges (*z*). Again a charge may be in perpetuity and then it cannot be redeemed (*a*). An agreement provides that in default of a certain payment for the maintenance by one party to the other, the latter would be at liberty to cultivate the field and maintain herself clearly created a charge. Such a provision does not affect the effect of the agreement as a charge, although it cannot be enforced by sale of the land (*b*).

(*o*) *Babu Ram* v. *Imam Ullah* (1935) All. L.J. 279, 157 I.C. 538, ('35) A.A. 411; *Raghukul Tilak* v. *Pitam Singh* (1931) 52 All. 901, 130 I.C. 198, ('31 A.A. 99.

(*p*) (1895) 17 All. 99.

(*q*) (1919) 42 All. 158, 46 I.A. 228, 55 I.C. 550, ('19) A.PC. 55; *Beti Mahalakshmi* v. *Badan Singh* (1923) 45 All. 649, 74 I.C. 927, ('24) A.A. 105; *Sukumari* v. *Mugneeram* (1927) 54 Cal. 1, 95 I.C. 908, ('26) A.C. 839; *Daw* v. *U Bah* (1929) 7 Rang. 352, 118 I.C. 632, ('29) A.R. 26.

(*r*) *Jyoti Prakash* v. *Mukti Prakash* (1924) 51 Cal. 150, 81 I.C. 734, ('24) A.C. 485; *Subramanian* v. *Raja of Ramnad* (1918) 41 Mad. 327, 43 I.C. 187.

(*s*) *Shariff Ahmed* v. *H. Hunter* (1936) 167 I.C. 52, (1937) A.O. 420; *Parshair Lal* v. *Brij Mohan Lal* (1935) 11 Luck. 575, 159 I.C. 117, (1936) A.O. 52.

(*t*) *Jnanendra Nath* v. *Sashi Mulch* (1[illegible] 60, 44 C.W.N. 240, 186 I.C. 83[illegible]

(*u*) *Ray Chand* v. *Basappa* (1941) A.B. 71.

(*v*) *Ram Raghubir* v. *United Refineries* (*Burma*) *Ltd.* (1933) 60 I.A. 183, 11 Rang. 186, 37 Cal. W.N. 633, 57 Cal. L.J. 308, 64 Mad. L.J. 655, 1933 All. L.J. 541, 35 Bom. L.R. 753, 142 I.C. 788, ('33) A.PC. 143.

(*w*) *Aubhoyessury Dobee* v. *Gour Sunkur* (1895) 22 Cal. 859; *Matangini Dassee* v. *Choonaymoney* (1888) 22 Cal. 903; *Venkata Lakshmamma* v. *Seetayya* (1920) 43 Mad. 786, 57 I.C. 764; *Rajkumar Lal* v. *Jai Karan Das* (1920) 5 Pat. L.J. 248, 57 I.C. 653.

(*x*) *Aravamudhu Ayyangar* v. *Zamindarini Srinath Abiramvalli Ayah* (1934) 66 Mad. L.J. 566, 150 I.C. 930, ('34) A.M. 353.

(*y*) *Fotick Chunder* v. *Foley* (1888) 15 Cal. 492.

(*z*) *Corporation of Calcutta* v. *Arunachandra Singh* (1934) 61 Cal. 1047, 38 Cal. W.N. 917, 60 Cal. L.J. 312, 153 I.C. 972, ('34) A.C. 862 reversing 60 Cal. 1470.

(*a*) *Matlub Hasan* v. *Mt. Kalawati* (1933) 147 I.C. 302, ('33) A.A. 934.

(*b*) *Renukabai* v. *Bhavan* (1938) 185 I.C. 33, 1939) A.N. 132.

Decretal charge.—If a decree is executory, a charge created by it can be enforced in execution: See note "Charge" under sec. 67.

Trustee's charge.—A trustee is entitled to a charge on the income as well as the corpus of the trust estate for all moneys properly expended in performing the obligations of the trust (*c*). This charge has priority over the claims of the beneficiaries (*d*). But as long as he is a trustee his remedy for enforcing his charge is limited by sec. 32 of the Trusts Act. He may therefore only reimburse himself for such expenses and interests out of the income and profits of the trust estate and prohibit any disposition of the trust property without previous payment of his expenses. While he is a trustee he cannot destroy the trust by bringing it to sale. But after he has ceased to be a trustee, or after he has lost possession of the trust property, he may enforce his charge by sale (*e*).

Transferee for consideration and without notice—It has been held that the Saving clause does not apply to an auction purchaser who is not a transferee within the meaning of sec. 5 of the Transfer of Property Act (*f*). This view has not been followed by the Allahabad and Patna High Courts (*g*) in which it was held that a transferee for consideration included an auction purchaser. A simple mortgagee is not a transferee to whom the property is transferred (*h*).

No merger in case of subsequent encumbrance

101. *Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.*

Amendment.—This section has been substituted by the amending Act 20 of 1929 for the original section which was as follows:—

> "Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

The old section covered the cases of the union of two estates which occurred when the purchaser of the equity of redemption acquired the rights of the mortgagee or when the mortgagee acquired the right of the mortgagor. The amendment of the section does not alter this rule. Where, therefore, a charge is created by the judgment-debtor in favour of the holder of a money decree, this charge is extinguished by the purchaser of the property by the charge-holder at the auction sale in execution of a prior mortgagee's decree. The debt itself having ceased to exist, it is not open to the charge-holder to seek a

(*c*) *In re Pumfrey* (1882) 22 Ch. D. 261.

(*d*) *Dodds* v. *Tuke* (1884) 25 Ch. D. 617; *Peary Mohun Mukerjee* v. *Narendra Nath* (1910) 37 Cal. 229, 234, 37 I.A. 27, 5 I.C. 404.

(*e*) *Abkan Sahib* v. *Soran Bivi* (1915) 38 Mad. 260, 28 I.C. 290; *Peary Mohun Mukerjee* v. *Narendra Nath* (1910) 37 Cal. 229, 37 I.A. 27, 5 I.C. 404.

(*f*) *Indra Narain* v. *Mohammad Ismail* (19[illegible]) A.A. 687; *Surayya* v. *Venkataraman* (19[illegible]) A.M. 701, (1940) 1 M.L.J. 831, 192 I.C. 47.

Nawal Kishore v. *Agra Municipality* (1943) A.A. 115, (1943) All. 453, (1943) A.L.J. 53, 205 I.C. 530; *Shebnarain* v. *Lakhan* (1945) 24 Pat. 345.

(*h*) *Surayya* v. *Venkataraman*, see *supra*.

S. 101 personal remedy against the judgment debtor (*i*). The first case is now covered by secs. 91 and 92 (*j*). The scope of the present section is therefore confined to cases in which the mortgagee or charge-holder acquires ownership, for the equity of redemption represents the estate of ownership.

The old section represented the equitable rule that merger was prevented by intention (*k*), which was an exception to the common law rule of merger. There is no common law rule of merger in India and so it is unnecessary to state the rule of merger as an exception. The rule of intention was an artificial one, for it was applied even in cases where the person affected did not know that non-merger would be to his benefit (*l*). The only case in which it is to the benefit of the mortgagee or charge-holder to keep the incumbrance alive is when it is necessary as a defence against a subsequent incumbrance. This is effected by the present section without the assistance of the equitable rule which belongs to a different system of jurisprudence.

Amendment whether retrospective.—This section is not specified in sec. 63 of the Amending Act 20 of 1929 as not having retrospective effect. The Allahabad High Court has held that it is retrospective (*m*); while the Rangoon High Court and the Madras High Court have held that it is not retrospective (*n*).

Extinction of mortgage security.—Merger is only one of the several ways in which a mortgage security may be extinguished. For the security may be extinguished :—

1. By a decree for foreclosure, or by a decree for sale after the sale is confirmed—see note under sec. 60 ' By order of a Court '.
2. By payment of the mortgage debt by the mortgagor or by a person under covenant to pay. Such a payment extinguishes the mortgage and does not operate as an assignment. See sec. 92 notes ' Mortgagor not subrogated ' : ' Covenant to pay excludes subrogation.' When the mortgage debt is paid by one of several co-mortgagors it is extinguished as to his share and assigned to him as to the shares of the other co-mortgagors—see sec. 95. When the mortgage debt is paid by a puisne mortgagee the mortgage is not extinguished but assigned to the puisne mortgagee—see sec. 92. When the mortgage debt is paid by a purchaser of the equity of redemption the question of extinction of the mortgage depends upon the existence of a subsequent incumbrancer—sec. 92.
3. By release by the mortgagee of the debt or of the security. If the mortgagee releases the debt, the mortgage is extinguished. If the mortgagee releases the security the mortgage is extinguished but the debt subsists and the mortgagee becomes an unsecured creditor. As to the effect of a release of part of the security—see sec. 82 note ' Release by mortgagee '.
4. By merger.
5. By novation.

The first three modes of extinction have already been discussed. The last two will be dealt with in the commentary under this section.

(*i*) *Devichand* v. *Chintaman* (1945) A.B. 116.

(*j*) See note ' Purchaser of Equity of Redemption redeems ' under sec. 92.

(*k*) *Forbes* v. *Moffat* (1811) 18 Ves. 384 ; *Thorne* v. *Cann* (1895) A.C. 11, 18, 19.

(*l*) *Dinobundhu Shaw* v. *Jogmoya Dasi* (1902) 29 Cal. 154, 29 I.A. 9 ; *Girdhar Das* v. *Ram Autur Singh* (1903) 8 Cal. W.N. 690 ; *Tara Sundari* v. *Khedan Lal* (1909) 14 Cal. W.N. 1089, 7 I.C. 80 ; *Andi Thevan* v. *Narayanasami* (1928) 55 Mad. L.J. 369, 111 I.C. 266, ('28) A.M. 793 ; *Kalimuddin* v. *Baidyanath* (1930) 51 Cal. L.J. 565, 128 I.C. 192, ('30) A.C. 572.

(*m*) *Tota Ram* v. *Ram Lal* (1932) 54 All. 897, 1932 All. L.J. 627, 139 I.C. 107, ('32) A.A. 489.

(*n*) *Ko Po Ken* v. *C.A.M.L.A.L. Firm* (1932) 10 Rang. 465, 140 I.C. 156, ('32) A.R. 197 ; *Venkatalingam* v. *Parthasarathy* (1942) A. M. 558.

S. 101

Merger.—A security may be extinguished by merger. This occurs (i) by the merger of a lower in a higher security and (ii) by the merger of a lesser estate in a greater estate. The section only deals with the second head of merger. A merger of estates takes place when two estates held in the same legal right become united in the same person. Where the capacity in which a person in possession of the mortgagee's rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that the two capacities are united in the same physical person cannot result in a merger (*o*).

Merger of lower in higher security.—The acquisition by a person of a security of a superior nature in law to the one he has, merges or extinguishes his legal remedies on the inferior security. So when a person recovers judgment on a contract debt, the debt is extinguished being merged in the judgment (*p*). And an equitable mortgage by deposit of title deeds is extinguished when a formal mortgage is executed for the debt (*q*); such merger is, however, excluded by express words indicating a contrary intention, *e.g.*, by a recital that the subsequent security is given by way of further or additional security (*r*). Again there is no merger if the remedies on the two securities are not co-extensive (*s*). Thus a promissory note enforceable by summary procedure will not merge in a mortgage for the same debt (*t*).

But though a debt merges in a judgment, yet if it is secured by a mortgage, the collateral security of the mortgage does not merge (*u*). The cause of action for the debt *transit in rem judicatam* but that does not affect the concurrent remedy on the mortgage (*v*). In *Drake* v. *Mitchell* (*w*) Lord Ellenborough said: "A judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." Accordingly the Calcutta High Court held that a mortgagor can redeem even after decree for sale under the repealed section 89 has been passed, and this he may do at any time until confirmation of the sale (*x*), for the mortgage security is not merged in the judgment and subsists until satisfaction of the decree (*y*). Therefore if the mortgage decree for sale is not executed and the mortgagee is in possession, the mortgagor and the mortgagor's purchasers cannot dispossess him except by suit for redemption (*z*). The fact that the mortgagee had sued on a prior mortgage and obtained a decree does not show that he did not intend to keep that mortgage alive (*a*), unless of course satisfaction of the decree is certified to the Court and a second mortgage is taken afterwards for the balance (*b*). It is in recognition of this principle that the clause providing for the extinction of the right of redemption in decrees absolute for sale has been omitted from secs. 89 and 93 of the Transfer of Property Act when re-enacted as Order 34, rules 5 and 8 of the Code of Civil Procedure, 1908.

If the higher security fails, the lower revives. If a mortgagee purchases the property mortgaged and the sale deed fails for want of registration (*c*), or because the property

(*o*) *Mahomed Abdul Samad* v. *Girdhari Lal* (1942) A.A. 175 (1942) All. 259, (1942) A.L.J. 174, 200 I.C. 269.

(*p*) *Owen* v. *Homan* (1851) 3 Mac. & G. 378, 407.

(*q*) *Re Annesley, Vaughan* v. *Vanderstegen* (1854) 2 Eq. Rep. 1257.

(*r*) *Twopenny* v. *Young* (1824) 3 B. & C. 208.

(*s*) *Venkata* v. *Ranga* (1887) 10 Mad. 160, 163.

(*t*) *Ramgopal* v. *Richard Blaquiere* (1868) 1 Beng. L.R. 35 O.C.J.

(*u*) *Economic Life Assurance Society* v. *Osborne* (1902) A.C. 147; *Ramshanker* v. *Gulab Shanker* (1933) 144 I.C. 736, ('33) A.N. 241.

(*v*) *Drake* v. *Mitchell* (1803) 3 East. 251.

(*w*) (1803) 3 East. 251.

(*x*) *Bibijan Bibi* v. *Sachi* (1904) 31 Cal. 863.

(*y*) *Surjiram Marwari* v. *Barhamdeo* (1905) 2 Cal. L.J. 202, *contra Shadi Ram* v. *Het Ram* (1912) 11 All. L.J. 634, 20 I.C. 59 (incorrect on this point).

(*z*) *Purnamal* v. *Venkata* (1897) 20 Mad. 486; *Latchmiput Singh* v. *Land Mortgage Bank of India* (1887) 14 Cal. 464.

(*a*) *Purnamal* v. *Venkata*, *supra*.

(*b*) *Ram Krishna* v. *Chotmal* (1889) 13 Bom. 348.

(*c*) *Hirachand Babaji* v. *Bhaskar* (1864) 2 Bom. H.C. 198 A.C.J.

S. 101

was under attachment (*d*), or if the sale is avoided as a fraud on creditors (*e*), he can still fall back on the mortgage. A mortgagee in possession under an invalid sale is still a mortgagee, and may bring the property to sale (*f*), or may be sued for redemption (*g*). On the other hand if the later security is inoperative there can be no merger. Thus an oral agreement before the Registration Act of 1864 is not merged in a subsequent written agreement which fails for want of registration (*h*).

Merger of lesser estate in greater estate.——The legal effect in English Common Law of the union of a charge and the ownership of an estate is merger, either because the lesser estate is drowned in the greater or because a man cannot be his own debtor (*i*). But in equity the question is one of intention. In *Forbes* v. *Moffatt* (*j*) Sir William Grant said: "Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. The question is upon the intention, actual or presumed, of the person, in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot.... Where no intention is expressed, or the party is incapable of expressing any, I apprehend the Court considers what is most advantageous to him."

But a serious limitation was apparently put upon this equitable rule by the case of *Toulmin* v. *Steere* (*k*). In that case Sir William Grant, M.R., said:—

> "The cases of *Greswold* v. *Marsham* (*l*) and *Mocatta* v. *Murgatroyd* (*m*) are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

This however is incorrect, since a purchaser of any equity of redemption, who redeems a mortgage, can by evidencing an intention to that effect keep the mortgage alive. The scope of the rule in *Toulmin* v. *Steere* (k) was narrowed by the judgment of Jessel, M.R., in *Adams* v. *Angell* (*n*), from which the following is an extract:

> "Now in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against any mesne incumbrances if there are any. So, also, it is admitted, that if without

(*d*) *Gopal Sahoo* v. *Gunga* (1882) 8 Cal. 530.
(*e*) *Appalaraju* v. *Krishnamurthy* (1932) 135 I.C. 582, ('32) A.M. 182.
(*f*) *Rama Charan* v. *Nimai Nandal* (1922) 35 Cal. L.J. 58, 64 I.C. 903, ('22) A. C. 114.
(*g*) *Ariyaputhira Padayachi* v. *Muthukomaraswami* (1914) 37 Mad. 423, 15 I.C. 343.
(*h*) *Vivandas* v. *Framji* (1870) 7 Bom. H. C. 45 O. C. J.
(*i*) *Banarsi Das* v. *Maharani Kuar* (1883) 5 All. 27, 33; *Kudhai* v. *Sheo Dayal* (1888) 10 All. 570, 575.
(*j*) (1811) 18 Ves. 384, 390, 392.
(*k*) (1817) 3 Mer. 210, 224.
(*l*) (1662) 2 Ch. Cas. 170.
(*m*) (1717) 1 P. Wms. 393.
(*n*) (1877) 5 Ch. D. 634, 645 C. A.

going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot and protects him."

This limits the scope of *Toulmin* v. *Steere* (o) to cases in which no actual intention is either expressed or proved by the facts of the case. In other words there is no presumption against merger but an intention to keep the security alive must be actually expressed or implied from the circumstances of the case (p). The old section 101 seems to have been based on *Toulmin* v. *Steere* as limited by *Adams* v. *Angell*, but the concluding words of the section " or such continuance would be for his benefit " seem to admit the wider rule of equity of presumed intention laid down in India by Holloway, J., in *Ramu Naikan* v. *Subbaraya* (q) and by the Privy Council in *Gokaldoss* v. *Rambux* (r), and in England in *Forbes* v. *Moffatt* (s) and again in *Thorne* v. *Cann* (t) where Lord Macnaghten said:—

"Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

The Privy Council seemed to put this construction on the section in *Malireddi Ayyareddi* v. *Gopala Krishnayya* (u), for they said, " It is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, sec. 101), that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit."

However this may be, *Toulmin* v. *Steere* was declared not to be the law in India by the Privy Council in *Gokuldas*' case and it is practically obsolete in England. The passage cited from *Adams* v. *Angell* was quoted with approval in *Liquidation Estates Purchase Co.* v. *Willoughby* (v) by Lindley, L.J., who seemed to regard *Toulmin* v. *Steere* as overruled by the dicta in *Thorne* v. *Cann* where Lord Herschell described it as " a case which certainly has not met with universal acceptance; it has been often commented upon and criticized adversely "; and Lord Macnaghten said of it, " The authority of that case cannot nowadays be treated as going beyond the actual decision." The dissenting judgment of Fletcher Moulton, L.J., in *Manks* v. *Whiteley* (w) is to the same effect.

Not only *Toulmin* v. *Steere* but the equitable rule of intention is now jettisoned by the present section. The equitable rule of intention is an exception engrafted on the common law rule of merger. As there is no common law rule of merger in India it is unnecessary to enact non-merger as an exception. While under the old section merger was the rule, the section as amended makes it the exception (x). The rule of intention is a technical rule, for it is presumed in cases of benefit when there is no actual intention and it is an artificial rule applied even in cases where the party is not even aware of the benefit (y). The Legislature has therefore discarded it and adopted the simple rule that

(o) (1817) 3 Mer. 310.
(p) *Re Gibbon, Moore* v. *Gibbon* (1909) 1 Ch. 367, 373.
(q) (1875) 7 Mad. H. C. R. 229.
(r) (1884) 10 Cal. 1035, 11 I.A. 126.
(s) (1811) 18 Ves. 384.
(t) (1895) A.C. 11, 18.
(u) (1924) 47 Mad. 190, 51 I. A. 140, 79 I. C. 592, ('24) A.PC. 36.
(v) (1896) 1 Ch. 726 C.A. on app. (1898) A. C. 321; *Crosbie Hill* v. *Sayer* (1908) 1 Ch. 866.
(w) (1912 1 Ch. 735.
(x) *Kanhaiya Lal* v. *Ikram* (1933) 8 Luck. 103, 139 I.C. 358, ('32) A.O. 268.
(y) *Dinobundhu Shaw* v. *Jogmoya Dasi* (1902) 29 Cal. 154, 29 I. A. 9; *Girdhar Das* v. *Ram Autar Singh* (1903) 8 Cal. W. N. 690; *Tara Sundari* v. *Khedan Lal* (1909) 14 Cal. W. N. 1089, 7 I. C. 980; *Andi Thevan* v. *Nagayasami* (1928) 55 Mad. L. J. 369, 111 I. C. 266, ('28) A.M. 703; *Kalimuddin* v. *Baidyanath* (1930) 51 Cal. L. J. 506, 128 I. C. 192, ('30) A.C. 572.

S. 101 the existence of a subsequent incumbrance prevents merger. In theory this is correct, for there can only be merger when the ownership and the charge meet; and in such a case it is to the advantage of the owner that the charge should merge, for that simplifies title (z). But this union cannot occur if any interest of a third person intervenes and if there is any outstanding interest, for then there can be no union of the charge and absolute ownership (a). Thus there is no merger if a leasehold interest is outstanding when the mortgagee purchases the equity of redemption (b). In the passage cited from *Adams* v. *Angell*, Jessel, M.R., pointed out that there is no merger when a tenant for life pays off a charge and it is obvious that in such a case merger would only operate as a gift to the reversioner (c). Again in practice the result is the same as under the rule of intention, for the existence of a subsequent incumbrance is the only case in which it is beneficial to keep the charge alive (d).

The old section 101 included the case of merger which occurs when the mortgagee purchases the equity of redemption and the converse case when the purchaser of the equity of redemption redeems the mortgagee. The latter case falls under secs. 91 and 92 of this Act and has already been dealt with. The former case is the subject of this section. The decisions have been under the rule of intention implied in sec. 101, and these cases are still good law, subject to this qualification that in consequence of the amendment made in the section, the section applies only when there is a subsequent mortgagee or charge-holder. It does not apply to a Court purchaser of the equity of redemption (e).

Rule of intention.—The fact that the mortgage deed was retained by the mortgagee after the purchase of the equity of redemption was held to indicate an intention to keep the mortgage alive (f), but in these cases there was a puisne mortgage. If the purchasing mortgagee has granted a sub-mortgage, that also is evidence that he intended to keep the mortgage alive (g). On the other hand the fact that the mortgagee purchased in the name of her son was held not to be evidence of an intention to keep the mortgage alive, because there was no puisne mortgage (h). When a mortgagee purchased the equity of redemption at a sale in execution of a money decree he did not lose priority over a puisne mortgage, although by mistake no mention was made of it in the sale proclamation (i). It has been held that a contract which operates to deprive the prior mortgagee of his charge upon the property when he became the owner of it under a sale must be a clear one (j).

The presumption has been held to be a rebuttable presumption (k), and no doubt even under the present section the purchasing mortgagee may by express declaration

(z) *Donisthorpe* v. *Porter* (1762) 2 Eden. 162, 163.

(a) Cf. per West, J., in *Mulchand Kuber* v. *Lallu Trikam* (1882) 6 Bom. 404, 413 [F.B.]; *Sonaulla Karikar* v. *Abu Sayad* (1930) 57 Cal. 473, 126 I.C. 413, ('30) A.C. 530; cf. *Gunindra Prosad* v. *Baijnath* (1904) 31 Cal. 370.

(b) *Mangtulal* v. *Upendra Lal* (1930) 57 Cal. 82, 125 I.C. 661, ('30) A.C. 335.

(c) *Burrell* v. *Egremont (Earl)* (1844) 7 Beav. 205, 232.

(d) *Raja of Kalahasti* v. *Sree Mohant Prayag* (1916) 30 Mad. L.J. 391, 400, 35 I.C. 224.

(e) *Baswannewa* v. *Dadgowda* (1942) A.B. 95, following *Keda Nath* v. *Bhagwant Prasad* (1936) A.P. 404, 15 Pat. 120, 163 I.C. 301 and dissenting from *Mahalakshmi* v. *Somaragu* (1939) A.M. 393, 189 I.C. 17, (1939) Mad. 660.

(f) *Shantappa* v. *Balapa* (1882) 6 Bom. 561; *Prayag Narain* v. *Chedi Rai* (1909) 14 Cal. W. N. 1093; *Gauri Shankar* v. *Bahadur Singh* (1925) 88 I. C. 340, ('25) A.P. 605.

(g) *Radha Kishan* v. *Fakharuddin* (1934) 154 I. C. 695, ('34) A. L. 143.

(h) *Gobind Sarup* v. *Kaldup Singh* (1924) 73 I.C. 764, ('24) A.L. 377; *Lala Lakhmichand* v. *Partab Singh* (1930) 12 Lah. L. J. 56, 128 I.C. 296, ('30) A.L. 620.

(i) *Ram Sarup* v. *Bharat Singh* (1921) 43 All. 703, 64 I.C. 765, ('21) A.A. 113; *Gurdit Singh* v. *Hakumat Rai* (1931) 135 I. C. 201, ('32) A.L. 56.

(j) *Madan Mohan* v. *Nand Ram* (1943) A.A. 156.

(k) *Gaya Prasad* v. *Salik Prasad* (1881) 3 All. 682, 687; *Matadin* v. *Kasim* (1891) 13 All. 432 (head note); *Shan Maun* v. *Madras Building Co.* (1892) 15 Mad. 268, 280; *Bai Reva* v. *Vali Mahomed* (1922) 46 Bom. 1009, 70 I.C. 912, ('22) A. B. 211; *Triuvengadam* v. *Sabapathi* (1925) 49 Mad. L.J. 361, 90 I.C. 767, ('25) A. M. 1217; *Mahl Singh* v. *Amar Nath* (1926) 7 Lah. 212, 94 I.C. 152, ('26) A.L. 430.

extinguish the mortgage in spite of the existence of a puisne mortgage, although to quote the phrase of James, L.J., in *Locking* v. *Parker* (*l*), he would be demented if he did so. A mere mention in a sale deed that of the amount due upon a prior mortgage is not sufficient to justify the conclusion that the merger was intended (*m*). In *Mt. Chanda Bibi* v. *Mohanram Sahu* (*n*) there was a mortgage of 1899. The mortgagee dies in 1905 and his widow purchased the equity of redemption in 1908. Her son succeeded to the property in 1909 and the Court held on the evidence that the presumption of an intention to keep the mortgage alive and so have priority over a charge of 1905 was not rebutted.

Lindley, L.J., in *Liquidation Estates Purchase Co.* v. *Willoughby* (*o*) held that the benefit which gives rise to the presumption must be a benefit accruing to the vendee on the date of the sale, and not a possible benefit which may arise in future on the happening of a possible contingency. This has been followed in cases in which the mortgagee after the purchase has been sued by a pre-emptor (*p*). The conclusion would be the same under the present section which refers only to a puisne mortgage or charge in existence at the date of the purchase. The Privy Council laid down the same rule in *Gokuldoss* v. *Rambux* (*q*). In *Bhawani Kumar* v. *Mathura Prasad* (*r*) the mortgagee purchased the property on the 19th March 1900 and nine days later a charge for arrears of land revenue arose for non-payment of which the land was sold by the Collector. The revenue sale purchaser sued to recover possession and the mortgagee set up his mortgage as a defence. The Privy Council held that the mortgage was extinguished by merger, for on the 19th March, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such. In this case there was a merger, for the charge was not in existence on the date of the purchase. On the other hand the words of the old section " or such continuance would be for his benefit " do not limit the benefit to a benefit accruing at the time of the sale. It has therefore been held under that section that if the continuance is for the benefit of the purchaser, no question of intention need be considered (*s*). When the charge for rent is in existence at the date of the mortgagee's sale, the mortgage is not extinguished by merger (*t*).

The rule of intention was applied in many cases before the Act in the case of a mortgagee purchasing the equity of redemption (*u*). But the application of this rule must depend on the circumstances present at the time of the mortgagee's acquisition of full ownership (*v*).

(*l*) (1872) 8 Ch. App. 30.

(*m*) *Madan Mohan* v. *Nand Ram* (1943) A.A.156.

(*n*) (1934) 13 Pat. 200, 153 I.C. 412, ('34) A.P. 134.

(*o*) (1896) 1 Ch. 726 C.A. on app. (1898) A.C. 321.

(*p*) *Jugal Kishore* v. *Ram Narain* (1912) 34 All. 268, 13 I.C. 619; *Durshan Singh* v. *Arjun Singh* (1926) 1 Luck. 560, 98 I.C 28, ('26) A.O. 606.

(*q*) (1884) 10 Cal. 1035, 11 I. A. 126; *Mahalakshmammal* v. *Sriman Madhawu* (1912) 35 Mad. 642, 11 I.C. 865; *Shankar* v. *Sadashiv* (1914) 38 Bom. 24, 31, 21 I.C. 39; *N. V. N. Natchiappa Chettyar* v. *Ko Tha Zan* (1928) 6 Rang. 488, 113 I.C. 809, ('28) A. R. 287.

(*r*) (1913) 40 Cal. 89, 39 I.A. 228, 16 I.C. 210, followed in *Sabjan Mandal* v. *Haripada Saha* (1920) 25 Cal. W. N. 424, 66 I.C. 108, ('21) A.C. 599; and *Indra Narayan* v. *Tarini Prosad* (1926) 90 I.C. 746, ('26) A.C. 165.

(*s*) *N.V.N. Natchiappa Chettiar* v. *Ko Tha Zan*, *supra*; *Ko Po Kun* v. *C.A.M.L.A.L. Firm* (1932) 10 Rang. 465, 140 I. C. 620, ('32) A. R. 197.

(*t*) *Bidhumukhi Dasi* v. *Babha Sundari* (1919) 24 Cal. W. N. 961, 59 I.C. 868; *Sita Chandra* v. *Parbati Charan* (1922) 35 Cal. L.J. 1, 69 I.C. 841. ('22) A.C. 32.

(*u*) *Ramu* v. *Subbaraya* (1875) 7 Mad. H. C. 229; *Lachmin Narain* v. *Koteshar Nath* (1880) 2 All. 826; *Bissen Dass* v. *Sheo Prasad* (1880) 5 Cal. L. R. 29; *Gaya Prasad* v. *Salik Prasad* (1881) 3 All. 682; *Har Prasad* v. *Bhagwan Das* (1882) 4 All. 196; *Ali Hasan* v. *Dhirja* (1882) 4 All. 518; *Shantapa* v. *Balapa* (1882) 6 Bom. 561; *Goluk Nath Misser* v. *Lalla Prem Lal* (1878) 3 Cal. 307 (renewal of mortgage).

(*v*) *Damodar Sami* v. *Govindarajalu* (1943) A.M. 429, (1943) Mad. 581, (1943) 1 M.L.J. 291, 56 M.L.W. 194, 208 I.C. 370 (F.B.).

S. 101

Instances in which, on a mortgagee purchasing, the security was held to be merged under the rule of intention are cited in foot-note (*w*); in all these cases there was no puisne mortgage. In some cases it has been held that sec. 101 is not applicable and the equitable rule of intention to keep alive the mortgage should be applied, even though there is no puisne incumbrance (*x*).

If the mortgagee after filing a suit on his mortgage, purchases the equity of redemption at a sale in execution of a simple money decree the mortgage is extinguished by merger and the suit must be dismissed (*y*). The case of *Lachman Prasad* v. *Lachmeshwar* (*z*) was a case of the purchase of the equity of redemption by a mortgagee. There was a mortgage in 1908 to a son and then a sale of the equity of redemption in 1914 to the father of a joint and undivided family who was for all intents and purposes the mortgagee himself. The father retained part of the price to pay off the mortgage, but a few days before his purchase a part of the equity of redemption was sold in execution of a money decree to the defendant. The father's purchase as to this part of the property failed and the Court held that the father could not enforce any part of the mortgage against the defendant on the ground that he had redeemed the mortgage at the time of his purchase. In other words the mortgage as to part was extinguished by merger and as to the part sold in execution the father's covenant to pay off the mortgage excluded his right of subrogation. The principle of this decision was followed by the Patna High Court in *Kedar Nath* v. *Bhagwat Prasad* in which it was held that a partial failure of consideration did not avoid the sale and the sale extinguished the mortgage security (*a*) *Daso Pillai* v. *Narayan Patro* (*b*) was a case in which a mortgage was extinguished by merger in a sale which could not be enforced. There was a mortgage by *A* to *B*. *C* obtained a money decree against *A* but before execution *B* purchased the equity of redemption. When *C* attached the property *B* objected that he had purchased it. *B*'s objection was dismissed and the property was sold and purchased by *C*. *B* omitted to sue under O. 21, r. 63, for a declaration of his title; but sought to enforce his mortgage against *C*. The Court held that the mortgage was extinguished by merger in the sale. *B*'s omission to file a suit for a declaration of his title was disastrous, for he lost his remedy both under the sale and the mortgage. It should be noticed that at the time of *B*'s purchase there was no incumbrance outstanding.

Instances in which on the mortgagee purchasing the equity of redemption the security has been held not to be merged under the rule of intention are cited in foot-note (*c*), and in all these cases there was a puisne mortgage.

(*w*) *Mastulla Mandal* v. *Jan Mamud* (1901) 28 Cal. 12 (mortgagee purchasing in execution of a rent decree); *Ahmad Shah* v. *Walidad Khan* (1906) P. R. 98; *Sri Ram* v. *Ramji Das* (1909) P.R. 59 I.C. 949; *Bapu* v. *Mahadaji* (1894) 18 Bom. 348, 354; *Baldeo Prasad* v. *Mahabir* (1913) 18 I.C. 99; *Arumagasundara* v. *Narasimha* (1915) 29 Mad. L. J. 583, 29 I.C. 916; *Raja of Kalahasti* v. *Sree Mahant Prayag* (1916) 30 Mad. L.J. 391, 35 I.C. 224; *Jawahir Mal* v. *Udai Ram* (1916) 31 I.C. 891 (usufructuary mortgagee purchasing in execution of his own decree on a simple mortgage); *Rai Rewa* v. *Vali Mahomed* (1922) 46 Bom. 1009, 70 I.C. 912. ('22) A.B. 211; *Ram Sahai* v. *Mahabir Singh* (1943) A.O. 407, (1943) O.W.N. 320, 209 I.C. 23.

(*x*) *Ram Sahai* v. *Manohar Prasad* 1943 A.O. 407, (1943) O.W.N. 320, 209 I.C. 23; *Mahalakshmi* v. *Somaraju* (1939) A.M. 393, (1939) *Mad.* 600, (1939) 2 M.L.J. 72, 49, M.L.W.280, (1939) M.W.N. 189, but see *Baswanewa* v. *Dadgowda* (1942) A.B. 95 following (1936) A.P. 404 and dissenting from (1939) A.M. 393.

(*y*) *Balamani Ammal* v. *Rama Aiyar* (1925) 48 Mad. L.J. 273, 87 I.C. 57, ('25) A.M. 786.

(*z*) (1922) 20 All. L.J. 151, 66 I.C. 203, ('22) A.A. 76.

(*a*) (1935) 15 Pat. 120, 163 I.C. 391, (1936) A.P. 404.

(*b*) (1933) 57 Mad. 195, 65 Mad. L J. 819, 148 I.C. 121, ('33) A.M. 879.

(*c*) *Baldeo Prasad* v. *Uman Shankar* (1910) 32 All. 1, 4 I.C. 810; *Syed Ibrahim* v. *Arumugathayee* (1915) 38 Mad. 18, 16 I.C. 877; *Suppa Sokkaya* v. *Sappu Bhattar* (1918) Mad. W.N. 41, 43 I.C. 714; *Madho Singh* v. *Pancham Singh* (1927) 49 All. 233, 101 I.C. 409, ('27) A.A. 211; *Ram Sarup* v. *Ram Lal* (1922) 44 All. 659, 75 I.C. 472, ('22) A.A. 394; *Phulchand* v. *Surji* (1923) 74 I.C. 684, ('23) A.A. 457; *Durshan Singh* v. *Arjun Singh* (1926) 1 Luck. 560, 98 I.C. 28, ('26) A.O. 606; *Hanwant Raj* v. *Ram Harakh* (1927) 103 I.C. 802, ('27) A.O. 341; *Bansidhar* v. *Jagmohan Das* (1928) 3 Luck. 472, 110 I.C. 79, ('29) A.O. 88; *Sonaulla Karikar* v. *Abu Sayad* (1930) 57 Cal. 478, 126 I.C. 413, ('30) A.C. 530; *Kalimuddin* v. *Baidyanath* (1930) 51 Cal. L.J. 565, 128 I.C. 192, ('30) A.C. 572; *Abdul Majid* v. *Arunachala* (1931) 61 Mad. L.J. 857, 136 I.C. 305, ('32) A.M. 84; *Upendra Nath Samanta* v. *Saroda Prosad Ghose* (1932) 36 Cal. W.N. 696, 140 I.C. 589, ('32) A.C. 772; *Makhan Lal* v. *Gokal Chand* (1932) 138 I.C. 699, ('32) A.L. 237.

Illustrations.

(1) *A* mortgages property to *B*. *B* sues *A* to realize the mortgage debt. During the pendency of the suit *B* purchases the equity of redemption in execution of a money decree against *A*. The mortgage is extinguished by merger and *B*'s suit must be dismissed: *Balamani Ammal* v. *Ram Aiyar* (1925) 48 Mad. L.J. 273, 87 I.C. 57, ('25) A.M. 786. **S. 101**

(2) *A* mortgages property first to *B* and then to *C*. *B* obtains a decree on his mortgage, and instead of bringing the property to sale makes a further advance to *A* and takes a fresh mortgage for the decretal amount plus the further advance. *C* claims priority over *B*. But *B*'s first mortgage is not extinguished by merger as there is a subsequent mortgage, and *B* is entitled to priority over *C* in respect of the decretal amount: *Mahalakshmammal* v. *Sriman Madhwa* (1912) 35 Mad. 642, 11 I.C. 865.

(3) *A* mortgaged property to *B* in 1915. *A* then sold the property to *C* in 1916, and a month later professed to sell the property to *B*. *B* took possession but was evicted by *C*. *B* then sued *C* on the mortgage and *C* contended that the mortgage was extinguished by merger. Held that there was no merger (i) because *B* got nothing by his purchase, for *A* had already parted with the equity of redemption and (ii) because at the time of the purchase *C*'s interest was outstanding: *Sonaulla Karikar* v. *Abu Sayad* (1930) 57 Cal. 473, 126 I.C. 413, ('30) A.C. 530.

Charge.—When a landlord in execution of a decree for rent purchases his tenant's holding he is entitled to use his rent-charge as a shield against a mortgagee of the tenant (*d*).

As between himself and subsequent mortgagee.—When the mortgagee purchases the equity of redemption and acquires ownership he may keep the mortgage alive for his own defence as against a puisne incumbrancer. He is entitled to remain in possession until the subsequent mortgagee has redeemed the prior mortgage irrespective of the question of limitation on the prior mortgage (*e*). He can use the equity of redemption by way of attack also (*f*). But the mortgage is nevertheless extinguished as between the mortgagee and the mortgagor or as between the mortgagee and a stranger. Thus the purchasing mortgagee has no claim for interest after the date of his purchase (*g*) and he cannot enforce his mortgage by suit (*h*). It has been said that the rights of the mortgagee merge in those of the mortgagor or remain in suspense until they are needed for purposes of defence against the puisne mortgagee (*i*). Where a mortgagee purchases part of the mortgaged property in full satisfaction of his claim the equities between the prior and puisne mortgagee are to be worked out by the executing Court when the properties are directed to be sold or the sale proceeds are to be worked out. Although the prior mortgagee cannot claim the benefit of subrogation, he is entitled to keep his mortgage alive as against the puisne mortgagee (*j*).

Where purchasing mortgagee is also puisne mortgagee.—If the purchasing mortgagee is also the puisne mortgagee, no estate intervenes and there is a merger of both mortgages in the estate of ownership. This occurred in the case of *Laxman Ganesh* v. *Mathurabai* (*k*). There was a first mortgage in 1886 to *G* and a second mortgage in 1894 also to *G*. *G* in 1895 brought a suit for sale on the first mortgage and purchased with leave of the Court subject to the second mortgage. At a partition in 1905 between *G*'s grandson and *G*'s widowed daughter-in-law the second mortgage was allotted to the

(*d*) *Meherunnesa* v. *Sham Sundar* (1901) 6 Cal. W.N. 834.

(*e*) *Hari Ram* v. *Minaksi Rani* (1939) A.A. 660. See also *Ram Sarup* v. *Ram Lal* (1922) A.A. 394, 44 All. 659, 75 I.C. 472, 20 A.L.J. 596; *Nazani Din* v. *Ram Sukh Das* (1938) A.L. 286; *Sengamuthu* v. *Thayarammal* (1940) A.M. 646, (1940) 1 M.L.J. 740, (1940) M.W.N. 256.

(*f*) *Bohra Bhup Singh* v. *Sakha Ram* (1945) A.A. 158, (1945) All. 186, (1945) A.L.J. 101, 221 I.C. 434.

(*g*) *Syed Ibrahim Sahib* v. *Arumugathayee* (1915) 38 Mad. 18, 16 I.C. 877.

(*h*) *Arumugasundara* v. *Narasimha* (1915) 29 Mad. L.J. 583, 29 I.C. 916.

(*i*) *Ram Sarup* v. *Ram Lal* (1922) 44 All. 659, 75 I.C. 472, ('22) A.A. 394.

(*j*) *Rama Aiyar* v. *Bagavathi Murthu* (1936) A.M. 473, 70 M.L.J. 506, 163 I.C. 884.

(*k*) (1914) 38 Bom. 369, 23 I.C. 121.

S. 101

grandson and the sale certificate to the daughter-in-law. The grandson sued to enforce the mortgage and the suit was dismissed on the ground that, as *G* as puisne mortgagee could not have sued himself as owner, those claiming under him could have no higher right. The effect of the judgment was that after *G*'s purchase both his mortgages merged in the estate of ownership, and the sale certificate and the puisne mortgage deed were both deeds of the same title. Where a subsequent usufructuary mortgagee paid off a foreclosure decree obtained by a prior mortgage to save the property from foreclosure and later sued the mortgagor to recover the amount so paid and obtained a foreclosure decree, it was held that he had no intention to keep his own mortgage alive (*l*).

Novation.—Novation differs from merger in that the securities are of equal degree and the one security is accepted in lieu of the other, *e.g.*, in *Badri Prasad* v. *Daulat* (*m*) where the second mortgage bond was to different obligees. When this occurs the old security is extinguished. But if the new security fails there has been no substitution and therefore no extinction of the old security. Thus in *Har Chandi Lal* v. *Sheoraj Singh* (*n*) a Hindu mortgaged his 5/6th share of a village, and his separated nephew mortgaged his 1/6th share to the same mortgagee. After the Hindu's death his widow and the nephew mortgaged the whole village for the same debt to the same mortgagee. The mortgagee sued on the last mortgage but it was held not to be binding on the widow. After the widow's death the nephew succeeded to the 5/6th share and was held to be liable on the first mortgage. The intention to substitute a new mortgage of the 5/6th share having failed, the Privy Council said it was not consistent with equity and good conscience that the new mortgage should operate as a release of the old.

In such a case the remedy on the old security might become barred by estoppel or *res judicata*. In *Sheoraj* v. *Harchandi Lal* (*o*), an earlier stage of the litigation in the case last cited, when the mortgage on the whole village was held to be not binding on the widow the mortgagee sued on her late husband's mortgage, but the suit failed as he might and ought to have sued her on the earlier mortgage.

Renewal.—Renewal differs from Novation in that a new security is taken without extinguishing the old. Under the doctrine of subrogation a third mortgagee redeeming a first mortgage acquires the rights of the first mortgagee, and has priority over the second mortgage only as regards the first mortgage but not as regards the third mortgage (*p*). Conversely a first mortgagee making a fresh advance after a second mortgage, on a renewed mortgage, even if that fresh advance is to pay off the first mortgage, retains priority over the second mortgagee as regards the first mortgage but not as to the fresh advance in respect of which he is in the position of third mortgagee. The best illustration is the case of *Gopal Chunder* v. *Herembo* (*q*). The first mortgage was in 1882 by Herembo to the plaintiff of his one-third share of a property for Rs. 1,000 with interest at 12 per cent. The second mortgage was also by Herembo of the same share to the defendant for Rs. 1,000 with interest at 18 per cent. The third mortgage was by Herembo and his two brothers, to the plaintiff of the whole property for Rs. 3,400 with interest at 18 per cent. The consideration was the balance due on the first mortgage plus a further cash advance of Rs. 100 and with reference to the first mortgage it contained the following recital: "Now in order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we will

(*l*) *Gafoor Khan* v. *Baldeo* (1943) 208 I.C. 180, (1943) A.O. 284.
(*m*) (1880) 3 All. 706.
(*n*) (1917) 39 All. 178, 44 I.A. 60, 39 I.C. 343, ('16) A.PC. 68.
(*o*) (1913) 11 All. L.J. 365, 19 I.C. 127.
(*p*) *Seetharama* v. *Venkatakrishna* (1893) 16 Mad. 94; *Alangaran Chetti* v. *Lakshmanan Chetti* (1897) 20 Mad. 274; *Kanhaiya Lal* v. *Gulab Singh* (1932) 7 Luck. 655, 138 I.C. 206, ('33) A.O. 9.
(*q*) (1889) 16 Cal. 523, 528; *Punjab and Sind Bank* v. *Kishen Singh* (1935) 156 I.C. 795, ('35) A.L. 359.

pay at the rate of Rs. 1-8 per month and within 12 months from this day's date we will repay the whole amount in full, principal as well as interest." Upon these facts the transaction was held to be a fresh advance and a fresh security given both for the old debt and the fresh advance, and that the first mortgage remained alive for the protection of the plaintiff against the second mortgagee. A prior mortgagee taking another mortgage in renewal of his own does not on that account lose priority over a *mesne* mortgage even though the renewed mortgage includes other property and varies the rate of interest (*r*). But if the first mortgage is time-barred, the mortgagee making a fresh advance on a renewed mortgage has no right of priority over the *mesne* mortgagee (*s*). The renewal of a mortgage by a person with a limited interest, *i.e.*, the son having only a life interest under the will of his father, the deceased mortgagor, cannot operate as a discharge of the first mortgage (*t*). And when a mortgagor gave a third mortgage consolidating two prior mortgages and the third mortgage was found invalid for want of registration, he was allowed to redeem the prior mortgages (*u*). In an Allahabad case (*v*), there were two mortgages, the first to *K* and the second to *N.R.* *K* obtained a decree for sale on his mortgage, but the mortgagor gave a usufructuary mortgage to *K* which *K* accepted in satisfaction of the decree. The Court held that *K* could not use his first mortgage as a shield against *N.R.* This was incorrect, for the existence of the subsequent incumbrance showed that *K* could not have abandoned his prior security. On similar facts a contrary conclusion was arrived at in a Madras case (*w*).

In *Tenison* v. *Sweeny* (*x*), where successive mortgages were for the sum secured by the former mortgage and for the sums subsequently advanced, Lord St. Leonards said: "It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages, and that the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether, by taking a new security for their old debt and for further advances, they do not prejudice their original securities." Accordingly when a prior mortgagee purchased the rights of a puisne mortgagee, it was held that he did not lose the rights that were secured to him by the prior mortgage (*y*).

But of course the creditor can if he chooses abandon his original security in favour of the new one. Thus if he gets a decree on the first mortgage and certifies satisfaction of the decree (*z*), or admits in a recital in the subsequent mortgage that the first mortgage has been satisfied (*a*), he will not be allowed to fall back on it. But the mere fact that the mortgagee has filed a suit on the first mortgage does not show that he has abandoned it (*b*). Again in *Shankar* v. *Mejo Mal* (*c*) the Privy Council held that a suit on a second mortgage incorporating the first does not, apart from abandonment, necessarily have the effect of releasing the earlier security. In that case there was a first mortgage to the plaintiff of certain villages for Rs. 15,500, a second mortgage to the defendant of the same villages for Rs. 7,000, and a third mortgage again to the plaintiff of the same and other villages for Rs. 20,000 inclusive of the Rs. 15,500 due on the first mortgage. Decrees for sale were obtained on the second and third mortgages only, and in distributing the sale proceeds the Court gave priority to the defendant as the plaintiff had not sued

(*r*) *Goluknath Misser* v. *Lalla Prem Lal* (1878) 3 Cal. 307; *Gopal Chunder* v. *Herembo* (1889) 16 Cal. 523; *Inderdawan Pershad* v. *Gobind Lall* (1896) 23 Cal. 790; *Baij Nath Hoenka* v. *Daleep* (1920) 58 I.C. 489.

(*s*) *Kanhaiya Lal* v. *Gulab Singh* (1932) 7 Luck. 655, 138 I. C. 206, ('33) A.O. 9; *Radhakishen* v. *Babu Hazarilal* (1944) A.N. 168 F.B.

(*t*) *Skinner* v. *Nauni Lal Singh* (1913) 35 All. 211, 40 I.A. 105, 19 I.C. 267.

(*u*) *Arumugam* v. *Periasami* (1896) 19 Mad. 160.

(*v*) *Nakta Ram* v. *Moti Ram* (1906) All. W.N. 191.

(*w*) *Mahalakshmammal* v. *Sriman Madhwa* (1912) 35 Mad. 642, 11 I.C. 865, followed in *Velayuda Reddi* v. *Narasimha* (1917) 32 Mad. L.J. 263, 38 I.C. 240.

(*x*) (1844) 1 Jo. and Lat. 710, 717.

(*y*) *Fateh Ali* v. *Gehna* (1928) 9 Lah. 88, 112 I.C. 17, ('28) A.L. 301.

(*z*) *Ramkrishna* v. *Chothmal* (1899) 18 Bom. 348.

(*a*) *Chhagan Lal* v. *Muhammad Husain* (1919) 41 All. 456, 51 I.C. 133 F.B.

(*b*) *Purgamal* v. *Venkata* (1897) 20 Mad. 486.

(*c*) (1901) 23 All. 313, 28 I.A. 203.

Ss. 101, 102

on his first mortgage. The plaintiff then sued for recovery of the sale proceeds on the ground of priority under the first mortgage. The Privy Council held that the distribution was not conclusive of the rights of the parties that the third mortgage did not impair the effect of the first, and that the fact of the plaintiff suing on the third mortgage alone did not lead to the inference that he had abandoned his rights on the first, for it was not necessary for him to do so in order to recover the whole debt.

Notice and Tender.

Service or tender on or to agent.

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient:

Provided that, in the case of a notice required by section 83, *in the case of a deposit, the application shall be made to the Court in which the deposit has been made.*

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit *in any Court in which a suit might be brought for redemption of the mortgaged property* the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Amendment.—The section has been amended by Act 20 of 1929. The old section was as follows:—

"Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person, or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount."

See notes to sec. 103.

Notice, etc., to or by person incompetent to contract.

103. Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served *on or by*, or tender or deposit made, accepted, or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of *Order XXXII in the First Schedule to the Code of Civil Procedure*, 1908, shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Sections 102 and 103 deal with matters of procedure. Notice would be under secs. 69 and 83 and tender on redemption under sec. 60. The sections generally follow sec. 196 of the Law of Property Act, 1925. The third paragraph in sec. 102 is new and was inserted by the Amending Act 20 of 1929 to make it clear that the application for service of notice under sec. 83 should be made to the Court in which the deposit has been made. This notice is notice consequent on the deposit having been made (*d*). Power to apply to the Court for directions as to service of notice and as to tender by deposit in Court is now limited to cases in which the whereabouts of the mortgagee or his agent are entirely unknown to the mortgagor. Under the old sec. 102 it was sufficient if they could not be found in the district. The amendments in sec. 103 are merely clerical.

Power to make rules.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

Rules have been framed under this section by the various High Courts. It has been held that such rules prevail over the general terms of the Code of Civil Procedure (*e*).

(*d*) *Ganeshi Lal* v. *Rohni Rukumdhuj* (1928) 50 All. 655, 108 I.C. 570, ('28) A.A. 311.

(*e*) *Vrajlal* v. *Venkataswami* (1928) 52 Bom. 459, 106 I.C. 794, ('28) A.B. 123.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

S. 105

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered, periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lease defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Lessor, lessee, premium and rent defined.

Lease.—The relation of lessor and lessee is one of contract, and in Bacon's Abridgement a lease is defined as "a contract between the lessor and the lessee for the possession and profits of land, etc., on the one side and recompense by rent or other consideration on the other." Hence it has been held that "a mere demand for rent is not sufficient to create the relationship of landlord and tenant which is a matter of contract assented to by both parties (*f*)." When the agreement vests in the lessee a right of possession for a certain time it operates as a conveyance or transfer and is a lease. The section defines a lease as a *partial* transfer, *i.e.*, a transfer of a right of enjoyment for a certain time. The essential elements of a lease are:—

(1) the parties,
(2) the subject-matter, or immoveable property,
(3) the demise, or partial transfer,
(4) the term, or period,
(5) the consideration, or rent.

(1) *The Parties.*

Parties.—The parties are the lessor and the lessee. The lessor is called the landlord. The word "tenant" is used in English law to denote ownership, for under the feudal system an owner is a tenant of the Crown. The word in English law is therefore generally associated with words denoting the quality of the ownership, *e.g.*, Tenant in fee simple, or Tenant in tail, or Tenant *pur autre vie.* The word is also used in this sense in Indian law in such expressions borrowed from the English law as joint tenant, tenant in common and tenant for life. But as the feudal system never applied in India (*g*) the proper meaning of the word tenant in Indian law is a lessee, especially when used in opposition to landlord (*h*).

Lessor.—An absolute owner, who is under no personal incapacity, can grant a lease for any term he pleases. A limited owner can grant a lease only to the extent

(*f*) *Deo Nandan* v. *Meghu* (1907) 34 Cal. 57, 62.
(*g*) See *Ranee Sonet Kowar* v. *Mirza Himmat Bahadur* (1876) 3 I.A. 92 ('The principles of English Feudal law are clearly inapplicable to a Hindu zemindar' per Sir James Colvile at p. 101).
(*h*) *Ekambara Ayyar* v. *Meenatchi Ammal* (1904) 27 Mad. 401 F.B.

permitted by law. Thus a lease by a tenant for life will not endure beyond his death, unless he is especially empowered under the terms of the deed of settlement. S. 105

Joint tenants have unity of title. A lease by joint tenants operates as a lease by each and by all. On the death of any one of the joint tenants the lessee holds under the survivors. Tenants in common have unity of possession but not of title. A lease by tenants in common operates as a separate demise by each of his share, and a confirmation by the others (*i*); and each tenant in common may by separate demise lease his own share only (*j*). But their lessees have not unity of possession and are not tenants in common *inter se* (*k*).

Competency to grant a lease depends upon competency to transfer under sec. 7. The lessor must therefore be competent to contract and have title or authority.

In English law a minor cannot hold a legal estate in land (*l*). Before the Law of Property Act, 1925, a lease by a minor was voidable, but might be ratified on his attaining majority. But as a minor's contract is void in India, it follows that a minor is not competent to be a lessor. See note "Minor" under sec. 7. A lease by a minor has been held to be void even though it was made by an instrument executed only by the lessee (*m*).

Restrictions on the power of the owner to grant leases have been imposed in the case of disqualified land owners and of encumbered estates under management by various local Acts.

The guardian of the property of a minor has authority without the permission of the Court to grant a lease for a term not exceeding five years or enuring for more than one year after the minor attains majority—Guardian and Wards Act, 1890, sec. 29 (b). The powers of a testamentary guardian or a guardian appointed by a deed are limited by the terms of the will or of the instrument of appointment—Guardian and Wards Act, 1890, sec. 28.

The power of an executor or administrator to grant a lease is regulated by sec. 307 of the Indian Succession Act 39 of 1925.

Lessee.—Leases may be granted to any person who is competent to contract at the date of execution. A lease may be granted to several persons who may take as tenants in common or as joint tenants. In the case of joint tenants the interest of each person passes upon death to the survivors. In the case of tenants in common the interest of a deceased lessee passes at his death to his representatives. Thus in a lease to a partnership the surviving partners are trustees for the representatives of the deceased partner in respect of the latter's share. But if two or more persons hold a demise under one lease, then, in the absence of a clear provision to the contrary, the entire body of tenants constitutes a single tenant *qua* the landlord (*n*).

Where a person convicted of permitting disorderly conduct in a café subsequently under a different name took a lease of premises in the neighbourhood for conducting a restaurant, it was held that the consideration of the person with whom the landlord was entering into the lease was a vital element in that agreement so that the landlord having been mistaken with regard to the identity of the lessee the lease was void *ab initio* (*o*).

(*i*) *Thompson* v. *Hakewill* (1865) 19 C.B. (N.S.) 713, 726 per Byles, J.

(*j*) *Jacob* v. *Seward* (1872) L.R. 5 H.L. 464.

(*k*) *Manimohan Pal* v. *Gour Chandra Das* (1933) 60 Cal. 1212, ('34) A.C. 71.

(*l*) Law of Property Act, 1925, s. 1 (6).

(*m*) *Govinda Kurup* v. *Chowakkaram* (1931) 59 Mad. L.J. 941, 129 I.C. 449, ('31) A.M. 147.

(*n*) *Motilal* v. *Kartar Singh* (1930) 11 Lah. 427, 127 I.C. 1, ('30) A.L. 815 F.B.; *William White* v. *Tyndall* (1888) 13 A.C. 263.

(*o*) *Sowler* v. *Potter* (1940) I. K. B. 271.

S. 105

Section 7 does not apply to transferees; and the general scheme of the Act is that minors may be transferees but not transferors (*p*). Both a sale to a minor and a mortgage to a minor are valid (*q*)—see note under sec. 6 (h) (3). But it has been held that a lease to a minor is void as the lease imports a covenant by the minor to pay rent and other reciprocal obligations (*r*). This was so decided before the Amending Act of 1929, and the present section 107 makes it clear that a lease to a minor must be void, because it is to be executed both by the lessor and by the lessee. If the lease is granted by a minor it is void even if the deed is executed by the lessee (*s*).

(2) *The Subject-matter.*

Subject-matter.—The subject-matter of a lease must be immoveable property as defined in section 3. The subject-matter is therefore not only land and minerals and buildings but also benefits to arise out of land such as fisheries (*t*); ferries (*u*); market dues (*v*); or a *hat*, which is a right to collect certain dues (*w*); or even a right to fell trees for a term of years so that the transferee derives benefit from further growth (*x*)—see note "Things rooted in the earth" under sec. 3. Grass is not immoveable property and in *In re Hormusji Irani* (*y*) a contract for grazing was held not to be a lease. A *yagman vritti* is not immoveable property, and an assignment of a right to collect offerings for a period of years is not a lease (*z*).

If the subject-matter is property not only not in the possession of the lessor but property to which he may never establish title, the so-called lease will be construed as an agreement to lease upon the happening of a contingency (*a*). A mining lease is to be regarded in India as a lease and not as a sale of minerals. The annual payment of royalty would be rent (*b*).

(3) *The Demise.*

Demise.—The word demise is not used in the Act, but it is a term of English law commonly used by conveyancers in India to denote a transfer by lease. The strict technical import of the word (from the Latin *demitto*) is any transfer or conveyance, but by force of habit it is used to denote a partial transfer by way of lease (*c*). The words "transfer of a right to enjoy such property" indicate that all rights of ownership are not transferred. The significance of these words as indicative of the limited estate transferred is apparent if contrasted with those in sec. 54 where a sale is defined as a "transfer of ownership in exchange for a price." In *Giridhari Singh* v. *Megh Lal Pandey* (*d*) Lord Shaw said: "The essential characteristic of a lease is that the subject is

(*p*) *Raghava Chariar* v. *Srinivasa* (1917) 40 Mad. 308, 315, 36 I.C. 221.

(*q*) *Ulfat Rai* v. *Gauri Shankar* (1911) 33 All. 657, 11 I.C. 20; *Narain Das* v. *Mst. Dhania* (1916) 38 All. 154, 35 I.C. 23; *Munni Koer*, v. *Madan Gopal* (1916) 38 All. 62, 31 I.C. 792; *Munia* v. *Perumal* (1911) 37 Mad. 390, 26 I.C. 195; *Subba Reddy* v. *Guruva Reddy* (1930) 120 I.C. 77, ('30) A.M. 425—sales; *Raghava Chariar* v. *Srinivasa* (1917) 40 Mad. 308, 36 I.C. 921; *Madhab Koeri* v. *Baikuntha* (1919) 4 Pat. L.J. 682, 52 I.C. 338; *Thakar Das* v. *Mussammat Putli* (1924) 5 Lah. 317, 82 I.C. 96, ('24) A.L. 611; *Zafar Ahsan* v. *Zubaida Khatun* (1929) 27 All. L.J. 1114, 121 I. C. 398, ('29) A.A. 604—mortgages.

(*r*) *Pramila Bali Das* v. *Jogeshar* (1918) 3 Pat. L.J. 518, 46 I.C. 670; *Govinda Karup* v. *Chowakkaram* (1931) 59 Mad. L. J. 941, 129 I.C. 449, ('31) A.M. 197.

(*s*) *Govinda Karup* v. *Chowakkaram* (1930) 59 Mad. L.J. 941, 129 I.C. 449, ('31) A.M. 147.

(*t*) *Ram Gopal* v. *Nurumuddin* (1893) 20 Cal. 446; *Somerset (Duke)* v. *Fogwell* (1825) 5 B. & C. 875; *Grove* v. *Portal* (1902) 1 Ch. 727.

(*u*) *R.* v. *Nicholson* (1810) 12 East. 330; *Peter* v. *Kendall* (1827) 6 B. & C. 703.

(*v*) *Sikandar* v. *Bahadur* (1905) 27 All. 462.

(*w*) *Surendra Narain Singh* v. *Bhai Lal Thakur* (1895) 22 Cal. 752.

(*x*) *Seeni Chettiar* v. *Santhanathan* (1897) 20 Mad. 58 F.B.

(*y*) (1888) 13 Bom. 87.

(*z*) *Kodulal* v. *Beharilal* (1932) 137 I. C. 136, ('32) A.S. 60.

(*a*) *Mohendra Nath* v. *Kali Proshad* (1903) 30 Cal. 265.

(*b*) *Income Tax Commissioner* v. *Kamaksha Narain* (1940) 20 Pat. 13, 191 I.C. 340, (1940) A.P. 633 following *H. V. Low & Co. Ltd.* v. *Jyoti Prasad Singh Deo* L.R. 58 I.A. 392, I.L.R. 59 Cal. 699.

(*c*) *Greenaway* v. *Adams* (1806) 12 Ves. 395, argument of counsel at p. 397.

(*d*) (1918) 45 Cal. 87, 44 I.A. 246, 250, 42 I.C. 651.

one which is occupied and enjoyed and the *corpus* of which does not in the nature of things and by reason of the user disappear." His Lordship explained that this was the reason why, in the absence of express words, a lease does not include mineral rights. A mining lease is a lease within the definition of sec. 105 as it is a transfer of a right to use part of the surface (e).

A lease therefore is not a mere contract, but is a transfer of an interest in land and creates a right *in rem* (f). It is good against the whole world irrespective of notice and cannot be affected by any subsequent disposition by the lessor. The estate transferred to the lessee is called the leasehold. The estate remaining in the lessor is called the reversion. Even when the lease is in perpetuity there is an interest still remaining in the lessor. In *Kally Dass Ahiri* v. *Monmohini Dassee* (g) Sir Lawrence Jenkins said—"A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest. This result is to be inferred by the use of the word 'lease,' which implies an interest still remaining in the lessor. Before the lease the owner had the right to enjoy the possession of the land, and by the lease he excludes himself during its currency from that right, but the determination of the lease is the removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease." The estate of the lessor and lessee are estates of inheritance, and the interest of the lessor and the lessee after their death vest in their heirs, executors or devisees (h). This is not so expressly stated in the Act for the Act does not deal with the subject of succession (i). A person who obtains a share of a leasehold either by assignment or by inheritance becomes a co-tenant in the whole tenure; and so far as the relations between him and the landlord are concerned he cannot be held to hold any estate in severalty. Each such person becomes a tenant in common of the whole estate by reason of the rule of the indivisibility of the estate without the landlord's consent, and has privity of estate with the landlord in respect of the whole estate (j). Each tenant is liable to the landlord for the whole rent and all covenants running with the land (k). A kharpesh grant made by a zamindar for the maintenance of the junior members of his family is not a lease, although such grant provides for the payment of government revenue and road cess (l).

(4) *The Terms.*

Commencement.—The commencement of a lease must be certain in the first instance, or capable of being ascertained with certainty afterwards, so that both the time when it begins and the time when it ends, is fixed. Section 110 enacts that if the day of commencement is not stated the lease begins from the day of execution. But this does not apply to an executory agreement of lease; and such an agreement is void for uncertainty if the commencement of the term is not mentioned or if there are not materials for ascertaining it (m). However if possession is taken under such an agreement the term will commence from the date of entry (n).

(e) *Fala Krishna Pal* v. *Jagannath Marwadi* (1932) 59 Cal. 1314, 36 Cal. W. N. 709, 56 Cal. L. J. 187, 140 I.C. 788, ('32) A.C. 755.

(f) *Ragoonathdas* v. *Morarji* (1892) 16 Bom. 568; *Kandasami Pillai* v. *Ramaswami Mannadi* (1919) 42 Mad. 203, 51 I.C. 507 F.B.

(g) (1897) 24 Cal. 440 approved by the Privy Council in *Abhiram Goswami* v. *Shyama Charan Nanda* (1909) 36 I.A. 148, 36 Cal. 1003, 4 I.C. 449, and in *Raghunath Roy* v. *Raja of Jheria* (1919) 46 I.A. 158, 47 Cal. 95, 50 I.C. 849; *Venkatesh* v. *Bhujbali* (1933) 57 Bom. 194, 35 Bom. L.R. 60, 142 I.C. 481, ('33) A.B. 97.

(h) *Maharaja Tej Chund* v. *Sri Kanth* (1846) 3 M.I.A. 261; *Shaikh Dahoollah* v. *Shaikh Amanutoolah* (1871) 16 W.R. 147; *Badinath* v. *Bhajan Lal* (1883) 5 All. 191; *Khitish Chandra* v. *Bhikan* (1914) 19 Cal. L.J. 448, 25 I.C. 530; *Gobind Lal* v. *Hemendra* (1890) 17 Cal. 686 P.C.

(i) *Kishori Lal* v. *Krishna Kamini* (1910) 37 Cal. 377, 382, 5 I.C. 500.

(j) *Hollaway* v. *Berkeley* (1826) 6 B. & C. 2.

(k) *United Dairies* v. *Public Trustee* (1923) 1 K.B. 469; *Jagan Mohan Sarkar* v. *Brojendra Kumar* (1926) 53 Cal. 197, 90 I.C. 211, ('25) A.C. 1056 F.B.; *Moti Lal* v. *Kartar Singh* (1930) 11 Lah. 427, 127 I.C. 1, ('30) A.L. 515 F.B.

(l) *Shib Prasad* v. *Lekhraj* (1945) A.P. 182.

(m) *Marshall* v. *Berridge* (1881) 19 Ch. D. 233, 239.

(n) *Doe d. Cornwall* v. *Matthews* (1851) 11 C.B. 675.

S. 105

A lease may commence either in the present or the future, *e.g.*, on the determination of a prior lease for years (*o*). If it is expressed to commence from a past day, that is only for the purpose of computation, and the interest of the lessee begins from the date of execution. Thus in *Bird* v. *Baker* (*p*) by a lease dated the 19th July 1851 premises were demised "to hold from the 25th December 1849 for and during and until the full end and term of fourteen years thence next ensuing" with a proviso enabling the demise to be determined at the expiration of the first seven years thereof, and it was held that the seven years were to be reckoned from the 25th December 1849. But the reference to that date was only a method of calculation and did not convey an interest before the date of execution. Before execution no interest passes (*q*); and conversely the lessee is not liable for breaches of covenants before execution (*r*).

If the lease commences in the future it is sufficient if it is capable of being definitely ascertained when the lease takes effect. Until that time it may be contingent on a future event, for when that event happens the principle *id certum est quod certum reddi potest* applies; and the lease becomes valid and binding. Thus a lease may commence after a life or lives in being (*s*).

Duration.—In India a lease may be in perpetuity; but the common law of England does not recognize a perpetual lease. The grant of a fee simple leaves nothing to the grantor, whereas by a lease the owner carves out an interest subordinate to his own. This feature of the English law is attributed to the Statute of *Quia Emptores* (1290) 18 Edw. 1 c. 1 which enacted that a freeman could sell his land so that the purchaser held under the same chief lord or baron and the freeman did not become a mesne lord between the chief lord and the purchaser (*t*). In a case before the Act, Markby, J., said that the estate of a permanent lessee in India is what English lawyers call an estate in fee (*u*); but this statement is not accurate (*v*).

But in India as in England a mere general letting, *i.e.*, a lease which is silent as to duration of term, would be void as a lease (*w*); though it would create a tenancy at will which would be converted by payment of rent into a tenancy from year to year or month to month. In the case of a "bemaidi kabulayet" or agreement of lease without a term for an annual rent, the Privy Council held that it operated either as a permanent lease or as a lease from year to year and that no intermediate position was open (*x*).

An option of renewal, whether the option be of the tenant (*y*), or of the lessor (*z*) does not affect the duration of the term. This is because the option until exercised creates no interest in the superadded term (*a*). A covenant for a perpetual renewal of the lease must always be unequivocal (*b*). Where by an agreement in writing the owner of a furnished house let it to a tenant at a weekly rent for 6 months certain with an option "of continuing the tenancy for a further period of 6 months on the same terms and conditions including this clause," it was held that the tenant had the right to renew for one further period of 6 months and no more (*c*). See note *infra* "covenant for renewal" under section 111 (a).

(*o*) *Pitcha Kutti* v. *Kamala* (1864) 1 Mad. H.C. 153.
(1858) 1 E. & E. 12.
Jervis v. *Tomkinson* (1856) 1 H. & N. 195.
Shaw v. *Kay* (1847) 1 Exch. 412.
(*s*) *Goodright Hall* v. *Richardson* (1789) 3 Term. Rep. 462.
(*t*) Per Jenkins, J., in *Kally Dass Ahiri* v. *Monmohini Dassee* (1896) 24 Cal. 440, 447.
(*u*) *Bejoy Chunder Banerjee* v. *Kally Prosonno* (1879) 4 Cal. 327.
(*v*) See *Vithalbowa* v. *Narayan Daji* (1894) 18 Bom. 507, 511.
(*w*) *Sewakram* v. *Meerut Municipal Board* (1937) A.A. 328; *Anwarali* v. *Jaimini Lal Roy* (1940) A.C. 89, (1939) 2 Cal. 254, 43 C.W.N. 797, 180 I.C. 625.
(*x*) *Janaki Nath* v. *Dina Nath* (1931) 54 Cal. L.J. 412, 133 I.C. 782, ('31) A.PC. 207.
(*y*) *Boyd* v. *Kreig* (1890) 17 Cal. 548, disapproving *Bhobani* v. *Shibnath* (1886) 13 Cal. 113; *Yousaf* v. *Poleplogo* (1906) 8 Bom. L. R. 580; *Reference* (1902) 25 Mad. 3; *Radhika Prasad* v. *Ramsunder* (1868) 1 Beng. L.R. 7 (A.C.).
(*z*) *Apu* v. *Narhari* (1878) 3 Bom. 21; *Jagjivandas* v. *Narayan* (1884) 8 Bom. 493; *Moro* v. *Tukaram* (1865) 5 Bom. H.C. 92 (A.C.); *Mohunto Southo Pursad* v. *Rughoo* (1875) 26 W.R. 98.
(*a*) *Hand* v. *Hall* (1877) 2 Ex. D. 355.
(*b*) *Sewakram* v. *Meerut Municipal Board* (1937) A.A. 328.
(*c*) *Green* v. *Palmer* (1944) 1 Ch. 328.

It is not, however, necessary that the term of the lease should be for a fixed period. It is sufficient, if it is definite (*d*). In England it was held that a tenancy "for duration of the war" did not create a good leasehold interest, the term being uncertain (*e*). As there were numerous tenancies of this kind the defect was cured in England by the validation of war-time Leases Act 1944 (*f*).

Leasehold estates.—The duration of the tenancy determines the leasehold estate created. There are two estates which, strictly speaking, do not fall within this section. One is a tenancy at sufferance which is merely a fiction of law to prevent what would otherwise be a trespass. The other is a tenancy at will which does not fulfil the definition of a lease, as the term is uncertain. A lessee is liable for rent; but not so a tenant at sufferance or a tenant at will. A tenant at will is not a trespasser, for his occupation is permissive and so he is liable for compensation for use and occupation (*g*). A tenant at sufferance is sometimes said to be liable for compensation for use and occupation (*h*).

Tenancy at sufferance.—A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It therefore cannot be created by contract and arises only by implication of law, when a person who has been in possession under a lawful title continues in possession after that title has determined, without the consent of the person entitled (*i*). The Madras High Court has observed that the fiction has no place after the enactment of the Transfer of Property Act (*j*). But the Act, as already observed, is not exhaustive; and the term is a useful one to distinguish a possession rightful in its inception but wrongful in its continuance, from a trespass wrongful both in its inception and in its continuance. A tenant holding over after the expiration of his term is a tenant at sufferance (*k*). If he holds over against the landlord's consent he is a trespasser (*l*), and is liable for mesne profits (*m*). A mortgagor left in possession under an English mortgage is a tenant at sufferance and cannot grant a lease without the concurrence of the mortgagee and if he does the mortgagee can treat the lessee as a trespasser (*n*).

A tenancy at sufferance does not create the relationship of landlord and tenant; and in a suit for ejectment of a tenant holding over without the landlord's consent limitation runs under Article 139 from the expiration of the term and not from the termination of the tenancy at sufferance (*o*).

A tenancy at sufferance is determined at any time by the landlord entering without notice or demand, or by the tenant quitting. Thus a tenant remaining in possession in defiance of his landlord after termination of the lease is a tenant at sufferance and is not entitled to notice to quit (*p*). So also if a Hindu widow grants a lease and the reversioner after her death elects to avoid it, the lessee is a tenant at sufferance and can be evicted

(*d*) *Ramchand* v. *Lush* (1936) A.L. 890.

(*e*) *Lace* v. *Chantler* (1944) 1 K.B. 368.

(*f*) *Hawtrey* v. *Beaufort Ltd.* (1946) 1 K.B. 280.

(*g*) *Kanailal Biswas* v. *Nitai Chand Saha* (1910) 12 Cal. L.J. 612, 7 I.C. 492; *Howard* v. *Shaw* (1841) 8 M. & W. 118; *Goggan* v. *Warwicker* (1852) 3 Car. & Kir. 40.

(*h*) *Bayley* v. *Bradley* (1848) 5 C.B. 396, 406.

(*i*) *Mozam Shaikh* v. *Ananda Prasad* (1942) A.C. 841, 75 C.L.J. 444, 46 C.W.N. 366, 200 I.C. 660.

(*j*) *Subbraveti* v. *Gundala* (1910) 33 Mad. 260, 4 I.C. 1080; *Madar* v. *Kader Moidin* (1916) 39 Mad. 54, 33 I.C. 705; *Govindasawmi* v. *Ramasami* (1916) 30 Mad. L.J. 492, 34 I.C. 6.

(*k*) *Kundan Lal* v. *Deepchand* (1938) 1938 All. L.J. 682, 146 I.C. 762, ('38) A.A. 756; *Bansidhar* v. *Ramcharan* (1940) 189 I.C. 488, (1940) A.O. 401.

(*l*) *Doe d. Patrick* v. *Beaufort (Duke)* (1851) 6 Exch. 498; *Jones* v. *Foley* (1891) 1 Q.B. 730, 731.

(*m*) *Gulam Mohiuddin* v. *Dayabhai* (1923) 25 Bom. L.R. 447, 73 I.C. 442, ('23) A.B. 398.

(*n*) *Keech* v. *Hall* (1778) 1 Doug. K.B. 21; *Macleod* v. *Kissan* (1906) 30 Bom. 250, 269.

(*o*) *Kanthеppa* v. *Sheshappa* (1898) 22 Bom. 893; *Chandri* v. *Daji Bhau* (1900) 24 Bom. 504; *Pusa Mal* v. *Makdum* (1909) 31 All. 514, 3 I.C. 566.

(*p*) *Gokul Chand* v. *Shib Charan* (1912) 9 All. L.J. 574, 13 I.C. 59; *Bansidhar* v. *Ram Charan* (1940) 189 I.C. 488, (1940) A.O. 401.

S. 105 without notice (q). The English law allows a landlord to re-enter if he can effect a peaceable entry (r). But under the law of India a landlord cannot evict a tenant *proprio motu.* If the tenant at sufferance is evicted otherwise than in due course of law he may recover possession under sec. 9 of the Specific Relief Act (s).

Tenancy at will.—A tenancy at will is determinable at the will either of the landlord or of the tenant. The law implies a tenancy at will of one party to be a tenancy at will of either party (t). A tenancy at will arises by implication of law in cases of permissive occupation when a person is in possession of premises with the consent of the owner (u), or it may arise expressly by an agreement to let for an indefinite term for a compensation accruing from day to day so long as both parties please (v).

Doe d. Hull v. *Wood* (w) is an instructive case of permissive occupation. William Hull was tenant from year to year and died in 1842. His widow continued in occupation and paid rent to the lessor, but did not take out letters of administration. In 1844 she married the defendant Wood, and then William Hull's father took out letters of administration. It was held that the term vested in him and that he was entitled to evict her after demand for possession as she was a tenant at will. Her payments of rent were treated as having been made on behalf of the administrator, and not so as to imply a surrender by the administrator and the grant of a new lease to her. She was in occupation by leave of the administrator and therefore a tenant at will.

Another case of tenancy at will is that of entry into possession under a void lease (x) and it has an interesting history. This generally occurred when the lease was oral and offended against the Statute of Frauds which requires a lease of over three years to be in writing. The law implied a tenancy at will in the case of entry under such a lease. This led to great hardship, for a man who had been in possession and paying rent for three years under an oral lease for five years might be evicted at any moment. The law got over the difficulty by saying that though it was a tenancy at will yet it was a tenancy at will *in the first instance* and that it was converted by payment of rent into a tenancy from year to year (y). Subsequently Courts of Equity went further, and said that though it was void as a lease it was valid as a contract and could be proved by parole evidence in spite of the statute in an action for specific performance, and that if it had been partly performed by entry into possession, the defence of the statute was excluded. This subject is more fully discussed in the notes to sec. 53A.

A tenancy at will is terminable by either party. A demand by the landlord for possession is sufficient (z). Notice, however, by the tenant is not effectual unless he gives up possession. But the tenancy is determined if the tenant assigns or underlets, for that is a usurpation of the rights of the landlord and an act inconsistent with the will to continue the tenancy (a). Death of either tenant or landlord determines the tenancy (b).

(q) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Raghubir Singh* v. *Jethu Mahton* (1923) 2 Pat. 171, 70 I.C. 290, ('23) A.P. 130.

(r) *Williams* v. *Taperell* (1892) 8 T.L.R. 241; *Jones* v. *Foley* (1891) 1 Q.B. 730.

(s) *Emperor* v. *Haji Gulam* (1919) 43 Bom. 531, 51 I.C. 193; *Rudrappa* v. *Narsingrao* (1905) 29 Bom. 213; *Khaja Enaetoolah* v. *Kishen Sunder* (1867) 8 W.R. 386, 389; *Sofaoll Khan* v. *Woopean Khan* (1868) 9 W.R. 123.

(t) *Manicka* v. *Chinnappa* (1913) 36 Mad. 557, 16 I.C. 1002.

(u) *Doe d. Jones* v. *Jones* (1830) 10 B. & C. 718 (minister in possession by leave of trustees of congregation); *Garrard* v. *Tuck* (1849) 8 C.B. 231 *cestui que trust* in possession with the acquiescence of the trustees.

(v) *Richardson* v. *Langridge* (1811) 4 Taunt 129.

(w) (1845) 14 M. & W. 632.

(x) *Janki* v. *Kanhaiya Lal* (1935) 159 I.C. 316, (1936) A.O. 102.

(y) See the judgment of Lord Kenyon in *Doe d. Shore* v. *Porter* (1789) 3 Term. Rep. 13.

(z) *Deo Nandan Pershad* v. *Meghu Mahton* (1907) 34 Cal. 57; *Ram Kishun* v. *Bibi Sohila* (1933) 145 I.C. 567, ('33) A.P. 561; *Doe d. Price* v. *Price* (1832) 9 Bing. 356; *Janki* v. *Kanhaiya Lal* (1935) 159 I.C. 488, (1940) A.O. 102.

(a) *Doe d. Davies* v. *Thomas* (1851) 6 Exch. 854. See the Distress for Rent Act, 1737, 11 Geo. 2 c. 19 s. 14.

(b) *Chemminian* v. *Udayavarma* (1900) 10 Mad. L. J. 201; *James* v. *Dean* (1805) 11 Ves. 383, 391.

Indian cases of tenancy at will have arisen when the tenant expressly agrees to vacate whenever possession is demanded by the landlord (*c*); or at any time on fifteen days' notice (*d*); or where no rent is fixed (*e*); or where there has been possession under an invalid lease before payment of rent (*f*); or where there has been permissive occupation (*g*). An utbandi holding in Bengal is merely a tenancy at will (*h*).

Illustrations.

(1) *A* hires from *B* two houses under an agreement as follows:—"I have this day hired from you two houses. Rs. 5 a year are agreed as rent. I am to live there in as long as you will allow me to do so." Although an annual rent was reserved this was a tenancy at will: *Jivraj Gopal* v. *Atmaram Dayaram* (1890) 14 Bom. 319.

(2) *A* sold his lease to *B* without a written assignment by merely handing over the lease to *B*. The lessor sued for rent. *B* was a tenant at will, liable only for compensation for use and occupation: *Gaya Prasad* v. *Baijnath* (1892) 14 All. 176.

Use and occupation.—A tenant at will is not liable to pay rent because there has been no demise to him. He is not liable for mesne profits or damages like a trespasser because his occupation is permissive. But he is liable to pay compensation for use and occupation. If the rent is fixed, or there is an express agreement as to rent, the amount fixed or agreed is recoverable, the amount so fixed or agreed being evidence of the quantum payable. If there is no express agreement that he should pay, the mere fact of this occupation of the land of another implies an agreement to pay reasonable compensation (*i*). If the defendant takes possession under an agreement of sale to him and the sale goes off, he is a tenant at will and liable for use and occupation from the time when the contract is at an end (*j*). Compensation for use and occupation was decreed in the Indian cases of tenancy at will cited in the last paragraph. Compensation for use and occupation was also awarded when the occupants were really trespassers and the plaintiff waived the trespass and treated them as tenants at will (*k*). Where there is a lease to one partner, the lessor is not entitled to recover compensation from the other partners, for they occupy not with his permission but with that of the lessee (*l*). A suit for rent may not be converted into a suit for use and occupation, at the hearing, for it involves different issues (*m*).

Leasehold estates under this section.—The leases recognized by this section are—

(1) leases for a certain time,

(2) periodic leases,

(3) leases in perpetuity.

Jenkins, C.J., in *Municipal Corporation of Bombay* v. *Secretary of State* (*n*) said: "It is a principle of general application that it is not within the power of a person to create

(*c*) *Jivraj Gopal* v. *Atmaram* (1890) 14 Bom. 319; *Balkrishna Vamanaji* v. *Jasha Farsi* (1895) 19 Bom. 150; *Ratnasabhupathi* v. *Venkatachalam* (1891) 14 Mad. 271.

(*d*) *Khuda Bakhsh* v. *Sheo Din* (1886) 8 All. 405; *Hanso* v. *Har Narain* (1886) A.W.N. 115 F.B.

(*e*) *Ranee Lalun Monee* v. *Sona Monee* (1874) 22 W. R. 334.

(*f*) *Puroma Soonduree* v. *Prollad Chunder* (1870) 12 W. R. 289; *Gaya Prasad* v. *Baijnath* (1892) 14 All. 176; *Sheokaran Singh* v. *Maharaja Parbhi Singh* (1909) 31 All. 276, 2 I.C. 211 F.B.; *Ramchandra* v. *Tama* (1912) 36 Bom. 500, 15 I.C. 830; *Ramchandra* v. *Syameswari* (1925) 42 Cal. L. J. 71, 90 I.C. 98, ('25) A.C. 1171.

(*g*) *Kanailal* v. *Nitai Chand Shah* (1910) 12 Cal. L. J. 612, 7 I.C. 492; *Ram Kishun* v. *Bibi Sohila*, *supra*.

(*h*) *Surrendranath Sarkah* v. *Poornachandra Mukherji* (1933) 60 Cal. 681, 37 Cal. W.N. 335, 146 I.C. 55, ('33) A.C. 609.

(*i*) *Gibson* v. *Kirk* (1841) 1 Q. B. 850.

(*j*) *Howard* v. *Shaw* (1841) 8 M. & W. 118.

(*k*) *Surnomoyee* v. *Denonath Gir* (1883) 9 Cal. 908.

(*l*) *Ragoonathdas Gopaldas* v. *Morarji Jutha* (1892) 16 Bom. 568.

(*m*) *Surendra Narain Singh* v. *Bhai Lal* (1895) 22 Cal. 752; *Rachhea* v. *Upendra* (1900) 27 Cal. 239; *Veerabhadra* v. *Sri Vaithianathaswami* (1927) 52 Mad. L.J. 899, 99 I.C. 977, ('27) A.M. 182; *Kirpa Shankar* v. *Janki Prasad* (1941) 199 I.C. 83, (1942) A.P. 86; *Mahabir Prasad* v. *Paleshwari Prasad* (1942) 202 I.C. 548, (1942) A.O. 506; *Haji Mahomed* v. *Hyderabad Municipality* (1944) A.S. 49. But see *Md. Farooq* v. *Masjid Begum* (1942) 200 I.C. 593, (1942) A.O. 408.

(*n*) (1905) 29 Bom. 580, 602.

S. 105

whatever interests he may please in land; he is limited to such interests as are recognized by the system of jurisprudence governing his disposition." Therefore a lease until suitable land is provided for and six months' notice is given is void (*o*).

(1) Leases for a certain time.—The words "a certain time" seem inconsistent with the phrase "a lease of uncertain duration" which occurs in sec. 108 (i) where it is used to describe yearly or monthly tenancies. But as Lord Kenyon said in *Goodright d. Hall* v. *Richardson* (*p*), the certainty need not be ascertained at the time; for if in the fluxion of time a day will arrive which will make it certain, that is sufficient. The term may therefore be defined either by express limitation or by reference to some event which will afterwards fix its exact length. In the first case a certain time is expressed; in the latter it is implied.

Some of the older cases suggest that certainty with reference to a future event is insufficient. Thus in Bacon's Abridgment it is said that a lease during the coverture between *A* and *B* would be void for uncertainty. But this is obsolete, and in *Great Northern Railway* v. *Arnold* (*q*) a lease for the period of the war was held to be valid as the parties could have made a lease for 999 years terminable with the war. A lease "for so long as the Kesari Mahratta Institution is in existence" was held to be valid (*r*). Again a lease during the pendency of a mortgage granted by the lessor to the lessee was held to be valid (*s*); so also in a case (*t*) where the duration of the lease was contingent on the result of pending litigation. But the result must be certain, and a lease until other suitable ground should be provided by the lessor is void (*u*).

A lease for life is a lease for a certain time, for it terminates with the death of the lessee (*v*). A lease for so long as the lessee pays rent has been construed as a lease for life (*w*). In a Bombay case (*x*) Macleod, C.J., held that such a lease was a permanent lease, differing from an earlier Bombay case (*y*) where a lease for so long as the lessee pleases to hold the land was said to be determinable at the death of the lessee. Such a lease may be transferable, but is not necessarily heritable (*z*). A lease for life by English Common Law was considered as a grant for a period of uncertain duration and created a freehold estate and was void if not made by deed (*a*). So a lease for which no term is fixed, with an agreement not to raise the rent so long as the tenant pays it regularly, has been held to operate as an agreement to lease for the life of the tenant (*b*).

(2) Periodic leases.—These are tenancies from year to year or from month to month. The period may be a year, a quarter, a month, or even a week, and the mode in which the rent is reserved may afford a presumption as to the period of the lease (*c*). A tenancy from year to year differs from a tenancy at will in that it can only be determined by notice duly given, and the interest created is not terminated by the death of either party.

Ibid.

(1789) 3 Term. Rep. 462.

(1916) 33 T. L. R. 114.

Ramchandra v. *Narasinha* (1931) 33 Bom. L.R. 590, 135 I.C. 839, ('31) A.B. 466: *Indian Cotton Co.* v. *Raghunath* (1931) 33 Bom. L.R. 111, 130 I.C. 598, ('31) A.B. 178.

(*s*) *Mahomed* v. *Ezekiel* (1905) 7 Bom. L. R. 772.

(*t*) *Lokhanath Ghose* v. *Jogobundhoo Roy* (1876) 1 Cal. 297.

(*u*) *Municipal Corporation of Bombay* v. *Secretary of State*, *supra*.

(*v*) Cf. *Parshotam Vishnu* v. *Nana Prayag* (1894) 18 Bom. 109; *Abdulrahim* v. *Sarafalli Mania* v. *Lallubhai* (1900) 2 Bom. L.R. 488; *Karim Bakhsh* v. *Natha Singh* (1921) 3 Lah. L. J. 14, 66 I.C. 904.

(*w*) *Pool* v. *Secretary of State* (1886) P.R. 68

(*x*) *Bai Sona* v. *Bai Hiragavri* (1926) 28 Bom. L. R. 552, 95 I.C. 524, ('26) A.B. 374.

(*y*) *Vaman Shripad* v. *Maki* (1880) 4 Bom. 424, followed in *Higgins* v. *Nobin Chunder* (1907) 11 Cal. W.N. 809; and *Abdulrahim* v. *Sarafalli*, *supra*.

(*z*) *Donkangowda* v. *Revanshedappa* (1943) A.B. 148.

(*a*) But see now Law of Property Act, 1922, XVth, Schedule 7 (3).

(*b*) *Zimbler* v. *Abraham* (1903) 1 K. B. 577.

(*c*) *Wilkinson* v. *Hall* (1837) 3 Bing. N. C. 508; *Durga Nikarini* v. *Gobordhan Bose* (1914) 19 Cal. W. N. 525, 529, 24 I.C. 183; *Sheikh Akloo* v. *Sheikh Emaman* (1917) 44 Cal. 403, 38 I.C. 899.

The duration of the term in periodic leases is continuous from period to period (*d*). Such a lease is described in sec. 108 (i) as a lease of uncertain duration, and in Article 35 of the Stamp Act as a lease which does not purport to be for any definite period. The interest of the lessee therefore does not terminate at the end of the period. A tenant from year to year has an interest for one year certain with a growing interest during every year thereafter springing out of the original contract and as parcel of it (*e*). The characteristics of the periodic tenancy from year to year were laid down in the Court of Exchequer Chamber in *Gandy* v. *Jubbar* (*f*) as follows: "There frequently is an actual demise from year to year so long as both parties please. The nature of this tenancy is discussed in 4 Bac. Abr. Lit. Leases and Terms for years pp. 838, 839, 7th ed., and this article has always been deemed of the highest authority. It seems clear that the learned author considered that the true nature of such a tenancy is that it is a lease for two years certain, and that every year after it is a springing interest arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year it becomes an entire lease certain for the years past and also for the year so entered on, and that it is not a reletting at the commencement of the third and subsequent years. We think this is the true nature of a tenancy from year to year created by express words, and that there is not in contemplation of law a recommencing or reletting at the beginning of each year." In *Queen's Club Gardens Estates Ld.* v. *Bignel* (*g*) Salter, J., said: "In the case of all periodic tenancies, whether from year to year, or from quarter to quarter, or from month to month or for any other period, the law, as I find it stated in the authorities, appears to be that the tenancy is from period to period, from one fixed date to another. It is a tenancy for so many years, or quarters, or months, or weeks, as the parties may think fit. If a new period be allowed to begin, the tenancy must, in the absence of course of any other arrangement between the parties, continue until the period ends, and neither party can, against the will of the other, put an end to the tenancy during the currency of the period." Following this Beaumont, C.J., in the undernoted case (*h*) said: "A monthly tenancy, that is a tenancy subject to a month's notice, creates in the first instance a tenancy for two months certain. But as soon as the third month commences, that is not a new tenancy; it turns the original tenancy into a three months' tenancy and when the fourth month begins, the tenancy becomes a four months' tenancy and so on so long as the tenancy continues, until, that is to say, notice to quit is given." A month's notice is mentioned in this passage because according to local usage in Bombay a month's notice is necessary. Gentle, J., in the undernoted case (*i*) said: "A monthly tenancy in my view is not a tenancy which commences or begins in one month and on its expiry a fresh tenancy is created in the following month or months but is a tenancy for an unstated period which is determinable by one or other of the parties giving a notice to quit." To the like effect are the observations of the Court in *Ganesdas Ramgopal* v. *Jamuna* (*j*). A periodic tenancy is sometimes called a tenancy at will regarding it as a tenancy at will with a restraint on the exercise of the will. A tenancy from year to year or from month to month arises by express agreement, or, in the absence of contract, by presumption of law under sec. 106. A tenancy at will implied from holding over, or from entry under a void lease, becomes on payment of rent a tenancy from year to year or from month to month or from week to week (*k*). A lease for an indefinite period is generally construed as a lease for life but if the rent is

(*d*) *Bowen* v. *Anderson* (1894) 1 Q. B. 164.

(*e*) *Legg* v. *Strudwick* (1690) 2 Salk. 414, cited in *Oxley* v. *James* (1844) 13 M. & W. 209, 214; *Cattley* v. *Arnold* (1859) 28 L. J. Ch. 352.

(*f*) 9 B & S. 15 at p. 18.

(*g*) (1924) 1 K. B. 117 at p. 134.

(*h*) *Utility Articles Manufacturing Co.* v. *Raja Bahadur Motilal Mills* (1943) A.B. 306 (1943) Bom. 553.

(*i*) *Usharani Debi* v. *The Research Industries Ltd.* (1945) 50 C.W.N. 461.

(*j*) (1945) 24 Pat. 449.

(*k*) *Ladies Hosiery and Underwear Ltd.* v. *Parker* (1930) 1 Ch. 304, 329.

S. 105 payable yearly it would be taken to be a lease from year to year (*l*). A lease for a year with a stipulation that it should remain in force until another lease is granted has been construed as a lease from year to year (*m*).

(3) Leases in perpetuity.—As already stated a lease in perpetuity is unknown in English law. In India such a lease is created either by an express grant or by a presumed grant. Such leases are generally agricultural leases or they are leases executed before the Transfer of Property Act.

Express grant.—Words which suffice by themselves to import permanency are—*miras* or *mirasdar* (*n*); *mourasi* (*o*); *mulgeni* (*p*); *nirantar* (*q*); *patni* (*r*); so also words indicative of a heritable grant such as *Ba Farzandan* (*s*) or *Naslan bad Naslan* (*t*). The words *istemari mourasi mokurari* in a lease mean permanent and heritable (*u*). The tenancy created by a *taluka putta* is presumed to be permanent unless there are indications to the contrary in the surrounding circumstances (*v*). A *bemiadi* pattee (a lease for indefinite period) may be a permanent lease (*w*).

On the other hand the following words are not *per se* sufficient to import permanency of tenure—*Paracudi* and *Ulavadi Mirasidar* (*x*); *Mokarari* (*y*); *Istemari Mokarari* (*z*); *Kyam* and *Saswatham* (*a*); *Mukkaddami* (*b*). But these words do not exclude the notion of permanency, and when they occur their effect is a matter of construction having regard to the other terms of the instrument, the object of the lease, the circumstances under which it was granted and the subsequent conduct of the parties (*c*). Such considerations may show that a *bemiadi* lease, that is, a lease without a term, is a permanent lease (*d*).

(*l*) *Ashutosh* v. *Chandi Charan* (1927) 31 Cal. W.N. 46, 99 I.C. 200, ('27) A.C. 179; *Chandi Charan Mitra* v. *Ashutosh Lahiri* (1926) 53 Cal. 95, 94 I.C. 684, ('26) A.C. 558; *Jagadish Chandra* v. *Bisweswari* (1917) 41 I.C. 227; cf. *Higgins* v. *Nobin Chunder* (1907) 11 Cal. W.N. 809 and *Vaman Shripad* v. *Maki* (1880) 4 Bom. 424.

(*m*) *Venkatachellam* v. *Audian* (1881) 3 Mad. 358; *Virammal* v. *Rungayyangar* (1882) 4 Mad. 381.

(*n*) *Vithu* v. *Dhondi* (1890) 15 Bom. 407; *Ayimannessa* v. *Panna Lal* (1923) 27 Cal. W. N. 1037, ('23) A.C. 705.

(*o*) *Giribala* v. *Kedar Nath* (1929) 56 Cal. 180, 117 I. C. 534, ('29) A.C. 454.

(*p*) *Unhamma Devi* v. *Vaikunta Hegde* (1894) 17 Mad. 218.

(*q*) *Gungava* v. *Konher* (1876) P.J. 227.

(*r*) *Modhu Sudan* v. *Rooke* (1898) 25 Cal. 1, 24 I.A. 164.

(*s*) *i.e.*, including descendants.

(*t*) *i.e.*, from generation to generation: *Tulshi Pershad Singh* v. *Ram Narain Singh* (1886) 12 Cal. 117, 12 I.A. 205.

(*u*) *Baikanta Nath* v. *Lakshan Chandra* (1917) 41 I.C. 875.

(*v*) *Budayar Rahman* v. *Karam Ali* (1913) 18 Cal. L.J. 271, 21 I.C. 47; *Sarada Kripa* v. *Akhil* (1917) 21 Cal. W. N. 903, 41 I.C. 530; *Jogesh Chandra* v. *Makbul Ali* (1921) 47 Cal. 979, 60 I.C. 984.

(*w*) *Income Tax Commissioner* v. *Visheshwar Singh* (1939) 18 Pat. 805, (187) I.C. 691, (1940) A.P. 24.

(*x*) *Mayandi Chettiyar* v. *Chokkalingam* (1904) 27 Mad. 291, 31 I.A. 83, reversing *Chockalingam* v. *Mayandi* (1896) 19 Mad. 485.

(*y*) *Bengal Govt.* v. *Nawab Jafur Hossein Khan* (1860) 5 M. I. A. 467; *Sheo Pershad* v. *Kally Dass Singh* (1880) 5 Cal. 543; *Bilasmoni* v. *Raja Sheo Pershad Singh* (1882) 8 Cal. 664, 9 I.A. 33.

(*z*) *Leelanand Singh* v. *Munoorunjun Singh* (1874) 13 Beng. L.R. 124, I.A. Sup. Vol. 181; *Tulshi Pershad Singh* v. *Ram Narain Singh* (1886) 12 Cal. 117, 12 I.A. 205; *Beni Pershad Koeri* v. *Dudh Nath Roy* (1900) 27 Cal. 156, 165, 26 I.A. 216; *Agin Bindh Upadhya* v. *Mohan Bikram* (1903) 30 Cal. 20; *Narsing Dayal Sahu* v. *Ram Narain Singh* (1903) 30 Cal. 883; *Ram Rachhya Singh* v. *Kumar Kamakhya* (1925) 4 Pat. 139, 84 I.C. 586, ('25) A.P. 216 affirmed in 55 I.A. 212, 7 Pat. 649, *infra*.

(*a*) *Rajaram* v. *Narasinga* (1891) 15 Mad. 199; *Rama Aiyangar* v. *Gurusami* (1918) 35 Mad. L.J. 129, 46 I.C. 62; *Venkatachariar* v. *Narasimha* (1918) 35 Mad. L.J. 647, 48 I.C. 301.

(*b*) *Bhagwati* v. *Hanuman* (1900) 23 All. 67.

(*c*) *Robert Watson & Co.* v. *Mohesh Narain Roy* (1875) 24 W.R. 176; *Sheo Prasad* v. *Kallydas Singh* (1880) 5 Cal. 283; *Bilasmoni* v. *Raja Sheo Pershad Singh* (1882) 8 Cal. 664, 9 I.A. 33; *Tulshi Pershad Singh* v. *Ram Narain Singh* (1886) 12 Cal. 117, 12 I.A. 205; *Narsing Dayal* v. *Ram Narain Singh* (1903) 30 Cal. 833, approved by the Privy Council in *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (1928) 7 Pat. 649, 55 I.A. 212, 109 I.C. 663, ('28) A.PC. 146; *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1916) 43 Cal. 332, 36 I.C. 321; *Gaya* v. *Ramjiawan Ram* (1881) 3 All. 569.

(*d*) *Dinanath Kundu* v. *Janaki Nath* (1928) 55 Cal. 435, 110 I.C. 368, ('28) A.C. 392 on app. *Janaki Nath* v. *Dina Nath* (1931) 54 Cal. L.J. 412, 133 I.C. 732, ('31) A.PC. 207.

S. 105

The fact that the lease is permanent does not exclude the Bengal Zemindars' right to enhance rent up to the limit sanctioned by usage in respect of tenures created after the permanent settlement (*e*). The right of enhancement of rent is not inappropriate in case of a tenure which is perpetual (*f*). But if for a long time the rent has not been enhanced in spite of an increase in the value of the tenure the inference will be that the rent is fixed (*g*).

A lease does not cease to be a lease in perpetuity because there is a forfeiture clause, for such a provision is merely a security for payment of rent (*h*). If the lease is a lease in perpetuity a slight increase in rent will not of itself destroy the permanent character of the tenancy (*i*). But a tenancy, though permanent in its inception, ceases to be permanent, if the tenant executes rent deeds for a specified period and admits his ability to ejectment and enhancement of rent (*j*).

Presumed grant.—If the tenant has been in long possession before the Act, the conduct of the parties and the circumstances of the case may show that the tenancy is permanent. Long possession is by itself insufficient to prove permanency (*k*), as the only presumption from long possession is a yearly tenancy (*l*). Where land has been held on rent which is variable, the mere fact that buildings have been erected on the land with knowledge of the landlord is not itself sufficient to raise the presumption that the tenancy is permanent (*m*).

If the origin of the tenancy is known, long possession even if coupled with payment of a uniform rent is not sufficient (*n*), unless a custom to the contrary is proved (*o*).

But if the origin of tenancy is not known, then the maxim *optimus rerum interpres usus* applies and long possession coupled with a uniform rent raises a presumption of

(*e*) *Bamasoondari* v. *Radhika* (1869) 13 M.I.A. 248; *Bhupendra Chandra* v. *Harihar* (1920) 24 Cal. W. N. 874, 58 I.C. 867; *Krishendra Nath* v. *Kusum Kumari* (1927) 54 I.A. 48, 54 Cal. 166, 100 I.C. 93, ('27) A.PC. 20; *Bhabani* v. *Suchitra* (1930) 51 Cal. L.J. 25, 126 I.C. 203, ('30) A.C. 270; *Satya Charan Law* v. *Rai Mohan Sil Das* (1932) 36 Cal. W.N. 183, 138 I.C. 139, ('32) A.C. 436. See also s. 7 (1) of the Bengal Tenancy Act, 1885.

(*f*) *Jogendra Krishna* v. *Sahasini Dassi* (1941) A.C. 541, (1941) 2 Cal. 44, 74 C.L.J. 145, 45 C.W.N. 590, 197 I.C. 376.

(*g*) *Saroda Prosad* v. *Umasankar* (1927) 44 Cal. L.J. 385, 99 I.C. 258, ('27) A.C. 168; *Dhunput Singh* v. *Gooman Singh* (1867) 11 M.I.A. 433.

(*h*) *Megh Lal Pandey* v. *Rajkumar Thakur Giridhari Singh* (1907) 34 Cal. 358; *Bhagwati Prasad* v. *Balgobind* (1933) 8 Luck. 377, 142 I.C. 885, ('33) A.O. 161; *Income Tax Commissioner* v. *Visheshwar Singh* (1939) 18 Pat. 805, 187 I.C. 691, (1940) A.P. 24.

(*i*) *Bhabataran Pohari* v. *Trailokyanath Bag* (1932) 59 Cal. 1282, 36 Cal. W.N. 632, 55 Cal. L.J. 398, 140 I.C. 743, ('32) A.C. 764; *Priya Nath* v. *Surendra Nath* (1922) 69 I.C. 992, ('22) A.C. 511.

(*j*) *Suraj Bhan* v. *Hafiz Abdul* (1941) A.L. 195, 43 P.L.R. 75, 195 I.C. 291.

(*k*) *Secretary of State* v. *Rajendra Prasad* (1937) 170 I.C. 316, (1937) A.P. 391.

(*l*) *Secretary of State* v. *Luchmeswar Singh* (1888) 16 Cal. 223, 16 I.A. 6; *Nabu Mondul* v. *Cholim Mullik* (1898) 25 Cal. 896, 908; *Barada Prosad* v. *Prasanno Kumar* (1912) 16 Cal. W.N. 564, 14 I.C. 152; *Kedar* v. *Madhu Sudan* (1923) 37 Cal. L.J. 478, 75 I.C. 105, ('23) A.C. 682; *Prosunno Coomaree Debea* v. *Sheikh Rutton Bepary* (1877) 3 Cal. 696; *Narayanbhat* v. *Davlata* (1891) 15 Bom. 647; *Ramabai* v. *Babaji* (1891) 15 Bom. 704.

(*m*) *Secretary of State* v. *Beni Prasad* (1937) 170 I.C. 677, (1937) A.P. 444; *Gordhanlal* v. *Purucudu Narayan* (1939) A.C. 291, 68 C.L.J. 481, 182 I.C. 8; *Nand Ram* v. *Hakim Suraj* (1938) A.A. 42.

(*n*) *Gangabai* v. *Kalapa* (1885) 9 Bom. 419; *Ismail Khan Mahomed* v. *Broughton* (1900) 5 Cal. W.N. 846; *Ismail Khan* v. *Jaigun Bibi* (1900) 27 Cal. 570; *Raimala* v. *Shiba Sundari* (1912) 16 Cal. L.J. 26, 16 I.C. 351; *Secretary of State* v. *Digambar* (1919) 46 Cal. 160, 45 I.C. 43; *Jyoti Prasad* v. *Dasrath* (1922) 36 Cal. L.J. 73, 63 I.C. 109, ('21) A.C. 453; *Bechu Singh* v. *Kumar Kamakhya Narain Singh* (1932) 36 Cal. W.N. 626, 138 I.C. 234, ('32) A. PC. 105; *Ram Lal Sahu* v. *Bibi Zohra* (1940) 20 Pat. 115, 195 I.C. 583, (1941) A.P. 228; (1938) 182 I.C. 618, (1939) A.P. 296.

(*o*) *Babaji* v. *Narayan* (1879) 3 Bom. 340; *Narayanbhat* v. *Davlata* (1891) 15 Bom. 647. But see *Guru Din Saha* v. *Badu* (1936) 12 Luck. 516, 164 I.C. 1003, (1937) A.O. 165.

S. 105 permanency (*p*). This presumption was made in favour of a lessee of a wakf property who had held for a long period of time at an unchanged rent and as heritable property even though a permanent lease could not have been granted without the permission of the Kazi and no such permission had been proved (*q*). Viscount Sumner said :—

> " The presumption of an origin in some lawful title, which the Courts have so readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. Hence their Lordships cannot accept the appellant's contention that the provisions of the Indian Evidence Act, sec. 114, prevent the inference of a consent by the kazi in the absence of any evidence of an application to the kazi for leave, or some other proved fact of that kind. The matter is one of presumption, based on the policy of the law.... The presumption is not an ' open sesame ' with which to unlock in favour of a particular kind of claimant a closed door, to which neither the law nor the proved facts would in themselves have afforded any key. It is the completion of a right, to which circumstances clearly point where time has obliterated any record of the original commencement."

Before the Transfer of Property Act the ordinary tenancy in Bengal was not heritable; but an inference of permanency may arise when the tenancy has passed through several successions (*r*). Again the fact that the land is held for building purposes or for residence may raise a presumption of permanence (*s*). In the absence of a contract to the contrary or local law or usage, a lease of land for the purpose of putting up a permanent construction cannot be deemed to be a permanent lease. It must be deemed to be a lease from month to month (*t*). The question of buildings generally arises in the case of homestead lands in Bengal; and in a Calcutta case (*u*) it was suggested that as to such land an inference of permanency could hardly arise, unless a pucca structure had been erected. But the correctness of this conclusion has been doubted (*v*); and in several cases (*w*) an inference of permanency has been drawn in the case of homestead lands on which no substantial structure had been erected, when a uniform rent has been charged in spite of a great

(*p*) *Nidhee Kristo* v. *Nistarinee Dossee* (1874) 21 W.R. 386; *Dukhina Mohun Roy* v. *Kureemoolah* (1869) 12 W.R. 243; *Ram Ranjan* v. *Ram Narain Singh* (1895) 22 Cal. 533, 22 I.A. 60; *Nilratan Mandal* v. *Ismail Khan Mahomed* (1905) 32 Cal. 51, 31 I.A. 149; *Durga Mohun* v. *Rakhal Chandra* (1901) 5 Cal. W.N. 801; *Ismail Khan Mahomed* v. *Asmatulla Sareng* (1904) 8 Cal. W.N. 297; *Ismail Khan Mahomed* v. *Srimutty Mrinmoyi* (1904) 8 Cal. W.N. 301; *William Grant* v. *Robinson* (1907) 11 Cal. W.N. 242; *Kittu Hegadthi* v. *Channamma* (1907) 30 Mad. 528; *Nemai Chandra* v. *Mahomad Basir* (1909) 9 Cal. L. J. 475, 4 I.C. 173; *Moharam* v. *Telamuddin* (1912) 16 Cal. W.N. 567, 13 I.C. 606; *Naba Kumari* v. *Behari Lal* (1907) 34 Cal. 902 P.C.; *Shoroshi* v. *Bhagloo* (1920) 32 Cal. L.J. 85, 57 I.C. 877; *Syed Ali* v. *Manik Chandra* (1923) 27 Cal. W.N. 969, 80 I.C. 580, ('24) A.C. 156.

(*q*) *Mahammad Muzaffaral-Musavi* v. *Jabeda Khatun* (1930) 57 Cal. 1293, 57 I.A. 125, 130, 123 I.C. 722, ('30) A.PC. 103.

(*r*) *Pramatha Nath* v. *Champa Dasi* (1929) 56 Cal. 275, 118 I.C. 353, ('29) A.C. 473; *Bireswar Mookherji* v. *Troilokhya Dasi* (1926) 30 Cal. W.N. 709, 99 I.C. 315; *Naba Kumari Debi* v. *Behari Lal* (1907) 34 Cal. 902 P.C.; *Durga Mohun* v. *Rakhal Chandra* (1901) 5 Cal. W.N. 801; *Ram Duar Rai* v. *Lachhmi Prasad* (1941) A.A. 51, (1941) All. 27, (1941) A.L.J. 7, 193 I.C. 407.

(*s*) *Prosunno Coomar* v. *Jagunnath* (1881) 10 Cal. L.R. 25; *Gangadhur Shikdar* v. *Ayimuddin* (1882) 8 Cal. 960; *Rungo Lall Lohea* v. *Wilson* (1899) 26 Cal. 204; *Promada Nath Roy* v. *Srigobind* (1905) 32 Cal. 648; *Navalram* v. *Javerilal* (1905) 7 Bom. L.R. 401; *Shoroshi Charan* v. *Bhagloo, supra*; *Ram Duar Rai* v. *Lachhmi Prasad*, see *supra*; *Sheikh Dargahan* v. *Hafiz Mahamed* (1936) 176 I.C. 562 (1938) A.P. 333, (1939) 18 Pat. 571, 184 I.C. 363, (1939) A.P. 448 but see the cases under note (*m*) above and note (*t*) and (*x*) below.

(*t*) *Bujrang Sahai* v. *Mt. Mulla* (1941) A.A. 399.

(*u*) *Abdul Hakim* v. *Elahi Baksh* (1925) 52 Cal. 43, 85 I.C. 103, ('25) A.C. 309.

(*v*) See *Kamal Kumar* v. *Nanda Lal Dule* (1929) 56 Cal. 738, 746, 116 I.C. 378, ('29) A.C. 37, per Rankin, C.J., and *Pramatha Nath* v. *Champa Dasi* (1929) 56 Cal. 275, 118 I.C. 353, ('29) A.C. 473, per Mitter, J.

(*w*) *Moharam* v. *Telamuddin* (1912) 16 Cal. W.N. 567, 13 I.C. 606; *Winterscale* v *Sarat Chandra* (1904) 8 Cal. W.N. 155; *Pramatha Nath* v. *Champa Dasi*, *supra*.

increase in the value of the land. The mere fact that permanent buildings have been erected on the land cannot in any way alter the incidence of tenancy (*x*).

As regards tenancies in Bengal of which the origin was not known, Rankin, C.J., in *Kamal Kumar Datta* v. *Nanda Lal Duke* (*y*) said :—

"The principles applicable to cases of this class may be stated as follows :—(1) when a person claims to hold land as a tenant under a landlord it is for him to prove the existence, the nature and the extent of the interest which the owner of the full rights has granted to him ; (2) the terms of the holding as between landlord and tenant must in these cases be a matter of contract either express or implied ; (3) the Legislature, as regards this province (Bengal), has regulated the terms of agricultural holdings. The letting of land for residential purposes is regulated by the Transfer of Property Act of 1882, but from the operation of this statute old tenancies such as those now in question, are excluded by sec. 2 ; (4) ordinarily the person who sets up a contract will be required to give reasonable particulars and direct proof of the contract relied upon, but in the case of tenancies proved to be of long standing this principle is inapplicable, and from the history of the tenancy and the circumstances of the case it is open to the tenant to show that the origin of the tenancy being unknown the correct inference is to the effect that the right granted to the tenant and enjoyed by him is a permanent right."

Although this judgment has reference to Bengal the principles enunciated are of general application. In *Afzalunissa* v. *Abdul Krim* (*z*) the Privy Council quoted with approval the following head note to the case of *Casperz* v. *Kader Nath Sarbadhikari* (*a*) and said that its application was not limited to Bengal :—

"Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a pucca house upon it, the fact of the house having been there for a very considerable time, of it having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature."

Whether the facts and circumstances of the case justify the inference of permanence has been said by the Privy Council to be a mixed question of fact and of law (*b*). But the Courts hold firmly to the principle declared in *Secretary of State* v. *Maharajah Luchmeswar Singh* (*c*) that the burden of proving the permanency of the tenancy is on the tenant (*d*).

(*x*) *Secretary of State* v. *Beni Prasad* (1937) 170 I.C. 677, (1937) A.P. 444 ; *Bansi Singh* v. *Chakradhar Prasad* (1938) 17 Pat. 358, (1938) A.P. 569 ; *Chaganlal* v. *Indra Koer* (1941) 194 I.C. 459, (1941) A.P. 495 ; *Anant Teli* v. *Ramdhan Puri* (1938) 179 I.C. 940, (1939) A.P. 350.

(*y*) (1929) 56 Cal. 738, 116 I.C. 278, ('29) A.C. 37 ; *Debendra Nath* v. *Pasupati* (1931) 35 Cal. W.N. 1047, 136 I.C. 889, ('32) A.C. 198.

(*z*) (1919) 47 Cal. 1, 46 I.A. 131, 50 I.C. 49, ('19) A.PC. 11 ; *Sukumar Chandra* v. *Nagendra Bala Dasi* (1940) A.C 393, 72 C.L.J. 209, 190 I.C. 622.

(*a*) (1901) 28 Cal. 738.

(*b*) *Dhanna Mal* v. *Moti Sagar* (1927) 8 Lah. 573, 54 I.A. 178, 101 I.C. 355, ('27) A.PC. 102. But see the explanation and application of this case in *Kamala Kumar* v. *Nanda Lal*, *supra*, and in *Debendra Nath* v. *Pashupati*, *supra* ; *Ram Ranbija* v. *Ramjiwan Ram* (1942) 200 I.C. 769, (1942) A.P. 397.

(*c*) (1889) 16 Cal. 223, 16 I.A. 6, 11.

(*d*) *Seturatnam Aiyar* v. *Venkatachala Gounden* (1920) 43 Mad. 567, 47 I.A. 76, 55 I.C. 117, ('20) A.PC. 67 ; *Chidambara Sivaprakasa* v. *Veerama Reddi* (1922) 45 Mad. 586, 49 I.A. 286, 68 I.C. 538, ('22) A.PC. 292 ; *Nainapillai* v. *Ramanathan* (1924) 47 Mad. 337, 51 I.A. 83, 82 I.C. 226, ('24) A.PC. 65 ; *Subramanya Chettiar* v. *Subramanya Mudaliar* (1929) 52 Mad. 549, 56 I.A. 248, 116 I.C. 601, ('29) A.PC. 156 ; *Kamal Kumar* v. *Nanda Lal Dule*, *supra* ; A.C. 37 ; *Sidhanath* v. *Chiko* (1921) 23 Bom. L.R. 533, 63 I.C. 935, ('21) A.B. 454 ; *Ponniah* v. *Deivanai* (1919) 36 Mad. L.J. 463, 52 I.C. 247 ; *Nilratan Mandal* v. *Ismael Khan Mahomed* (1905) 32 Cal. 51, 31 I.A. 149 ; *Rangasami* v. *Gnana* (1899) 22 Mad. 264 ; *Ram Ranjan Chuckerbutty* v. *Ram Narain Sing* (1895) 22 Cal. 533, 542, 22 I.A. 60 ; *Gopala* v. *Juvappa* (1931) 133 I.C. 369, ('31) A.M. 577 ; *Hiralal* v. *Secretary of State* (1931) 33 Bom. L.R. 828, 134 I.C. 721, ('31) A.B. 436 ; *Md. Zayayuddin* v. *Dargahan* (1939) 18 Pat. 571, 184 I.C. 363, (1939) A.P. 418.

S. 105

Permanency by prescription.—A permanent tenancy may be acquired by prescription, for it is a well established rule that there can be adverse possession of a limited interest in property as well as of the full title of the owner (*e*).

The Bombay case of *Datto* v. *Babasahib* (*f*) was, it is submitted, a clear case of a permanent tenancy acquired by prescription. The tenant came into possession in 1865 under a permanent lease which was inadmissible as evidence of a lease for want or registration. Under *Varatha Pillai* v. *Jeevarathammal* (*g*) the unregistered lease was admissible as evidence of the character of the lessee's possession. This evidence was supported by a series of entries in the Record of Rights showing that the lessee claimed to be a permanent tenant. Nevertheless the Court held that a permanent tenancy could not be, and was not acquired. The Court professed to follow *Naina Pillai* v. *Ramanathan* (*h*). But that case had no application, for the tenant there had entered as a tenant at will and his subsequent assertion of a permanent tenancy could not create title by adverse possession. That case was distinguished on this ground in *Periyan Chetty* v. *Govind Rao* (*i*).

When the possession is that of a trespasser it is adverse from the time of the trespass. Thus in a Bombay case (*j*) a permanent tenant encroached upon other land of his landlord and claimed it as included in his lease and his possession was held to be adverse from the time of his encroachment. Again, in a Calcutta case (*k*) possession under an invalid lease granted by a wife in the belief that her husband was dead was adverse in its inception. A typical case is *Budesab* v. *Hanmanta* (*l*) where the tenant resisted eviction on the ground that he was a permanent tenant and remained in possession for 12 years thereafter. It was held that he was a trespasser after the original tenancy was determined, and his possession was adverse from that date.

When a permanent tenancy is claimed by one who is already in possession as a tenant for years or from year to year, different considerations arise. The relationship of landlord and tenant, once established, is presumed to continue, and the tenant cannot by the mere assertion of a title inconsistent with the real legal relationship between the parties convert that relationship into adverse possession (*m*). Such assertions do not necessarily throw upon the landlord the onus of refuting them by suit (*n*). In *Vaman* v. *Khanderao* (*o*) the plaintiff claimed a permanent tenancy as to two plots. He succeeded as to the plot where the origin of his possession was not proved, but failed as to the plot where it was shown that he had entered as tenant, In *Tekait Ram Chunder Singh* v. *Srimati Madho Kumari* (*p*) the Privy Council held that the assertion by tenants, in

(*e*) *Maidin Saiba* v. *Nagappa* (1883) 7 Bom. 96; *Madhava* v. *Narayana* (1886) 9 Mad. 244, 247; *Sankaran* v. *Periasami* (1890) 13 Mad. 467; *Parameswaram* v. *Krishnan* (1903) 26 Mad. 535; *Icharam Singh* v. *Nilmoney* (1908) 35 Cal. 470; *Periyan Chetty* v. *Govind Rao* (1932) 62 Mad. L.J. 496, 137 I.C. 487, ('32) A.M. 328; *Thakor Fate Singji* v. *Bamanji* (1903) 27 Bom. 515; *Ram Rachhya Singh* v. *Kumar Kamakhya Narayan Singh* (1925) 4 Pat. 139, 150, 84 I.C. 586, ('25) A.P. 216 on appeal *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (1928) 55 I.A. 212, 7 Pat. 649, 109 I.C. 663, ('28) A.PC. 146.

(*f*) (1934) 58 Bom. 419, 36 Bom. L.R. 359, 150 I.C. 555, ('34) A.B. 194.

(*g*) (1919) 46 I.A. 285, 292, 43 Mad. 244, 53 I.C. 901.

(*h*) (1924) 50 I.A. 83, 47 Mad. 337, 82 I.C. 226, ('24) A.PC. 65.

(*i*) (1932) 62 Mad. L.J. 496, 137 I.C. 487, ('32) A.M. 328.

(*j*) *Maidin Saiba* v. *Nagappa*, *supra*.

(*k*) *Bejoy Chunder* v. *Kally Prosonno* (1879) 4 Cal. 327.

(*l*) (1897) 21 Bom. 509; *Parmeswaram* v. *Krishnan*, *supra*; *Icharam Singh* v. *Nilmoney* (1908) 35 Cal. 470; *Periyanan* v. *Govinda*, *supra*.

(*m*) *Seshamma Shettati* v. *Chickaya Hegade* (1902) 25 Mad. 507; *Narasayya* v. *Raja of Venkatagiri* (1914) 37 Mad. 1, 7 I.C. 202; *Narayan Visaji* v. *Lakshuman* (1873) 10 Bom. H.C. 324 A.C.; *Prasanna Kumar* v. *Sri Kantha Rout* (1913) 40 Cal. 173, 16 I.C. 365; *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (1923) 50 I.A. 202, 45 All. 419, 74 I.C. 476, ('23) A.PC. 118; *Nainapillai* v. *Ramanathan* (1924) 47 Mad. 337, 51 I.A. 83, 82 I.C. 226, ('24) A.PC. 65; *Sohama Singh* v. *Kesar Singh* (1932) 13 Lah. 432, 140 I.C. 474, ('32) A.L. 586; *Sarajul Haque* v. *Dwijendra Mohan* (1941) A.C. 33, 45 C.W.N. 240, (1907) I.C. 751.

(*n*) *Rajah Nilmony Sing* v. *Kally Churn Battacharjee* (1874) 2 I.A. 83, 23 W.R. 150 P.C.

(*o*) (1935) 37 Bom. L.R. 376, 156 I.C. 1020, ('35) A.B. 247.

(*p*) (1886) 12 Cal. 484, 12 I.A. 188.

suits against third parties, of a permanent tenancy was not sufficient to make their position adverse when there were no conflicting claims between themselves and the landlord: and again in *Beni Pershad Koeri* v. *Dudhnath Roy* (q) the Privy Council held that mere notice by a person holding for life that he held on perpetual tenure would not make his possession adverse. There are cases (r) which apparently conflict with this statement of the law; but these have been explained in a Madras case (s) as being cases in which the possession was really that of a trespasser when the permanent tenancy was claimed.

Permanency by estoppel.—A permanent tenancy may also be acquired by estoppel as in the case of *Forbes* v. *Ralli* (t), or by implied contract as in *Lala Beni Ram* v. *Kundan Lall* (u). These cases are discussed in the note "Estoppel by acquiescence" under sec. 51.

(5) *The Consideration.*

Consideration.—The consideration is either premium or rent. Premium is the price paid or promised in consideration of the demise. The definition of lease in sec. 105 was criticised in the case of *In re U. P. Electric Supply Co.* (v) as excluding a lease where the consideration is premium as well as rent. There is no doubt, however, that the consideration may be rent plus premium as well as rent alone or premium alone. The undernoted case (w) is an instance of such a lease. The premium or price may be an outstanding debt (x).

Premium.—If the consideration is premium alone, the transaction may be either a lease or a usufructuary mortgage. The expression "*zuripeshgi* lease" means literally a lease for a premium. The premium was the original loan, and mortgages were given in this form to evade the prohibition against usury. In a zuripeshgi lease the so-called lessee is really the creditor operating the repayment of his debt out of the subject-matter of the so-called lease. If the indebtedness continues despite the grant of the lease, then the transaction is in effect a mortgage. But the distinction is sometimes very fine. In *Nidha Shah* v. *Murli Dhar* (y) there was a grant of land rent free for fourteen years in consideration of a debt to the grantee at the time of execution. The Privy Council said that it was not a mortgage, as no accounts were to be taken and the land was not security for the debt. Zuripeshgi leases are discussed in a note under sec. 58.

There is no charge for unpaid premium corresponding to the charge of the unpaid vendor under sec. 55 (4) (b); and this is so even though the lease be in perpetuity (z).

Rent.—According to old English authorities "rent" has three essential features, (1) that it must be reserved to the lessor and not to any stranger, (2) that it must be reserved by apt words, and (3) that it cannot be a reservation of something in case which forms part of the demised premises (a). Rent in English law is said to be a profit from the property demised. It is not part of the property demised as that is returned to the lessor at the end of the term. But in mining leases the *corpus* of the demise is exhausted in the process of working, and though the consideration is called rent (b), it has been said that such leases are

(q) (1900) 27 Cal. 156, 26 I.A. 216.
(r) *Budesab* v. *Hanmanta* (1897) 21 Bom. 509; *Gopalrao* v. *Mahadevrao* (1897) 21 Bom. 394; *Vithalbowa* v. *Narayan* (1894) 18 Bom. 507; *Bejoy* v. *Kally* (1879) 4 Cal. 327.
(s) *Seshamma Shettati* v. *Chickaya Hegade* (1902) 25 Mad. 507.
(t) (1925) 4 Pat. 707, 52 I.A. 178, 87 I.C. 318, ('25) A.PC. 146; *Rani Bhuneshwari* v. *Secretary of State* (1937) 169 I.C. 756, (1937) A.P. 374.
(u) (1899) 21 All. 496, 26 I.A. 58.
(v) (1934) 61 Cal. 556, 38 Cal. W.N. 627, 152 I.C. 601, ('34) A.C. 803.
(w) *Janaki Nath* v. *Dina Nath* (1931) 54 Cal. L.J. 412, 133 I.C. 732, ('31) A.PC. 207.
(x) *Beni Prasad* v. *Mulchand* (1910) 6 Nag. L.R. 65, 6 I.C. 817.
(y) (1903) 25 All. 115, 30 I.A. 54.
(z) *Venkatacharyulu* v. *Venkatasubba Rao* (1925) 48 Mad. 821, 90 I.C. 725, ('26) A.M. 55.
(a) *Commissioners of Inland Revenue* v. *Lord Hatherton* (1936) 2 K.B. 316 (free coal payable under a mining lease to the lessor or his agent or nominee though not rent at common law is, however, "rent" within the meaning of the Finance Act 1910).
(b) *R.* v. *Westbrook*, *R.* v. *Everist* (1847) 10 Q.B. 178, 203 (lease of a brick field for a rent and a royalty on the bricks made—but the royalty was held to be part of the rent).

S. 105 really sales out and out of a portion of the land (c). In India a mining lease is regarded as a lease and not a sale of minerals and the annual payment of royalty is regarded as rent (d). The description in English law of the word "rent" as profits is not strictly accurate. This description was misapplied in a Bombay case (e) where the lessee agreed to pay the lessor Rs. 100 a year as rent and Rs. 16-8 on account of the Government assessment payable by the lessor. The Court held that the Rs. 16-8 was not rent as the property demised was subject to the assessment and the assessment was therefore not a profit. It is true that the assessment was a charge upon the land, but when the lessee agreed to relieve the lessor of this charge, that was surely part of the profit or usufruct or increase, to quote the words of Lord Cairns in *Gowan* v. *Christie* (f), accruing out of the demise. But in Indian law, any payment by the lessee that is part of the consideration of the lease is rent. Thus when the lease provides for collection charges in addition to rent, such charges are really part of the rent (g). So also a stipulation to pay assessment (h) or taxes payable by the lessor (i) makes the assessment or taxes part of the rent (j). When the lessee agrees to pay rent to the lessor, and also to pay the head lessor a rent payable by the lessor, this latter sum is also rent (k). On the other hand if the payment is not made in consideration of the lease, it is not rent. Such are payments under the Bombay Land Revenue Code by inferior to superior holders between whom the relationship of landlord and tenant does not exist (l); or cesses levied for public purposes such as sanitation, education or police (m). Parties may agree that certain payments would not be regarded as rent. A personal agreement by a tenant to pay a certain sum or certain quantity in kind to the landlord is not rent (n).

As in England, rent may be not only payment in money but also the delivery of chattels (o), corn or the share of the crop (p) or the rendering of services (q). Similarly in the Bengal Tenancy Act rent is defined as whatever is lawfully payable in money or deliverable in kind by a tenant to his landlord on account of the use and occupation of land held by the tenant. If the rent is fixed in perpetuity in money and measures of paddy, the tenancy is a fixed rate mukerari tenancy although the price of paddy may vary (r). But the mere description of a lease as mauroshi mukerari would not show that the rent was fixed in perpetuity. The terms of the deed may provide for its variation (s). The actual figures of rent may not have been determined. It is sufficient, if there is no uncertainty regarding the way in which it should be fixed (t).

Rent must be certain or so stated that it can afterwards be ascertained, and if it is so ascertainable it may fluctuate (u). If the lessee should agree to pay whatever rent the lessor might impose the lease is void (v).

(c) *Gowan* v. *Christie* (1873) 2 Sc. App. 273; *Munro* v. *Didcott* (1911) A.C. 140.

(d) *Income Tax Commissioners* v. *Kamakhha Narain* (1940) 20 Pat. 13, 191 I.C. 340, (1940) A.P. 633 following *H.N. Low & Co., Ltd.* v. *Jyoti Prasad Sing Deo* L.R. 58 I.A. 392, 59 Cal. 699.

(e) *In re Gangaram Narayandas Teli* (1915) 39 Bom. 434, 28 I.C. 584.

(f) (1873) 2 Sc. App. 273.

(g) *Mahomed Fayez* v. *Jamoo Gazee* (1882) 8 Cal. 730; *Radha Charan* v. *Golakchandra* (1904) 31 Cal. 834, 837; see also *Muhammad Abdul* v. *Nathu* (1905) 27 All. 183.

(h) *Reference* (1884) 7 Mad. 155.

(i) *Surnomoyee* v. *Koomar Purresh* (1879) 4 Cal. 576; *Watson* v. *Sreekristo* (1894) 21 Cal. 132; *Assanulla* v. *Tirthabashini* (1895) 22 Cal. 680.

(j) *Bengal Coal Co.,* v. *Janardan Kishor* (1938) 65 I.A. 354.

(k) *Basanta Kumari* v. *Ashutosh Chuckerbutti* (1900) 27 Cal. 67; *Mohebut Ali* v. *Mohamed Faizullah* (1898) 2 Cal. W.N. 455; contra *Ruttnessur* v. *Hurish Chunder* (1885) 11 Cal. 221 and *Hemendra Nath* v. *Kumar Nath* (1905) 32 Cal. 169 submitted to be incorrect.

(l) *Sadashiv* v. *Ramkrishna* (1901) 25 Bom. 556, 563.

(m) *Abdul Hari* v. *Nathua* (1904) 1 All. L.J. 537.

(n) *Anant Lal* v. *Bhibute Bhuwan* (1944) A.P. 293.

(o) *Pitcher* v. *Tovey* (1692) 4 Mod. Rep. 71 (wine).

(p) Usually called *batai*.

(q) *Doe d. Edney* v. *Benham* (1845) 7 Q.B. 976 (cleaning a church); *Jyotish Chandra* v. *Ramanath* (1905) 32 Cal. 243 (service as a physician); *Bandhu Ganda* v. *Balaram* (1902) 15 C.P.L.R. 42.

(r) *Tafazzal Ahmed* v. *Masalat Khan* (1934) 38 Cal. W.N. 797, 152 I.C. 484, ('34) A.C. 747.

(s) *Shri Prasad* v. *Sris Chandra* (1942) 22 Pat. 220, 210 I.C. 426, (1943) A.P. 327.

(t) *Viziaran* v. *Vikram Dev* (1944) A.M. 518.

(u) *Sree Sankarachari* v. *Varada* (1904) 27 Mad. 332 (rent according to rates of neighbouring land); *Re Knight, Ex parte Voisey* (1882) 21 Ch. D. 442.

(v) *Ramasami* v. *Rajagopala* (1888) 11 Mad. 200.

The payment and acceptance of an increased or diminished rent does not of itself import a new demise (*w*). But an agreement which varies the amount of rent or other essential terms of a lease amounts to a fresh lease and must be registered as such (*x*).

When once the relationship of landlord and tenant is established, mere non-payment of rent is not enough to prove that the relationship has ceased (*y*).

On the other hand a mere demand of rent from a person found in possession operates only as an offer, of a tenancy, and the relationship of landlord and tenant is not established until the rent is paid and accepted (*z*).

A lease may provide for enhanced rent in case of alienation. Such additional rent, though sometimes called penal rent, cannot be relieved against (*a*).

Periodically or on specified occasions.—Rent is a periodical payment. It is usually reserved yearly, quarterly or monthly, and if so it becomes due at the end of each such period. If the occasions are specified, such as quarter days or feast days, it becomes due on the first of such days after the commencement of the term. Rent is not in arrear until after midnight of the day for payment (*b*). Rent falling due on a Sunday may lawfully be paid on that day and is in arrear on Monday (*c*).

Agreement to lease.—An agreement to lease may effect an actual demise in which case it is a lease. See note *infra* 'Actual Demise.' On the other hand the agreement to lease may be a merely executory instrument binding the parties, the one, to grant, and the other, to accept a lease in the future. As to such an executory agreement the law in England differs from that in India.

English law.—In English law mere entry into possession under an agreement of lease does not create the relationship of landlord and tenant. When the intending lessee takes possession under an agreement to lease, the Common Law implied a tenancy at will from his permissive occupation. The Common Law Courts from very early times held that this was converted into a yearly tenancy by the payment and acceptance of rent; and this yearly tenancy was subject to such terms as were contained in the agreement and which were not inconsistent with a tenancy from year to year. But if the agreement was capable of specific performance, the Courts of Equity went further and on the doctrine of part performance restrained the landlord from evicting the tenant if he had entered into possession. Then after the fusion of the Courts of Common law and the Courts of Equity by the Judicature Acts, the case of *Walsh* v. *Lonsdale* (*d*) decided that a tenant who has taken possession under an agreement capable of specific performance, holds under the agreement on the same terms as if the lease had been granted.

Indian law.—As to an executory agreement to lease, it was at one time supposed that an intending lessee, who had taken possession under an agreement to lease capable of specific performance, was in the same position as if the lease had been executed and registered. These cases have, however, been rendered obsolete by the decisions of the

---

(*w*) *Deo d. Monck* v. *Geekie* (1844) 5 Q.B. 841; *Crowley* v. *Vitty* (1852) 7 Exch. 319.

(*x*) *Lalit Mohan* v. *Gopali* (1912) 39 Cal. 284, 297, 12 I.C. 723 F.B.; *Biraj* v. *Kedar Nath* (1908) 35 Cal. 1010, 1012; *Durga Prasad Singh* v. *Rajendra Narain Singh* (1914) 40 I.A. 223, 41 Cal. 493, 21 I.C. 750.

(*y*) *Hari* v. *Mahadaji* (1868) 5 Bom. H.C. 85 A.C.J.; *Rungo Lall* v. *Abdool Guffoor* (1879), 4 Cal. 314; *Prem Sukh Das* v. *Bhupia* (1878) 2 All. 517; *Gangabai* v. *Kalapa* (1885) 9 Bom. 419; *Tiruchurna* v. *Sanguvien* (1881) 3 Mad. 118; *Dadoba* v. *Krishna* (1883) 7 Bom. 34; *Rambhat* v. *Bababhat* (1894) 18 Bom. 250; *Mazhar Rai* v. *Ramgat Singh* (1896) 18 All. 290 *Jalasutram* v. *Bommadevara* (1906) 29 Mad. 42; *Jagannatha* v. *Muthia Pillai* (1901) 14 Mad. L.J. 477; *Rama Charan* v. *Administrator General* (1907) 6 Cal. L.J. 72; *Sriramulu* v. *Jogiraju* (1913) 24 Mad. L.J. 188, 18 I.C. 243.

(*z*) *Deo Nandan* v. *Meghu Mahton* (1907) 34 Cal. 57; *Evans* v. *Edith* (1838) 9 Ad. and El. 342; *Towerson* v. *Jackson* (1891) 2 Q.B. 484.

(*a*) *Rama Krishna Rao* v. *Mahadeo Bhatte* (1935) 68 Mad. L.J. 482, 156 I.C. 767, ('35) A.M. 335.

(*b*) *Dibble* v. *Bowater* (1853) 2 E. & B. 564.

(*c*) *Child* v. *Edwards* (1909) 2 K. B. 753.

(*d*) (1882) 21 Ch. D. 9.

S. 105 Privy Council that the equity in *Walsh* v. *Lonsdale* does not apply in India. See note under sec. 53A 'Statutory Law of India excludes *Walsh* v. *Lonsdale*.' If the agreement is in writing the intending lessee may defend his possession under sec. 53A.

Actual demise.—When a document, though in form an agreement to lease, finally ascertains the terms of the lease, and gives the lessee a right of exclusive possession either immediately or at a future date, the document is said to effect an actual demise and it operates as a lease. Whether it operates as a lease or as an agreement to lease is a matter of construction and intention (*e*).

Words of present demise are generally conclusive of a lease (*f*). There is a present demise even if the leasehold interest is to commence in the future (*g*). This is because a transfer may operate not only in the present but in the future; see note—"In present or in future" under sec. 5. In other words the agreement must create an immediate right in the party to be a tenant either from that day or from a future day and before the execution of any formal lease (*h*). Therefore an agreement by which one of the parties to a suit to recover land agreed that in case of success he would grant a lease of the land to the other on specified terms, does not create a present demise (*i*). This principle seems to have been overlooked in a Calcutta case (*j*). The agreement in that case was dated the 16th September and was to grant a lease for five years from the next day, *i.e.*, the 17th September, but the Court held that it did not operate as a lease. If all the terms essential to a lease are not fixed, the agreement is not construed as a lease (*k*). In *Ramjoo Mahomed* v. *Haridas Mullick* (*l*) the agreement was contained in two letters, The lessee's letter set forth all the terms essential to a lease, and the lessor's letter of acceptance concluded with the words, "all terms will be settled in the agreement." Page, J., held that this did not imply that the terms were not settled by the letters, but was merely an assurance that the terms mentioned in the lessee's letter would be embodied in the formal lease. The letters were therefore construed as a lease. An agreement is so construed, if the terms are fixed (*m*); especially if possession is to be taken under it (*n*), or if the lessee is already in possession (*o*), or if rent is to be paid before the execution of a formal lease (*p*). On the other hand in spite of words of present demise the instrument will be construed as executory if the terms are not settled (*q*), or if before granting the lease the lessor has to do work of completien (*r*), or improvement (*s*).

(*e*) *Swaminatha* v. *Ramaswami* (1921) 44 Mad. 399, 62 I.C. 354, ('21) A.M. 72; *Purmananddas* v. *Dharsey* (1886) 10 Bom. 101, 104; *Ramjoo Mahomed* v. *Haridas Mullick* (1925) 52 Cal. 695, 700, 91 I.C. 320, ('25) A.C. 1087; *Poole* v. ‑ (1810) 12 East. 168; *Gore* v. *Lloyd* (1844) 2 M. & W. 463.

(*f*) *Barry* v. *Nugent* (1782) 3 Doug. K. B. 179 (doth demise); *Baxter Abrahall* v. *Browne* (1775) 2 Wm. Bl. 973 (hereby set and let); *Ramjoo Mahomed* v. *Haridas Mullick* (1925) 52 Cal. 695, 91 I.C. 320, ('25) A.C. 1087; *Sultanali* v. *Tyeb* (1930) 32 Bom. L. R. 188, 125 I.C. 428, ('30) A.B. 210.

(*g*) *Ramjoo Mahomed* v. *Haridas Mullirk*, *supra*; *Sultanali* v. *Tyeb*, *supra*; *Poole* v. *Bentley* (1810) 12 East, 168; *Doe d. Walker* v. *Groves* (1812) 15 East. 244; *Mopurappa* v. *Ramaswami Gramani* (1934) 57 Mad. 760, 67 Mad. L. J. 54, 152 I.C. 538, ('34) A.M. 418.

(*h*) *Gore v. Lloyd* (1844) 2 M. & W. 463; *Doe d. Walker* v. *Groves* (1812) 15 East. 244.

(*i*) *Hemanti* v. *Midnapur Zamindari Co.* (1919) 47 Cal. 485, 46 I.A. 240, 55 I.C. 534.

(*j*) *Satyendra Nath* v. *Anil Chandra* (1910) 14 Cal. W. N. 65, 5 I.C. 38.

(*k*) *Chapman* v. *Towner* (1840) 6 M. & W. 100; *Macnaghten* v. *Rameshwar Singh* (1903) 30 Cal. 831.

(*l*) (1925) 52 Cal. 695, 91 I.C. 320, ('25) A.C. 1087.

(*m*) *Gore* v. *Lloyd*, *supra*.

(*n*) *Port Canning and Land Improvement Co.* v. *Katyani* (1919) 47 Cal. 280, 46 I.A. 279, 53 I.C. 522; *Doe d. Pearson* v. *Ries* (1832) 8 Bing. 178; *Hamerton* v. *Stead* (1824) 3 B. & C. 478.

(*o*) *Purmananddas* v. *Dharsey* (1886) 10 Bom. 101; *Sanjib Chandra* v. *Santosh* (1922) 49 Cal. 507, 69 I.C 877, ('22) A.C. 436; *Deo d. Phillip* v. *Benjamin* (1839) 9 Ad. & El. 644, 651; *Lovelock* v. *Franklyn* (1840) 8 Q. B. 371.

(*p*) *Pinero* v. *Judson* (1829) 6 Bing. 206.

(*q*) *Morgand, Dowling* v. *Bissell* (1810) 3 Taunt, 65 (rent to be subsequently ascertained); *Dunk* v. *Hunter* (1822) 5 B. & Ald. 322 (uncertainty as to term).

(*r*) *Sir Mahomed Yusuf* v. *Secretary of State* (1921) 45 Bom. 8, 57 I.C. 971, ('21) A.B. 200; *Rephart* v. *Porter* (1831) 7 Bing. 451.

(*s*) *Gore* v *Lloyd supra*.

Again the agreement may expressly provide either that it shall (*t*), or shall not (*u*) operate as a lease. S. 105

A *dowlferist* or rent roll is not even an agreement of lease although the entries are signed by the tenants (*v*).

Illustrations.

(1) *A* gave *B* a memorandum setting forth the terms of a lease for the reclamation of land in the Sunderban jungle. *B* entered into possession on the strength of the memorandum. The memorandum was a lease, and was not admissible in evidence for want of registration: *Port Canning and Land Improvement Co.* v. *Kalyani* (1919) 47 Cal. 280, 46 I.A. 279, 53 I.C. 522.

(2) By an agreement of the 8th October 1882 *A* agreed to let his property to *B* for a term of five years, the rent to commence from the 1st October 1882. *B* was regarded as a tenant at the date of the agreement, which operated as a present demise: *Purmananddas* v. *Dharsey* (1886) 10 Bom. 101.

(3) *A* by an agreement of the 16th February 1915 agrees to let to *B* a building then under construction as from the 1st April 1915 when it was expected to be completed. On the 1st April the building is not completed, but with *A*'s consent *B* takes possession and pays rent. There was by reason of delivery of possession a demise on the 1st April, but not under the agreement which was merely executory: *Sir Mahomed Yusuf* v. *Secretary of State* (1921) 45 Bom. 8, 57 I.C. 971, ('21) A.B. 200.

Rent Notes.—These are agreements to lease which fall under the wider definition of lease in the Registration Act which includes a kabulayet and an undertaking to cultivate or occupy. The rent note or agreement to lease may be in counterpart signed by both parties or it may be in correspondence (*w*); or it may be an application for a lease accepted by the endorsement of the word "granted" (*x*); or it may be an application for a lease accepted orally or by the conduct of the lessor putting the applicant into possession (*y*). If there is no present demise the agreement may be effected by an unregistered instrument or even orally. So when a tenant agreed orally to take three successive yearly leases after the expiry of his term, it was held that the agreement was valid as the oral agreement did not operate as a transfer of property (*z*). If there is a present demise the rent note operates as a transfer by way of lease and if the term does not exceed one year registration is not necessary (*a*). But if the term exceeds one year registration is necessary not under sec. 107, but under the Registration Act. A transfer by way of lease must be made by a person who owns the interest to be transferred. A rent deed which is executed by the transferee of interest to be conveyed by a lease, and reciting that the transferee had taken the premises from the transferor and the transferee merely agrees by the terms of the deed to pay certain rent for a certain period cannot be considered to be a lease (*b*).

(*t*) *Nund Ram* v. *Mauno Bibee* (1869) 10 W.R. 177.

(*u*) *Driscoll* v. *Battersea Borough Council* (1903) 1 K. B. 881.

(*v*) *Gungapersad* v. *Gogun* (1878) 3 Cal. 322; *Narain Coomary* v. *Ramkrishna* (1880) 5 Cal. 864.

(*w*) *Boyd* v. *Kreig* (1890) 17 Cal. 548, 554; *Morgan* v. *Fernandez* (1916) 30 Mad. L.J. 519, 83 I.C. 439; *Sir Mahomed Yusuf* v. *Secretary of State* (1921) 45 Bom. 8, 57 I.C. 971, ('21) A.B. 200.

(*x*) *Syed Sufdar* v. *Amzad Ali* (1881) 7 Cal. 703, 707; *Ramaswamy* v. *Thirupathi* (1904) 27 Mad. 43; *Sheikh Elahi* v. *Sheikh Hukum* (1914) 18 Cal. W. N. 38, 20 I.C. 907.

(*y*) *Moro Vithul* v. *Tukaram* (1868) 5 Bom. H.C. 92 (A.C.); *Hiralal* v. *Collector of Surat* (1876) P.J. 86.

(*z*) *Syrian Land Co.* v. *J. D. Rodrigues* (1933) 148 I.C. 301 ('33) A.R. 220.

(*a*) *Hirachand* v. *H. H. Hammond* (1934) 148 I.C. 548, ('34) A. Pesh. 81 (rent note of a bungalow for 5 months signed by the lessee only).

(*b*) *Taj Din* v. *Abdul Rahim* (1939) A.L. 423, 41 P.L.R. 498.

S. 105 But whether a rent note is a lease as defined in this section is a question on which there was a conflict of decision. The Allahabad High Court held that a lease must be a deed signed by the lessor (*c*). This view was taken by the Madras and Calcutta High Courts in the earlier cases (*d*), but was abandoned in later cases by the Madras High Court (*e*), and by the High Court of Calcutta (*f*). The Bombay (*g*) and Rangoon (*h*) and Patna (*i*) High Courts followed Allahabad.

This conflict of decision is now settled by the amendment of sec. 107 which requires a lease to be signed both by the lessor and by the lessee. A rent note or a kabulat signed only by the intending lessee is not a lease under this Act, but would be a lease under the Registration Act and the question of its registration would be decided under that Act (*j*). A rent note not compulsorily registrable under the Registration Act, executed by a tenant in favour of a landlord, if not registered can be relied upon to establish the relationship existing between the parties (*k*).

License.—A license is defined in sec. 52 of the Indian Easements Act 5 of 1882 as a right to do or continue to do, in or upon the immoveable property of the grantor something which would in the absence of such right be unlawful, and such right does not amount to an easement or an interest in the property (*l*). The distinction between a license and a lease is marked by the last clause of the definition, for a license does not create any estate or interest in the property to which it relates (*m*). A licensee is not entitled to notice to quit before eviction (*n*).

Accordingly a license

(1) is not assignable [Act 5 of 1882, sec. 56];
(2) does not entitle the licensee to sue strangers in his own name;
(3) is recoverable by the grantor [Act 5 of 1882, sec. 60];
(4) is determined when the grantor makes an assignment of the subject-matter.

Whether an instrument operates as a lease or as a license is a matter not of words but of substance (*o*). If the effect of the instrument is not to give exclusive possession, it will take effect as a license though called a lease or letting (*p*). On the other hand

(*c*) *Nand Lal* v. *Hanuman Das* (1904) 26 All. 368; *Kashi Gir* v. *Jogendro Nath* (1905) 27 All. 136; *Beni* v. *Puran Das* (1904) 27 All. 190; *Kedar Nath* v. *Shankar Lal* (1924) 46 All. 303, 78 I.C. 934, ('24) A.A. 514 followed in *Ahmed Khan* v. *Sadasheo* (1925) 80 I.C. 736, ('25) A.N. 121; *Safdar Ali* v. *Maharaja Ambika Prasad* (1930) 28 All. L. J. 1385, 130 I.C. 8, ('30) A.A. 678; *Sheo Karan* v. *Parbhu Narain* (1909) 31 All. 276, 2 I.C. 211; *Mahomed Liaqat Ali* v. *Ajudhia Prasad* (1943) A.A. 212, (1943) A.L.J. 66, 207 I.C. 323; *Mohan Lal* v. *Genda Singh* (1943) A.L. 127, (1943) Lah. 695, 45 P.L.R. 274, 208 I.C. 22 [F.B.].

(*d*) *Turof Sahib* v. *Esuf Sahib* (1907) 30 Mad. 322; *Kaki Subbanadri* v. *Muthu Rangayya* (1909) 32 Mad. 532, 4 I.C. 1039; *Nilmamud Sarkar* v. *Boul Das* (1909) 14 Cal. W. N. 73, 2 I.C. 994.

(*e*) *Syed Ajam* v. *Ananthanarayanna* (1910) 35 Mad. 95, 8 I.C. 668.

(*f*) *Akram Ali* v. *Durga* (1910) 14 Cal. L. J. 614, 10 I.C. 489; *Raimoni* v. *Mathura* (1912) 39 Cal. 1016, 14 I.C. 540; *Dinanath Kundu* v. *Janaki Nath* (1928) 55 Cal. 435, 110 I.C. 368, ('28) A.C. 392.

(*g*) *Ramsingh* v. *Bai Dhanba* (1925) 27 Bom. L. R. 626, 88 I.C. 648, ('25) A.B. 512.

(*h*) *U Tha Nyo* v. *Maung Kyaw Tha* (1925) 3 Rang. 379, 90 I.C. 693, ('25) A.R. 273; *Maung Ba Sein* v. *Maung Htook Shwe* (1927) 5 Rang. 95, 102 I. C. 105, ('27) A.R. 169.

(*i*) *Ramkrishna Jha* v. *Jainandan Jha* (1935) 157 I.C. 98, ('35) A.P. 291.

(*j*) *Jagadish Chandra Deo* v. *Bisheswar Lal* (1942) 199 I.C. 341, (1942) A.P. 323; *Tulsiram Rajaram* v. *Govinda Ramji* (1939) I.C. 753, (1940) A.N. 143.

(*k*) *Mohan Lal* v. *Ganda Singh* (1943) A.L. 127, (1943) Lah. 695, 45 P.L.R. 274, 208 I.C. 22 [F.B.].

(*l*) *Muskett* v. *Hill* (1839) 5 Bing. (N.C.) 694, 707; *Heap* v. *Hartley* (1889) 42 Ch. D. 461, 468 C.A.

(*m*) *Heap* v. *Hartley*, *supra* at p. 470; *Heiniger* v. *Droz.* (1901) 25 Bom. 433; *Secretary of State* v. *Karuna Kanta* (1908) 35 Cal. 82, 99; *Board of Revenue* v. *South Indian Rly.* (1925) 48 Mad. 368, 86 I.C. 688 ('25) A.M. 434 F.B.; *B. N. W. Railway* v. *Janki Prasad* (1936) A.P. 362.

(*n*) *Ma Gyi* v. *Maung Tet* (1934) 151 I.C. 971, ('34) A.R. 291.

(*o*) *Smith* v. *St. Michael, Cambridge, Overseers* (1860) 3 E. & E. 383, 390; *Mammikutti* v. *Puzhakka* (1906) 29 Mad. 353.

(*p*) *Reg.* v. *Morrish* (1863) 32 L. J. (M. C.) 245 (letting of space for a stall in an exhibition); *Seeni Chettiar* v. *Santhanathan* (1897) 20 Mad. 58 F.B.; *Mammikutti* v. *Puzhakkal*, *supra*; *Indian Hotels Co.* v. *Phiroz* (1923) 25 Bom. L.R. 84, 88 I.C. 816, ('23) A.B. 228; *Emperor* v. *Sheri Dadumiyaji* (1930) 32 Bom. L.R. 332, 126 I.C. 872, ('30) A.B. 165; *Athakutti* v. *Govinda* (1898) 16 Mad. 97.

if exclusive occupation is given, it matters not that it is subject to reservations and restrictions (*q*). But if it only gives the use of the property in a particular way or on certain terms while it remains in the possession and control of the owner, it will only be a license (*r*). In other words for a lease there must be a power and intention to hold the property to the exclusion of the grantor. The distinction is sometimes fine. In a Madras case (*s*) a document purporting to be a lease by a railway company of plots in a station yard for the purpose of stacking coal was construed to be a license. On the other hand in a very similar Allahabad case (*t*) a document purporting to be a license by a railway company to an oil company conferring a right of temporary occupation of plots of land for a petroleum installation was construed to be a lease. In the former case however a right of access was reserved by the railway company.

Illustrations.

(1) *A*, the owner of a news, reserves a space for garaging *B*'s motor car at a monthly rent. There is no demise or transfer of an interest in land. *B* is only a licensee: *Indian Hotels Co.* v. *Phiroz* (1923) 25 Bom. L.R. 84, 88 I.C. 316, ('23) A.B. 228 F.B.

(2) *A* grants *B* a lease for two years to tap toddy from palmyra trees in his garden but *B* is not to cut the leaves. The so-called lease creates no interest in immoveable property and is only a license: *Natesa Gramani* v. *Tangarelu* (1915) 38 Mad. 883, 23 I.C. 102.

(3) *A* lets a plot of land used as a *hat* or market to *B* for a fixed period for a fixed sum. *B* has the right to collect tolls in the market, and covenants to keep the *hat* clean, not to interfere with the rent of any permanent shop, not to make alterations without the leave of *A*, and to give up possession at the end of the term. In spite of the restrictions *B* has sufficient control of the land to make the instrument a lease and not a license: *Secretary of State* v. *Bhupalchandra* (1930) 57 Cal. 655, 129 I.C. 177, ('30) A.C. 739.

A lodger is a man who lives in the house of another and lodges with him (*u*). A lodger is only a licensee if he has no separate apartment (*v*); or even if he has a separate apartment, if the terms of the letting show that the landlord retains control over the whole house, *e.g.*, when he provides attendance (*w*) or where he has exclusive control of the front door (*x*). An inmate of a boarding house (*y*), and a guest in an inn (*z*), occupy only as licensees.

In the case of a tenement house the owner's residence on the premises and the fact that he pays the rates and taxes or that he retains control of the staircase and passages are not in themselves sufficient to show that the occupier of a flat is not a lessee (*a*). If the landlord at a tenement house maintains a privy for the common use of the tenants and which is not included in the lease of any one of them, each tenant is only a licensee in respect of the privy (*b*).

(*q*) *Glenwood Lumber Co.* v. *Phillips* (1904) A. C. 405, 408; *Young* v. *Liverpool Assessment Committee* (1911) 2 K. B. 195; *Secretary of State* v. *Bhupalchandra Ray* (1930) 57 Cal. 655, 129 I. C. 177, ('30) A.C. 739.

(*r*) *Wells* v. *Kingston upon Hill Corporation* (1875) L.R. 10 C.P. 402, 408; *Cory* v. *Bristowe* (1877) 2 App. Cas. 262, 276; *Seeni Chettiar* v. *Santhanathan* (1897) 20 Mad. 58 F.B.; *Secretary of State* v. *Karuna Kanta* (1908) 35 Cal. 82; *Mohipal* v. *Lalji* (1913) 17 Cal. W.N. 166, 16 I.C. 705.

(*s*) *Board of Revenue* v. *Southern India Railway* (1925) 48 Mad. 368, 86 I.C. 668, ('25) A.M. 434 F.B.

(*t*) *In re Burmah-Shell Oil Storage and Distributing Co. of India, Ltd.* (1933) 55 All. 874, 1933 All. L.J. 749, 145 I.C. 674, ('33) A.A. 735.

(*u*) *Bradley* v. *Bayliss* (1881) 8 Q.B.D. 195, 216.

(*v*) *Wright* v. *Stavert*, *supra*.

(*w*) *Smith* v. *St. Michael Cambridge Overseers* (1860) 3 E. & E. 388.

(*x*) *R.* v. *St. Georges Union* (1871) L.R. 7 Q.B. 90, 97.

(*y*) *Wright* v. *Stavert*, *supra*.

(*z*) *Bradley* v. *Bayliss*, *supra*; *Lane* v. *Dixon* (1847) 3 C.B. 776, 784.

(*a*) *Kent* v. *Fittall* (1906) 1 K.B. 60.

(*b*) *Lakhmichand* v. *Ratanbai* (1927) 51 Bom. 274, 101 I.C. 210, ('27) A.B. 116.

Ss. 105, 106

A servant occupies as a licensee and on behalf of his master when his occupation is in the course of his employment and subservient to and necessary for his service (*c*). But if he is permitted to occupy by way of remuneration for his services (*d*), and if his occupation is not connected with his services (*e*), he is a lessee and the services he renders are the rent.

A *burgadar* is a person who enters into a profit sharing arrangement to cultivate land. He is generally a servant unless the terms of the contract show an intention to create an interest in the land (*f*).

Other instances of licenses are the cases cited in foot-note (*g*).

Duration of certain leases in absence of written contract or local usage.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and *either be sent by post to the party* who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Amendment.—The words "either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party" have been substituted by the amending Act of 1929 for the words "tendered or delivered personally to the party who is intended to be bound by it." This recognizes the practice, already existing, of service by post.

Nature of periodic tenancy.—See note *supra:* "Periodic lease" under sec. 105.

Implied duration.—The section enacts a rule for the duration of leases in cases not governed by local law, contract or usage. The presumption as to the period under

(*c*) *Mayhew* v. *Suttle* (1854) 4 E. & B. 347 Ex. Ch.; *R.* v. *Spurrell* (1865) L.R. 1 Q. B. 72; *Smith* v. *Seghill* (1875) L. R. 10 Q.B. 422; *Athakutti* v. *Govinda* (1893) 16 Mad. 97.

(*d*) *Hughes* v. *Chatham Overseers* (1843) 5 Man. & G. 54, 78; *Dover* v. *Prosser* (1904) 1 K.B. 84.

(*e*) *Smith* v. *Seghill*, *supra*.

(*f*) *Sheikh Pokhan* v. *Rajani Kamal* (1919) 50 I.C. 285; *Brahmamoyee* v. *Sheikh Munsur* (1920) 32 Cal. L.J. 37, 58 I.C. 859.

(*g*) *Frank Warr & Co.* v. *London County Council* (1904) 1 K.B. 713 (use of refreshment rooms in a theatre): *Sweetmeat Automatic Delivery Co.* v. *Commissioners* (1895) 1 Q.B. 484 (automatic machines on a railway station platform); *Wilson* v. *Tavener* (1901) 1 Ch. 578 (agreement to let hoarding for advertisement); *King* v. *David Allen & Co.* (1916) 2 A.C. 54 (advertisements affixed to a wall); *Walton Harvey Ltd.* v. *Walker and Homfrays Ltd* (1931) 1 Ch. 274 (electric sign on a building); *Ramkrishna* v. *Unni Check* (1893) 16 Mad. 280 (grant of a right to trap elephants).

this rule is not rebutted by the fact that the rent is paid at different periods (*h*). The rule was recognized even before the Act (*i*). It applies when the tenant is in possession without evidence of the terms of the letting; and also in cases of an implied demise where entry creates a tenancy at will, converted by payment of rent into a tenancy from year to year or month to month according to the nature of the holding. In *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (*j*) the Privy Council said that where the owner recognizes the right of a person in possession by accepting rent from the latter, a tenancy such as could be terminated by notice to quit is created.

This section seems to have been overlooked in an Allahabad case (*k*) where a lease of a site for a market at a yearly rent was held to operate as a license because it was not registered. The report however does not show whether rent was paid or not. In another case (*l*) a tenant in possession under a lease of a house for a term of years which was void for want of registration was described as a tenant at will. This expression was evidently used to denote a periodic tenancy (*m*), for the tenant had been in possession paying rent for ten years and was obviously a monthly tenant.

Contract or local usage.—The presumption under this section is that the lease is from year to year or month to month, according to the nature of the property, and is terminable by six months' or fifteen days' notice, as the case may be. A stipulation that the rent would be payable monthly would raise a presumption that the tenancy was from month to month (*n*). Where a tenancy is created and the lessees enter into possession on payment of rent to the lessors, and the purpose of the tenancy is neither agricultural nor manufacturing, such lease may be taken to be a lease from month to month (*o*). Unless there is some indication to the contrary, the term "ordinary tenant" would in Calcutta mean a monthly tenant, even though there were no reference to payment of monthly rent (*p*). But this presumption may be rebutted by local usage or local law or express contract. Usage or local law generally govern agricultural tenancies and to such tenancies the section does not apply, unless made applicable by notification under sec. 117. As to monthly leases of houses in Bombay there is a usage requiring a month's notice to quit (*q*). There is no such usage in Calcutta (*r*). In the Punjab where the Act is not in force a monthly tenant is entitled to fifteen days' notice terminating with the month of the tenancy (*s*).

The provision as to notice to quit applies to cases where the parties are not regulated by their own contract. So a provision in a lease enabling the landlord to resume possession on payment of the cost of building, erected by the tenant dispensed with the necessity of notice to quit (*t*). Both the period of the lease and the length of notice may be determined by the contract (*u*). Again, the contract may provide that the tenancy may

(*h*) *Debendra Nath* v. *Syama Prosanna* (1907) 11 Cal. W.N. 1124; *Mohendra Nath* v. *Nagendra* (1919) 50 I.C. 918; *Biseshwar* v. *Pitambernath* (1919) 51 I.C. 44; *Sheikh Akloo* v. *Sheikh Emaman* (1916) 44 Cal. 403, 38 I.C. 899.

(*i*) *Nanabhai* v. *Pestanji* (1870) 6 Bom. H.C. 31 (A.C.); *Endar Lala* v. *Lallu Hari* (1871) 7 Bom. H.C. 111 (A.C.).

(*j*) (1876) 2 I.A. 92, 1 Cal. 391.

(*k*) *Basdeo Rai* v. *Dwarka Ram* (1916) 38 All. 178, 32 I.C. 346.

(*l*) *Ram* v. *Sameswari* (1925) 42 Cal. L.J. 71, 98 I.C. 98, ('25) A.C. 1171.

(*m*) See Note, 'Periodic leases', at p. 572.

(*n*) *Baidyanath* v. *Onkarmal* (1938) A.C. 656 (1938) 2 Cal. 261, 42 C.W.N. 598; *Bagchi* v. *Morgan* (1937) A.A. 36.

(*o*) *Anwarali* v. *Jamni Lal Roy* (1940) A.C. 89, (1939) 2 Cal. 254, 43 C.W.N. 797, 186 I.C. 625.

(*p*) *Pralhadrai* v. *Commissioner of Port of Calcutta* (1939) A.PC. 11.

(*q*) *Bhojabhai* v. *Hayem Samuel* (1898) 22 Bom. 754.

(*r*) *Profulla Chandra* v. *Nanda Lal* (1935) 39 C.W.N. 1069.

(*s*) *Rattan Sen* v. *Sm. Krishna Kaur* (1933) 141 I.C. 513, ('33) A.L. 134.

(*t*) *Monindra Nath* v. *Radha Prosanna* (1918) 47 I.C. 19.

(*u*) *Bhola Nath* v. *Raja Durga* (1907) 12 Cal. W. N. 724 (two months' notice); *Raja Behari* v. *Kailas* (1915) 22 Cal. L.J. 78, 30 I.C. 887 (notice according to the Bengali calendar); *Sahib Dayal* v. *Dhanpat* (1923) 75 I.C. 458, ('23) A. L. 281 (a week's notice).

S. 106 be terminated by notice before the end of the month or other period of the lease (*v*). But the contract must be a valid one. So where a lease of land from year to year was not registered, a clause requiring six months' notice to quit was inoperative (*w*).

Agricultural purposes.—The section though it refers to agricultural leases does not apply to them unless made applicable by notification under sec. 117.

Most agricultural tenures in India are before the Act and are regulated not by this Act but by local Acts or custom. A holding under the custom of *utbandi* in Bengal is merely a tenancy at will which can be terminated by verbal demand for possession (*x*). Some agricultural tenancies are not derivative tenures at all. The Madras High Court said that there was absolutely no ground for laying down that the rights of ryots in zemindaris invariably or even generally had their origin in express or implied grants made by the zemindars (*y*). Again in *Nidhee Kristo Bose* v. *Nistarinee Dossee* (*z*) Markby, J., compared a tenant in a Bengal Zemindary to a freeholder paying a quit rent to the lord of the manor. In *Bibee Sahadwa* v. *Smith* (*a*) Phear, J., said that the right of the occupancy ryot was similar to an easement or *a profit a prendre*. This description was applied by Mahmud, J., to a proprietory tenant in the United Provinces (*b*). In *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (*c*) the Privy Council refused to treat a mokarari tenure as a lease, and held that on the death of the grantee without heirs the estate did not revert to the zemindar.

Manufacturing purposes.—This pharse is used in its popular sense and means the making of articles of trade and commerce by means of machinery (*d*). If the lessee, to the knowledge of the lessor required and used the land for manufacturing purposes, then, in the absence of a contract, he is a yearly tenant, and entitled to six months' notice (*e*).

Notice to quit in periodic tenancies.—A tenancy at will is terminated by a demand, express, or implied, by a determination of the will, that is, by any act which is inconsistent with the will to continue the tenancy (*f*). A tenant holding under a rent note which is inadmissible for want of registration is a tenant at will and no notice is necessary to determine the tenancy. A demand for possession is sufficient (*g*). A tenant at sufferance is not entitled even to a demand for possession (*h*). This distinction is based on the principle that ejectment can only be brought for unlawful or tortious detention; and when possession of the land has been obtained by the consent of the owner such possession cannot ordinarily be deemed wrongful until at least a demand for possession has been made and refused (*i*). Notice under this section is not necessary, and a mere demand will suffice if the lease is on condition that the land demised should be surrendered whenever required (*j*). Notice is not necessary for leases for a fixed

(*v*) *Rure Khan* v. *Ghulam* (1924) 75 I.C. 1034, ('24) A.L. 643; *Ram Nath* v. *Badri Nath* (1928) 106 I. C. 537, ('28) A. L. 348; *Saik Kasam* v. *Haji Jusuf* (1924) 78 I.C. 445, ('24) A. N. 220.

(*w*) *Sheikh Akloo* v. *Sheikh Emaman* (1917) 44 Cal. 403, 38 I.C. 899; *Debendra Nath* v. *Syama Prosanna* (1906) 11 Cal. W. N. 1124.

(*x*) *Surendranath Sarkar* v. *Poornachandra Mukherji* (1933) 60 Cal. 681, 37 Cal. W. N. 385, 146 I.C. 55, ('33) A.C. 609.

(*y*) *Venkatanarasimha* v. *Dandamudi Kotayya* (1897) 20 Mad. 299; cf. *Cheekati Zamindar* v. *Ranasooru* (1900) 23 Mad. 318; *Narayana Ayyangar* v. *Orr* (1903) 26 Mad. 252; *Venkatachala Goundan* v. *Rungaratnam* (1913) 24 Mad. L.J. 571, 20 I.C. 374; *Moore* v. *Makhan Singh* (1919) 53 I.C. 180; *Veeranan* v. *Annasawmi* (1911) 21 Mad. L. J. 845, 12 I.C. 1.

(*z*) (1872) 21 W. R. 386.

(*a*) (1874) 12 Beng. L. R. 82.

(*b*) *Deoki Nandan* v. *Dhian Singh* (1885) 8 All. 467, 470.

(*c*) (1876) 1 Cal. 391, 3 I.A. 92.

(*d*) *Jayanti* v. *Upendra* (1946) A.C. 317.

(*e*) *Jacks & Co.* v. *Joosab Mahomed* (1924) 48 Bom. 38, 82 I.C. 791, ('24) A.B. 115.

(*f*) *Doe d. Jacobs* v. *Phillips* (1847) 10 Q.B. 130; *Rajendranath* v. *Bassider* (1877) 2 Cal. 146; *Janki* v. *Kanhaiyalal* (1935) 159 I.C. 816, (1936) A.O. 102.

(*g*) *Gur Prasad* v. *Hansaraj* (1946) A.O. 144.

(*h*) *Doe d. Bennett* v. *Turner* (1840) 7 M. & W. 226, 235.

(*i*) *Deo Nandan* v. *Meghu Mahton* (1907) 34 Cal. 57, 63.

(*j*) *Moosa Kutty* v. *Thekke* (1928) 110 I.C. 398, ('28) A.M. 687; *Kelu* v. *Ammad Kully* (1910) Mad.W.N. 794, 8 I.C. 362; *Kuda Baksh* v. *Abid Husain* (1909) 12 O.C. 279, 3 I.C. 878.

term which determine by the efflux of time and that is so whether the time is absolutely certain (*k*), or certain with reference to some future event (*l*).

A tenancy from year to year or from month to month does not come to an end by the efflux of time. It does not come to an end except on expiration of notice to quit (*m*). (See note *supra* : Nature of periodic tenancy.)

No question of notice under this section arises in the case of a permanent lease; or in the case of a lease which is determined by forfeiture (*n*). But under the amended section 111 (g) the lessor must give notice of his intention to determine the lease. Where the relationship of landlord and tenant between the parties has been created not by a lease, but by a decision of a Court, no question of serving notice to quit arises (*o*).

In the case of a tenant who holds under a periodic lease which has not been otherwise determined, a suit for eviction cannot be maintained, unless a valid notice to quit has been served before suit (*p*). If the tenant falsely sets up a permanent tenancy in the suit, that will not cure the defect of want of notice to quit (*q*). But notice to quit is not necessary if the tenant has denied the landlord's title before suit (*r*). This is not because the disclaimer works a forfeiture, but because it is evidence of an election to put an end to the tenancy and supersedes the necessity for notice (*s*). If a tenant evicted without notice to quit sues for possession claiming as full owner and that claim fails, he cannot turn round and claim to be restored to possession for want of notice (*t*).

Form and construction of notice to quit.—The section differs from the English law in that it requires the notice to be in writing and signed (*u*). The notice must extend to all the premises (*v*). The landlord cannot break up the tenure (*w*). A notice for a fraction of the holding is ineffective (*x*). It is not even good for the portion concerned (*y*). The notice need not state to whom possession is to be given (*z*); but if it does, it should do so with certainty (*a*).

(*k*) S. 111 (a); *Cobb* v. *Stokes* (1807) 8 East. 358, 361; *Gokul Chand* v. *Shib* (1912) 9 All. L.J. 574, 13 I.C. 59; *Hakim Mohmd. Fazihzaman* v. *Anwar Hussain* (1932) All. L. J. 126, 139 I. C. 828, ('32) A. A. 314; *Kundan Lal* v. *Deepchand* (1933) 1033 All. L.J. 680, 146 I.C. 762, ('33) A.A. 756.

(*l*) S. 111 (b); *Doe d. Waithman* v. *Miles* (1816) 1 Stark. 181 (lease during the continuance of a partnership determined by dissolution of the firm).

(*m*) S. 111 (h); *Muthusami Pillay* v. *Srinivasier* (1902) 12 Mad. L. J. 194.

(*n*) *Thacherakavil* v. *Noor Mahomed* (1921) 41 Mad. L.J. 265, 66 I.C. 48, ('22) A.M. 349.

(*o*) *Sazawar Khan* v. *Satyendra Lal* (1942) A.C. 406, 46 C.W.N. 464, 201 I.C. 443.

(*p*) *Rajendro Nath* v. *Bassider* (1876) 2 Cal. 146, differing from *Hem Chunder Ghose* v. *Radha Pershad* (1875) 23 W. R. 440; which was however followed in *Ram Lal Patak* v. *Dina Nath* (1896) 23 Cal. 200; *Adulla* v. *Subbarayyar* (1878) 2 Mad. 346, 351; *Purshotam* v. *Dattatraya* (1886) 10 Bom. 669; *Abu Bakar* v. *Venkatramana* (1895) 18 Bom. 107; *Dodhu* v. *Madhavrao* (1894) 18 Bom. 110; *Kishori Mohun* v. *Nund Kumar* (1897) 24 Cal. 720; *Ganoo* v. *Shri Dev* (1901) 26 Bom. 360; *Hemangini* v. *Srigobinda* (1902) 29 Cal. 203, dissenting from (1896) 23 Cal. 200; *Narasimha Chari* v. *Gopala Ayyangar* (1905) 28 Mad. 391; *Farzand Ali* v. *Motilal* (1921) 62 I.C. 421.

(*q*) *Subba* v. *Nagappa* (1889) 12 Mad. 353; *Vengu* v. *Ragava* (1896) 6 Mad. L.J. 59; *Vithu* v. *Dhondi* (1891) 15 Bom. 407; *Unhamma Devi* v. *Vaikunta* (1894) 17 Mad. 218; *Peria Karuppan* v. *Subramanian* (1908) 31 Mad. 261.

(*r*) *Gopalrao* v. *Kishor* (1885) 9 Bom. 527; *Haidri Begam* v. *Nathu* (1895) 17 All. 45; *Kathijakutti* v. *Kuthussa* (1910) 20 Mad. L.J. 415, 5 I.C. 924; *Anandamoyee* v. *Lakhi Chandra* (1906) 33 Cal. 339.

(*s*) *Maharaja of Jeypore* v. *Rukmini* (1919) 42 Mad. 589, 597, 46 I.A. 109, 50 I.C. 681, ('19) A.PC. 1.

(*t*) *Lalu Gagal* v. *Bai Motan Bibi* (1893) 17 Bom. 631.

(*u*) See cases cited in *Deo Nandan* v. *Meghu* (1907) 34 Cal. 57, 64.

(*v*) *Doe d. Horgan* v. *Church* (1811) 3 Camp. 71; *Doe d. Rodd* v. *Archer* (1811) 14 East. 245; *Bhimram* v. *Hura Soondery* (1921) 33 Cal. L. J. 516; *Durga Churn* v. *Pandub* (1921) 33 Cal. L. J. 518; *Chandra Mohun* v. *Bisseswar* (1892) 1 Cal. W.N. 158; *Kabil Sardar* v. *Chunder Nath* (1892) 20 Cal. 590.

(*w*) *Ram Kanie* v. *Gunesh* (1921) 33 Cal. L.J. 513, 64 I. C. 550.

(*x*) *Harihar Banerji* v. *Ramsashi Roy* (1919) 46 Cal. 458, 45 I. A. 222, 48 I. C. 277, ('18) A.PC. 102.

(*y*) *Atal* v. *Kedar* (1921) 33 Cal. L.J. 515, 64 I.C. 551.

(*z*) *Doe d. Bailey* v. *Foster* (1846) 3 C. B. 215, 225.

(*a*) *Doe d. Brooks* v. *Fairclough* (1817) 6 M. & S. 40.

S. 106

The rule has been to make lame and inaccurate notices sensible where the recipient cannot have been misled as to the intention of the giver (*b*). A liberal construction is therefore put upon a notice to quit in order that it should not be defeated by inaccuracies either in the description of the premises (*c*), or the name of the tenant (*d*) or the date of expiry of the notice (*e*). The Privy Council has said that these English authorities are applicable to cases arising in India and that "they establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and, further, that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed *ut res magis valeat quam pereat*" (*f*).

Illustrations.

A had leased to *B* 2 bhigas 2½ cottahs of bastu land in the char of Ram Kristoper standing in the name of Nidhi Ram bearing a yearly jamma of Rs. 25. *A* gave notice to quit describing the land as bastu land in the char of Ram Kristoper standing in the name of Nidhi Ram and bearing a yearly jamma of Rs. 25 describing the boundaries correctly but erroneously stating the area to be 6 cottahs. *B* must have known that *A* could not have intended to give a bad and ineffective notice for a fraction of the holding. It was a bona fide mistake which did not mislead *B*. The notice was therefore valid: *Harihar Banerji* v. *Ramsashi Roy* (1919) 46 Cal. 458, 45 I.A. 222, 48 I.C. 277 ('18) A. PC. 102.

On the other hand if a portion of the premises is deliberately excluded the notice is bad (*g*).

Again the notice to quit must indicate in substance and with reasonable clearness and certainty an intention on the part of the person giving it to determine the existing tenancy at a certain time (*h*).

Illustrations.

(1) *A* let a house to *B* on the 1st of July. On the 11th of December of the same year, *A* gave notice to *B* as follows:—"If the house you occupy is not vacated within a month from this date I will file a suit against you for ejectment as well as for recovery of rent at an enhanced rate." This was not a valid notice but merely a request to vacate accompanied by a threat: *Bradley* v. *Atkinson* (1885) 7 All. 899 F.B.

(2) *A* let three shops to *B* and then gave *B* notice saying that as other persons were offering a higher rent "you are informed by this notice that if from the first Aswin you want to keep the shops you shall have to pay Rs. 27 a month." The notice was insufficient either to determine the tenancy or to enhance the rent: *Sakhi Chand* v. *Ram Chandra* (1912) 16 Cal. L.J. 561, 15 I.C. 906.

(*b*) *Doe d. Williams* v. *Smith* (1836) 5 Ad. & El. 350; *Wride* v. *Dyer* (1900) 1 Q.B. 23.

(*c*) *Doe d. Cox* v. *Roe* (1802) 4 Esp. 185: *Shama Churn* v. *Wooma Churn* (1898) 25 Cal. 36; *Girdharilal* v. *Purnendu Narayan* (1939) A.C. 291, 68 C.L.J. 481, 182 I.C. 8.

(*d*) *Doe* v. *Spiller* (1807) 6 Esp. 70.

(*e*) *Sidebotham* v. *Holland* (1895) 1 Q.B. 378; *Doe d. Williams* v. *Smith*, *supra*; *Gnanaprakasam* v. *Vaz* (1931) 60 Mad. L. J. 293, 131 I.C. 621, ('31) A.M. 352: *Tika Ram* v. *Deoji Maharaj* (1934) 1934 All. L.J. 674, 152 I.C. 189, ('34) A.A. 787.

(*f*) *Harihar Banerji* v. *Ramsashi Roy* (1919) 46 Cal. 458, 45 I.A. 222, 225, 48 I.C. 277; *Secretary of State* v. *Madhu Sudan Mukherji* (1932) 36 Cal. W.N. 918, 141 I.C. 833, ('33) A.C. 260; *Utility Articles Mfg.* v. *Raja Bahadur Motilal Mills* (1943) A.B. 306.

(*g*) *Bodordoja* v. *Ajijuddin Sarkar* (1930) 57 Cal. 10, 120 I.C. 455, ('29) A.C. 651.

(*h*) *Bradley* v. *Atkinson* (1885) 7 All. 899 F.B.; *Deo Nandan* v. *Meghu Mahton* (1907) 34 Cal. 57.

S. 106

If the notice fixes a lawful date for the termination of the tenancy it matters not that the tenant is described as a trespasser (*i*) or that words of warning are added such as a threat by the landlord to increase the rent (*j*) or by the tenant that he will not stop unless some reduction is made (*k*). This is because "a notice otherwise sufficient is not made insufficient by its being accompanied by something else" (*l*). A notice to a monthly tenant to come to fresh terms with the landlord by the end of Asar failing which the tenancy will be determined from the 1st Sraban has been held to be a good notice (*m*). A notice to quit or in default to pay an enhanced rent operates as a notice to quit with an offer of a new tenancy at an enhanced rent and if the tenant continues in occupation he is taken to have acquiesced in the proposal to pay enhanced rent (*n*). The Oudh Court have held that even if a notice to quit is invalid to determine the tenancy, yet it may be effective to enhance the rent and if the tenant continues in possession he is liable to pay enhanced rent (*o*). This view is supported by the decision of the Nagpur High Court (*p*). This case was approved in a later case where the tenant was held not to be liable as he had protested (*q*). But it is submitted that if the notice to quit is invalid the tenant continues in possession under the existing lease and is not liable to pay enhanced rent.

The notice must not be conditional. Thus a notice to determine a tenancy unless the tenant employs a larger number of workmen is bad (*r*); so is a notice by the tenant that he will quit when he can get another situation (*s*). When a notice to quit was accompanied by a covering letter that the enclosed notice was intended to terminate the tenancy at Michaelmas next unless the landlord saw sufficient reason in the meantime to change his mind, this was held not to import a condition or to invalidate the notice (*t*). A case which is on the border line is that of *Kikabhai* v. *Kalu* (*u*) where a landlord wrote to his yearly tenant as follows: "Therefore within two days of the receipt of this notice meet us, increase the rent and give us a legal writing, or in default on the 31st March, 1892, we shall keep present two good men and take full possession of the said land with all trees, well, etc., on that day, and no contention of yours in that matter will avail, and if you raise a contention we shall have recourse to a regular suit to obtain possession and you will be responsible for the expenses." This was held not to be bad as a conditional notice on the ground that the two days expired six months before the 31st March. The notice became absolute in time; it fixed a valid date for the determination of the tenancy and was therefore valid.

A lessee is bound to give vacant possession when the tenancy is determined, but a lessee's notice is not bad, because it does not purport to give vacant possession (*v*).

Length of notice.—In the case of periodic leases, the common law rule as to notice to quit is that reasonable notice must be given to determine the tenancy (*w*). In the

(*i*) *Ram Charan* v. *Hari Charan* (1908) 7 Cal. L.J. 107; *Secretary of State* v. *Madhu Sudan Mukherji* (1932) 36 Cal. W.N. 918, 141 I.C. 833, ('33) A.C. 260.

(*j*) *Ahearn* v. *Bellman* (1879) 4 Ex. D. 201; *Ganga Das* v. *Ananda Chandra* (1909) 13 Cal. W.N. 146, 2 I.C. 548; *Adolphe Shrager* v. *Emma Price* (1908) 12 Cal. W.N. 1059; *Shankar Lal* v. *Babu Ram* (1921) 43 All. 330, 60 I.C. 842, ('21) A.A. 194; *Bhagwana* v. *Shib Sametri* (1925) 78 I.C. 651, ('25) A.A. 199.

(*k*) *Bury* v. *Thompson* (1895) 1 Q.B. 696.

(*l*) Per Cotton, L.J., in *Ahearn* v. *Bellman* (1879) 4 Ex. D. 201, 212.

(*m*) *Dhaniram* v. *Bholanath* (1942) 47 C.W.N. 207.

(*n*) *Roberts* v. *Hayward* (1828) 3 C. & P. 432; *Madan Mohan* v. *Bohra Ram Lal* (1934) 1934 All. L.J. 421, 153 I.C. 432, ('34) A.A. 115.

(*o*) *Baboo Lal* v. *Mohammad Askari* (1926) 89 I.C. 578, ('26) A.O. 78.

(*p*) *Nandlal Bhimji* v. *Anant Govind* (1939) 189 I.C. 895, (1940) A.N. 140.

(*q*) *Mohammad Noor* v. *Mirza Ashiq Beg* (1933) 9 Luck. 112, 145 I.C. 647, ('33) A.O. 465.

(*r*) *Muskett* v. *Hill* (1839) 5 Bing. (N.C.) 694, 711.

(*s*) *Farrence* v. *Elkington* (1811) 2 Camp. 591.

(*t*) *Norfolk County Council* v. *Child* (1918) 2 K.B. 805.

(*u*) (1898) 22 Bom. 241.

(*v*) *Baliaramgiri* v. *Vasudev* (1898) 22 Bom. 348, 353.

(*w*) *Clayton* v. *Blakey* (1798) 8 Term Rep. 3; Smith, L.C. 13th Ed., p. 119.

S. 106

case of yearly tenancies a half year's notice to quit at the end of some year of the tenancy has from early times been held to be sufficient (*x*). In the case of other periodic tenancies reasonable notice appears to be notice equal to the length of the period (*y*), so that a month's notice was sufficient to determine a monthly tenancy.

The section fixes six months for yearly and fifteen days for monthly tenancies created by implied demise, and appears to assume that that is the proper notice for all yearly and monthly tenancies. The month is reckoned according to the calendar by which the tenancy is regulated (*z*). In the case of leases before the Act, and of yearly tenancies not within the section, the Courts have followed the common law rule as to reasonable notice (*a*); but there is no fixed rule as to what is a reasonable notice (*b*). The fifteen days must be clear days. So that a notice to quit on the 30th Falgun served on the 15th Falgun is inadequate (*c*). But the notice may be in excess of fifteen days at the pleasure of the lessor (*d*). In the case of a monthly tenancy a notice of two months instead of fifteen days has been held to be valid (*e*). The notice is given at the peril of him who gives it (*f*), and if it is given for the proper length of time that need not be expressed on the face of the notice (*g*).

Date of expiry of notice.—The notice must terminate the tenancy at the end of the year or month of the period of the lease. It should expire on the last day of that period, otherwise it is invalid (*h*). Thus if the tenancy is a monthly tenancy beginning with the first day of each month, a notice by the tenant on the 9th of June that he would leave in a month's time is invalid, for although it gave more than 15 days' notice it did not terminate the tenancy at the end of the month (*i*). On the other hand in the case of a tenant holding over on the expiry of a yearly tenancy according to the Bengali calendar a notice on the 16th Baisak requiring the tenant to quit on the 31st Baisak is valid (*j*). This is a rule of English law and has been applied in the Punjab (*k*). If the tenancy begins in the middle of the year, yet, if the rent is paid at the end of each calendar year, the tenancy will be according to that year and a notice expiring with the end of such calendar year will be valid (*l*). But in a monthly tenancy beginning on the 6th of each month with rent payable on the 5th of the next month a notice to quit given on the 30th June for the end of July was invalid as it did not expire on the last day of the period of the tenancy (*m*).

(*x*) *Right d. Flower* v. *Darby* (1786) 1 Term. Rep. 159.

(*y*) *Doe d. Parry* v. *Hazell* (1794) 1 Esp. 94.

(*z*) *Haridas* v. *Upendra* (1912) 16 Cal. L.J. 74, 16 I.C. 937; *Debendra* v. *Syama Prosanna* (1906) 11 Cal. W.N. 1124; *Raj Behari* v. *Kailas Chandra* (1915) 22 Cal. L.J. 78, 30 I.C. 887; *Seoti Bibi* v. *Jagannath* (1920) 18 All. L.J. 854, 57 I.C. 593.

(*a*) *Sulatu Dass* v. *Jadu Nath Das* (1903) 8 Cal. W.N. 774 F.B.; *Haridas* v. *Upendra* (1913) 16 Cal. L.J. 74, 16 I.C. 937; *Durga Mohun* v. *Rakhal Chandra* (1901) 5 Cal. W.N. 801; *Charu Chandra* v. *Satya Sebak* (1919) 23 Cal. W.N. 641, 51 I.C. 415; *Digambar* v. *Jhari* (1899) 26 Cal. 761; *Ambabai* v. *Bhau* (1896) 20 Bom. 759; *Kishori Mohun* v. *Nund Kumar* (1897) 24 Cal. 720; *Bidhumukhi* v. *Kefyutullah* (1886) 12 Cal. 93; *Radha Gobind* v. *Rakhal Das* (1886) 12 Cal. 82; *Pandurang* v. *Yedneshwar* (1882) 6 Bom. 70; *Narayan* v. *Kashi* (1882) 6 Bom. 67; *Prosunno Coomaree* v. *Sheikh Rutton* (1878) 3 Cal. 696; *Rajendronath* v. *Bassider* (1876) 2 Cal. 146; *Debendra Nath* v. *Syama Prosanna*, *supra*.

(*b*) Cf. *Kali Kishen* v. *Golam* (1886) 13 Cal. 3.

(*c*) *Subadini* v. *Durga Charan* (1901) 28 Cal. 118.

(*d*) *Doe d. Gorst* v. *Timothy* (1847) 2 Car. & Kir. 351.

(*e*) *Secretary of State for India* v. *Madhu Sudan Mukherji* (1932) 36 Cal. W.N. 918, 141 I.C. 833, ('33) A.C. 260.

(*f*) *Bradley* v. *Atkinson* (1885) 7 All. 899.

(*g*) *Doe d. Gorst* v. *Timothy*, *supra*.

(*h*) *Shaikh Sona Ullah* v. *Troylukho Nath* (1897) 2 Cal. W.N. 383; *Hemangini* v. *Srigobinda* (1902) 29 Cal. 203; *Mahomedally* v. *Abdulla* (1925) 27 Bom. L.R. 102, 94 I.C. 631, ('25) A.B. 167; *Kikabhai* v. *Kalu* (1898) 22 Bom. 241; *Seoti Bibi* v. *Jagannath* (1920) 18 All. L.J. 854, 57 I.C. 593; *Sahtawan* v. *Mohan Singh* (1896) A.W.N. 51; *Deo d. Spicer* v. *Lea* (1809) 11 East. 312; *Rahmat Ullah* v. *Md. Hussain* (1940) A.A. 444, (1940) A.L.J. 502, 191 I.C. 223.

(*i*) *Bijay Chandra* v. *Howrah Amta Railway* (1923) 38 Cal. L.J. 177, 72 I.C. 98, ('23) A.C. 524; *Ganesh Das* v. *Jamuna Das* (1945) A.P. 385, 24 Pat. 449.

(*j*) *Gobinda Chandra* v. *Dwarka Nath* (1915) 19 Cal. W.N 489, 26 I.C. 962.

(*k*) *Chuni Lal* v. *Chuni Lal* (1923) 79 I.C. 957, ('23) A.L. 659.

(*l*) *Arunachella* v. *Ramiah Naidu* (1907) 30 Mad. 109; *Ismail Khan Mahomed* v. *Jaigun Bibi* (1900) 27 Cal. 570; *Doe d. Halcomb* v. *Johnson* (1806) 6 Esp. 10.

(*m*) *Bengal National Bank* v. *Janaki Nath* (1927) 54 Cal. 818, 104 I.C. 484, ('27) A.C. 725.

The date of expiry of a tenancy depends upon the date of its commencement and that again depends upon whether the lease is expressed to begin from or on a certain day. But to avoid this subtlety it has been held in England that a notice may be given expiring on the anniversary of the commencement of the tenancy (*n*). This is the effect of sec. 110, and the Privy Council have held that when a lease for years commencing from the first day of a month ends, according to the rule in sec. 110, on the first day of a month and the tenant holds over as a monthly tenant, the monthly tenancy expires at midnight on the first of each succeeding month, so that a notice of the 1st February 1928, which treated the tenancy as expiring on the 1st March 1928, is valid (*o*). But where a lease for 7 years was expressed to commence from 1318 Bs. and to end by the end of 1324 Bs., it has been held, that the lease ended on the last day of 1324 Bs. and not on the midnight of the first day of 1325 Bs. and consequently the holding over as a monthly tenant began on the first day of Baisak 1325 Bs. and a notice to quit on the last day of Asar was valid (*p*). A notice one day short of the proper time is invalid (*q*). A notice to quit on or before a date, being a date on which the tenancy expires, is a good notice to quit (*r*). It has been explained in *Dagger* v. *Shepherd* (*s*) that the effect of such a notice is, first, to give the tenant notice to determine the tenancy on the date named and, second, to make the tenant an offer to accept a determination of the tenancy on any earlier date of the tenant's choice, on which the tenant should give up possession of the premises.

It is usual after mentioning the date of the anniversary of the tenancy to add in the alternative some such general words as "at the end of the year of the tenancy which will expire next after the end of one-half year from the date of the service of this notice."

Notice by whom and to whom.—Notice to quit may be given by the lessor or by the lessee. The lessor includes the person in whom the legal reversion is vested, *i.e.*, the heir, transferee, executor and administrator. The landlord who during the currency of a yearly or monthly lease, grants a lease to a third person for a term of year, cannot give notice to quit after the commencement of such lease for years as his immediate reversion is then transferred to the tenant for years (*t*). Notice enures for the benefit of the successor in title of the lessor or lessee giving it (*u*). Similarly notice must be given to the lessor or to the lessee. The lessor includes the person in whom the reversion is vested, and the lessee includes the legal representative or the assignee of the tenant (*v*). A notice given by a landlord not in his own capacity, but on behalf of somebody else is bad (*w*). So also a notice given by a tenant to his sub-tenant after his own tenancy is terminated (*x*).

A landlord cannot give notice to a sub-tenant (*y*), but a person who comes into occupation in place of the tenant will be presumed to be an assign, and notice may be

---

(*n*) *Sidebotham* v. *Holland* (1895) 1 Q.B. 378.

(*o*) L.R. 6, 1933 All. L.J. 423, 14 ('32) A.PC. 279; *Rahmatullah* v. *Md. Hussain, supra.*

(*p*) *Dev Das Bela* v. *Abdul Gani* (1938) 2 Cal. 134, 67 C.L.J. 291, 42 C.W.N. 443, 177 I.C. 880.

(*q*) *Susil Chunder Neogy* v. *Birendrajit Shaw* (1934) 38 Cal. W.N. 782, 153 I.C. 673, ('34) A.C. 837; *Bholanath* v. *Raja Durga* (1907) 12 Cal. W.N. 724; *Charu Chandra Ghose* v. *Bankina Chandra Sett* (1938) 42 C.W.N. 1115.

(*r*) *Ismail Dada* v. *Bai Zuleikabai* (1944) A.B. 181.

(*s*) (1946) 1 A.E.R. 133.

(*t*) *Wordsley Brewery Co.* v. *Halford* (1903) 90 L.T. 89; *Manickam Pillai* v. *Ratnasami Nadar* (1917) 33 Mad. L.J. 384, 43 I.C. 210; *Adolphe Shrager* v. *Emma Price* (1907) 12 Cal. W.N. 1059; *Parbhu Ram* v. *Tekchand* (1919) 1 Lah. 241, 58 I.C. 865.

(*u*) *Doe d. Egremont* v. *Forwood* (1842) 3 Q.B. 627.

(*v*) *Rees d. Mears* v. *Perrot* (1830) 4 C. & P. 230 (notice to widow of deceased tenant).

(*w*) *District Board of Tippera* v. *Sarafatali* (1941) A.C. 408, 73 C.L.J. 281, 195 I.C. 594.

(*x*) *Biraja Sundri* v. *Mahamaya Sen* (1941) A.C. 399.

(*y*) *Pleasant d. Hayton* v. *Benson* (1811) 14 East. 234.

S. 106 given to him (z). Notice may be given by an agent authorized in this behalf. Accordingly notice to quit may be given by a general agent in charge of an estate (a), the steward of a corporation (b), a receiver appointed to receive rents and to let (c), but not by a *cestui que trust* (d), unless he is in management of the estate (e); also by an agent having special authority but the authority must appear on the face of the notice so that the tenant may know that he may safely act upon it (f). A notice by an unauthorized agent cannot be subsequently ratified (g) as it must be binding when served (h). The Calcutta High Court has held that an agent having power to sue in ejectment has power to give notice (i).

In the case of joint lessors the rule of English law is that notice by one co-lessor is sufficient to determine the tenancy as to all (j), and if the lessors are tenants in common, notice by one is valid as to his share (k); and notice to quit by one tenant in common is valid as to the whole if he is empowered by others as agent or partner (l). The English rule was followed in the Bombay case of *Ebrahim Pir Mahomed* v. *Cursetji* (m) where the parties were not Hindus. But whereas the English rule as to joint lessors is that the lessee holds the whole so long as he and all the lessors shall please, the Hindu rule is that the relation created by contract with several joint landlords continues until there exists a new and complete volition to change it (n). Accordingly one of several joint owners whether joint tenants or tenants in common cannot determine the tenancy, and notice to quit must be given by all (o). But when the tenancy has been determined by a joint notice the withdrawal of some of the joint lessors from a suit for possession will not prevent the other co-plaintiffs from obtaining their shares (p).

Service of notice.—Notice to quit may be served (1) personally, or (2) by post, or (3) at the residence, or (4) in the last resort by being affixed to the property demised.

Personal service.—Personal service may be on the agent of the party if duly authorized (q), such as an officer of a corporation (r), or the solicitor of the party (s). It it is served on a duly authorized agent it matters not that the agent does not communicate it to the party (t). Service on one joint tenant is *Prima facie* evidence that it has reached the other joint tenant (u). In a Calcutta case (v) the Court seemed to think that the express provisions of this section superseded this presumption and that

(z) *Doe d. Morris* v. *Williams* (1826) 6 B. & C. 41.
(a) *Doe d. Manvers* (Earl) v. *Mizam* (1837) 2 Mood. & R. 56.
(b) *Doe d. Birmingham Canal Co.* v. *Bold* (1847) 11 Q.B. 127.
(c) *Wilkinson* v. *Colley* (1771) 5 Burr. 2694.
(d) *Easton* v. *Penny* (1892) 67 L.T. 290; *Stait* v. *Fenner* (1912) 2 Ch. 504; *Farrow* v. *Orttawall* (1933) Ch. 480.
(e) *Jones* v. *Phipps* (1868) 3 Q.B. 567, 573.
(f) *Jones* v. *Phipps, supra*; *Bhagwana* v. *Shib Sametri* (1925) 78 I.C. 651, ('25) A.A. 199.
(g) *Doe d. Lyster* v. *Goldwin* (1841) 2 Q.B. 143. See illustration (b) to s. 200 of the Indian Contract Act and *Right Fisher* v. *Cutbell* (1804) 5 East. 491.
(h) *Jones* v. *Phipps, supra.*
(i) *Bodordoja* v. *Ajijuddin* (1930) 57 Cal. 10, 120 I.C. 455, ('29) A.C. 651.
(j) *Doe d. Aslin* v. *Summerset* (1839) 1 B. & Ad. 135; *Doe d. Kindersley* v. *Hughes* (1840) 7 M. & W. 139, 141.
(k) *Cutting* v. *Derby* (1776) 2 Wm. Bl. 1075; *Doe d. Robertson* v. *Gardiner* (1852) 12 C.B. 319.
(l) *Doe d. Elliot* v. *Hulme* (1828) 2 Man. & Ry. (K.B.) 433.
(m) (1887) 11 Bom. 644.
(n) West & Buhler, 4th Ed., p. 567, note (f).
(o) *Gopal Ram Mohuri* v. *Dhakeshwar* (1908) 35 Cal. 807; *Gholam Mohiuddin* v. *Khairan* (1904) 31 Cal. 786; *Radha Proshad* v. *Esuf* (1881) 7 Cal. 414; *Balaji* v. *Gopal* (1879) 3 Bom. 23; *Vagha* v. *Manilal* (1935) 37 Bom. L.R. 249, 156 I.C. 898, ('35) A.B. 262.
(p) *Dwarka Nath* v. *Kali Chunder* (1886) 13 Cal. 75; *Sri Raja Simhadri* v. *Prattipati* (1906) 29 Mad. 29, 34; *Jerman Gomez* v. *Ram Kumar Kaibarta* (1934) 58 Cal. L.J. 133, 149 I.C. 559, ('34) A.C. 127.
(q) *Tanham* v. *Nicholson* (1872) L.R. 5 H.L. 561; *Doe d. Prior* v. *Ongley* (1850) 10 C.B. 25.
(r) *Doe d. Carlisle* v. *Woodman* (1807) 8 East. 228.
(s) *Bhojabhai* v. *Hayem Samuel* (1898) 22 Bom. 754.
(t) *Tanham* v. *Nicholson, supra*; *Harihar Banerji* v. *Ramsashi Roy* (1919) 46 Cal. 458, 45 I.A. 222, 48 I.C. 277.
(u) *Doe d. Macartney* v. *Crick* (1805) 5 Esp. 196; *Doe d. Bradford* v. *Watkins* (1806) 7 East. 551; *Rajoni Bibi* v. *Hafisonnissa* (1900) 4 Cal. W.N. 572; *Harihar Banerji* v. *Ramsashi Roy, supra.*
(v) *Bejoy Chand* v. *Kali Prasanna* (1925) 29 Cal. W.N. 620, 623, 87 I.C. 708, ('25) A.C. 752.

"it is necessary in order to bind even a joint tenant that the notice must be addressed to and served on him in one of the ways mentioned in the second clause of that section." But this was dissented from in a later case (*w*), following a dictum of the Judicial Committee in *Harihar Banerji* v. *Ramsashi Roy* (*x*).

Service by post.—Service by post is a form of personal service which is expressly authorized by the amendment made by Act 20 of 1929. The posting in due course of a letter raises a presumption that it has reached the addressee—sec. 114 illustration (f) of the Indian Evidence Act. Accordingly the posting of a notice to quit raises a presumption of service. This was so held in cases (*y*) before the amendment of the section. Section 27 of the General Clauses Act 10 of 1897 enacts that, unless the contrary is proved service shall be deemed to have been effected by properly addressing, preparing and posting by registered post a letter containing the notice. Service may also be proved by proof of posting and the production in Court of the envelope with the endorsement of the postal officer stating the refusal of the addressee to receive the letter (*z*). If the letter has been delivered it matters not that the postal receipt is signed by some person other than the addressee (*a*). In an Allahabad case (*b*) notice was sent by post and left at the defendant's shop which was the subject of the demise, but not at his residence. This was not a valid service, for the letter did not reach the addressee. Publication of a notice in a local newspaper is not sufficient service (*c*).

Service at residence.—Service at residence is effected by delivery to a servant or a member of the other party's family. Under the section such service is equivalent to service on the party himself. The words "or to one of his family or servants at his residence" provide an alternative mode of service, and not one available only if personal service is impossible (*d*). This is a departure from the English law according to which the presumption of agency or the presumption that the notice has reached the party may be rebutted (*e*). Merely leaving notice at the tenant's residence without delivery to his wife or servant is not sufficient (*f*); nor delivery to the wife at a place where she did not reside with her husband (*g*).

Affixing to the property.—This is the last resort if the other modes of service fail and this form of service is invalid if personal service or service at the residence is not shown to have been impossible (*h*). There is no corresponding provision in English law, and by that law service is impossible if the tenant has disappeared (*i*).

Special legislation.—The effect of this section as of sec. 108 (q) and section 111 has been for all practical purposes superseded by special legislation in certain places to give protection to tenants against enhancement of rent and eviction—see note *infra* "Emergency Legislation" under section 108 clause, (q).

(*w*) *Bodordoja* v. *Ajijuddin* (1930) 57 Cal. 10, 20 I.C. 455, ('29) A.C. 651.

(*x*) (1919) 46 Cal. 458, 45 I.A. 222, 48 I.C. 277, ('18) A.PC. 102.

(*y*) *Jogendro* v. *Dwarka Nath* (1888) 15 Cal. 681; *Lootf Ali Meah* v. *Pearee Mohun Roy* (1871) 16 W.R. 223; *Rajoni Bibi* v. *Hafisonnissa* (1900) 4 Cal. W.N. 572; *Ismail Khan* v. *Kali Krishna* (1902) 6 Cal. W.N. 134, 137; *Subadini* v. *Durga Charan* (1901) 28 Cal. 118; *Gobinda Chandra* v. *Dwarka Nath* (1914) 20 Cal. L.J. 455, 26 I.C. 962; *Harihar Banerji* v. *Ramsashi Roy*, *supra*.

(*z*) *Jogendro* v. *Dwarka Nath*, *supra*; *Durga Nath* v. *Rajendra Narain* (1913) 17 Cal. W.N. 1073, 20 I.C. 363; *Girish Chandra* v. *Kishore* (1919) 23 Cal. W.N. 319, 54 I.C. 5.

(*a*) *Harihar Banerji* v. *Ramsashi Roy*, *supra*.

Gokul Chand v. *Shib* (1912) 9 All. L.J. 574, 13 I.C. 59.

Chandmal v. *Bachraj* (1883) 7 Bom. 474.

Kedar Nath v. *Madhu Sudan* (1923) 37 Cal. L.J. 478, 480, 75 I.C. 105, ('23) A.C. 682.

Doe d. Neville v. *Dunbar* (1826) Moore & H. 10; *Liddy* v. *Kennedy* (1871) L.R. 5 H. L. 134; *Tanham* v. *Nicholson* (1872) L.R. 5 H.L. 561.

(*f*) *Doe d. Buros* v. *Lucas* (1804) 5 Esp. 153; *Alford* v. *Vickery* (1842) Car. & M. 280.

(*g*) *Roe d. Blair* v. *Street* (1834) 2 Ad. & El. 329.

(*h*) *Bisesswar Roy* v. *Pitambernath* (1919) 51 I.C. 44.

C. F. Seaward v. *Drew* (1898) 67 L.J. (Q.B.) 322.

S. 107

Leases how made.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :

Provided that the Provincial Government may, from time to time, by notification in the official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases may be made by unregistered instrument or by oral agreement without delivery of possession.

Amendments.—The second paragraph of the section was substituted for the original by the Amending Act 6 of 1904. The original paragraph was—"All other leases of immoveable property may be made either by instrument or by oral agreement." That Act which made registration compulsory came into effect on the 11th March, 1904.

The third paragraph is new and was inserted by the Amending Act 20 of 1929.

The proviso was added by the Amending Act 6 of 1904 in consequence of a Madras decision (*j*) that the leases referred to in the proviso were compulsorily registrable in spite of a Government Notification issued under the proviso to section 17 (1) (d) of the Registration Act.

Creation of leases.—The section enacts the mode in which leases may be made and for that purpose divides them into two classes—

A.—Leases from year to year,

Leases for a term exceeding a year,

Leases reserving a yearly rent,

Permanent Leases (*k*).

B.—Other leases, *i.e.*, generally from month to month or for a term of a year or less than a year.

Leases in class A can only be made by registered instrument. Leases in class B may be made either by registered instrument or by oral agreement accompanied by delivery of possession.

(*j*) *Vairananda* v. *Miyakan* (1898) 21 Mad. 109.

(*k*) *Darbari Lal* v. *Raniganj Coal Association* (1944) A.P. 30 see also *Mohun Lal* v. *Genda Singh* (1943) A.L. 127, (1943) Lah. 695, 45 P.L.R. 274, 208 I.C. 22 (F.B.,

The Registration Acts of 1877 and 1908 make the same division, the registration of leases in class A being compulsory—sec. 17 (1) (d)—and the registration of leases in class B being optional. **S. 107**

Reserving a yearly rent.—The reservation of a yearly rent creates a presumption that the lease is from year to year; but this presumption may be rebutted having regard to the other parts of the instrument (*l*). As the sections both of this Act and of the Registration Act refer to leases from year to year as well as to leases reserving a yearly rent it would appear that registration is necessary whenever the rent is reserved yearly (*m*). But it has been held that the expression "reserving a yearly rent" refers to a lease which on its proper construction is a lease from year to year (*n*).

Oral agreement accompanied by delivery of possession.—If possession is given an oral lease for a year is valid (*o*). An oral agreement of lease accompanied by delivery of possession, if for more than one year is valid, by delivery of possession, for the first year, and thereafter the lessee continuing in possession with the assent of the lessor becomes a tenant by holding over under sec. 116 of this Act (*p*). When a lease is made by oral agreement accompanied by delivery of possession no estate passes until the lessee enters into possession. In English law a lessee before he enters has no estate but only an interest in the term which is called an *interesse termini*. This interest enabled him to sue the lessor for possession or to maintain a suit for ejectment but not for trespass. This rule was applied in a case where the assignee of a term was held entitled to give notice to quit to a monthly tenant of the original lessor (*q*). This he was entitled to do under sec. 109 but the judgment proceeds on the ground that although he had not entered he had an *interesse termini*. The doctrine of *interesse termini* has been abolished as from the 1st January, 1926, by sec. 149 of the Law of Property Act, 1925. Terms in England now take effect without actual entry; and this is the same in India where leases have been made by registered instrument or where the necessity for delivery of possession has been dispensed with by notification (*r*). The delivery of possession need not be physical. Constructive delivery is sufficient (*s*). Where an oral lease accompanied by the delivery of possession is established, a rent deed can be used to support the terms of the lease (*t*).

Consequences of non-registration.—A lease is void if unregistered in cases where registration is compulsory under this section. In *Ariff* v. *Jadunath* (*u*) the Privy Council held that if registration of a lease is compulsory under sec. 107 the lease can only be made by registered instrument, and if not so made is void altogether. See note *Ariff* v. *Jadunath* under sec. 53A. To the same effect are the undernoted cases (*v*). But

(*l*) *Sheikh Akloo* v. *Sheikh Emaman* (1917) 44 Cal. 403, 33 I.C. 899; *Surat Chandra* v. *Jadab Chandra* (1917) 44 Cal. 214, 37 I.C. 956; *Durgi* v. *Gobordhun Bose* (1915) 19 Cal. W.N. 525, 24 I.C. 183; *Gobinda Chandra* v. *Dwarka Nath* (1914) 20 Cal. L.J. 455, 26 I.C. 962; *Wilkinson* v. *Hall* (1837) 3 B'ng. (N.C.) 308; *Atherstone* v. *Bostock* (1841) 2 Man. & G. 511.

(*m*) *U Thin Sin* v. *Kokye* (1941) A.R. 117; *Adinath Bhattacharjee* v. *Krishna Chunder* (1943) A.C. 474, (1943) 1 Cal. 34, 47 C.W.N. 127, 209 I.C. 279; *Udaya Pratap* v. *Gourachundra Dyani* (1937) A.M. 656.

(*n*) *Jivraj Gopal* v. *Atmaram* (1890) 14 Bom. 319; *Khuda Bakhsh* v. *Sheo Din* (1886) 8 All. 405.

(*o*) *Alakan* v. *A. R. A. Arumugam* (1933) 146 I.C. 640, ('33) A.R. 262.

(*p*) *Alauddin Ahmed* v. *Aziz Ahmad* (1934) 148 I.C. 684, ('34) A.P. 369 affirming 144 I.C. 788, ('33) A.P. 435; *Mohammad Mossa* v. *Jaganund Singh* (1913) 20 I.C. 715.

(*q*) *Adolphe Strager* v. *Emma Price* (1907) 12 Cal. W.N. 1059.

(*r*) *Mst. Razia Begum* v. *Shaikh Muhammad Daud* (1927) 6 Pat. 94, 96 I.C. 558, ('26) A.P. 508.

(*s*) *Mohan Lal* v. *Genda Singh* (1943) A.L. 127, (1943) Lah. 695, 45 P.L.R. 274, 208 I.C. 22.

(*t*) *Taj Din* v. *Abdul Rahim* (1939) A.L. 423, 41 P.L.R. 498.

(*u*) (1931) 58 I.A. 91, 58 Cal. 1235, 131 I.C. 762, ('31) A.PC. 79.

(*v*) *Badal Chandra Sadu Khan* v. *Debendra Nath Dey* (1933) 37 Cal. W.N. 473, 58 Cal. L.J. 325, 145 I.C. 892, ('33) A.C. 612; *Mopurappa* v. *Ramaswami Gramani* (1934) 57 Mad. 760, 67 Mad. L.J. 54, 152 I.C. 598, ('34) A.M. 418; *Ram Ranbijaya* v. *Ramjiwan Ram* (1942) 200 I.C. 769, (1942) A.P. 397; *Ramjiwan* v. *Mt. Maharani* (1938) A.N. 295; *Darbari Lal* v. *Rani Gunj Civil Association* (1944) A.P. 80.

S. 107 if the tenant is in possession under an unregistered lease and the landlord recognizes his right by acceptance of rent, there is a presumption of a lease under sec. 106, and a notice to quit before eviction is necessary. But though the unregistered lease is void as a lease the person in possession under such a document may put it in evidence to protect his possession under sec. 53A (*w*). In the undernoted case it was held that though an unregistered lease is void as a permanent lease, it can be deemed to be a monthly lease terminable by 15 days' notice (*x*) but in another case it was regarded as a license (*y*).

Possession under a valid agreement of lease.—It was at one time supposed that if the lessee has taken possession under a valid agreement of lease and no formal lease is executed he has the same rights as if the lease had been executed provided specific performance of the agreement can be obtained. But since the application of the equity in *Walsh* v. *Lonsdale* in India has been negatived by the Privy Council these cases are obsolete. See note under sec. 53A. "Indian cases applying *Walsh* v. *Lonsdale* are no longer law". If the lessor seeks to evict the lessee, the latter may apply for a stay of the suit and himself sue for specific performance of the agreement to lease. If the suit for specific performance is time barred, the Court cannot enforce the agreement. But if the agreement is in writing the lessee may defend his possession under sec. 53A (*z*). An oral agreement to lease accompanied by delivery of possession is valid as a lease for one year (*a*) and if the lessee continues in possession with the assent of the landlord he becomes a tenant by holding over (*b*). In order, however, that sec. 53A should apply, the contract in writing must be proved by primary or secondary evidence. The terms of such contract must be determined by the contract itself and not from what purports to be its quotation in another document (*c*).

By both the lessor and the lessee.—The third paragraph of the section was inserted by the amending Act of 1929. A lease must now be executed by both parties, for it contains covenants by both. The effect of this amendment is to settle a conflict of decisions as to whether a rent note signed by the lessee alone was a lease. These cases are cited in the note under sec. 105 under the heading "Rent notes." An instrument signed by the lessor alone or by the lessee alone would now operate as an agreement to lease or a rent note. Where a patta is executed by the landlord alone and a kabuliat is executed by the tenant alone, the two documents read together do not amount to a valid lease. If, however, the tenant is put in possession he can take the benefit of sec. 53A (*d*).

Decree or order.—The relationship of landlord and tenant may be created by decree or order of a Court. A decree operating to create a lease is not exempt from registration. See note "Decree operating to create a lease" in Mulla's Registration Act, 3rd Ed., p. 88.

Crown grants.—Sec. 2 of the Crown Grants Act 15 of 1895 excludes Crown grants from the operation of the Transfer of Property Act. This section therefore does not apply to a lease of Crown lands granted by the Secretary of State, and the question of the registration of such a lease is governed by sec. 90 of the Registration Act (*e*).

(*w*) *Chandulal* v. *Keshavlal* (1936) A.B. 246, 38 Bom. L.R. 486, 163 I.C. 579.

(*x*) See *Darbari Lal* v. *Rani Ganj Coal Association*, *supra*.

(*y*) *Anand Sarup* v. *Panjab Hasan* (1943) A.A. 279.

(*z*) *Hadu Maharana* v. *Ramdulal Ghosh* (1944) A.P. 35.

(*a*) *Alakan* v. *A. R. A. Arumugam* (1933) 146 I.C. 640, ('33) A.R. 262.

(*b*) *Alauddin Ahmed* v. *Aziz Ahmad* (1934) 148 I.C. 698, ('34) A.P. 369 affirming 144 I.C. 788, ('33) A.P. 485; *Mohammad Mossa* v. *Jaganund Singh* (1913) 20 I.C. 715.

(*c*) *Hormusji Jamshedji* v. *Maneklal Mansukhlal* (1944) A.B. 103.

(*d*) *Hadu Maharana* v. *Ramdulal Ghosh* (1944) A.P. 35.

(*e*) *Secretary of State* v. *Nistarini Annie Mitter* (1927) 6 Pat. 446, 104 I.C. 209, ('27) A.P. 319; *Kallingal* v. *Secretary of State* (1920) 43 Mad. 65, 53 I.C. 345, dissenting from *Munshi Lal* v. *The Notified Area of Barant* (1914) 36 All. 176, 22 I.C. 933.

Punjab.—Leases in the Punjab where the Act is not in force may be made by oral agreement and the execution of a deed in writing is not necessary (*f*).

Proviso.—Under the power conferred by the proviso some local governments have issued notifications enabling leases other than leases from year to year, or for a term exceeding one year, or reserving a yearly rent, to be made (as in the Bombay presidency) by unregistered instrument, or (as in Sind) orally. For notifications by the Local Governments see different local rules and orders.

Extent.—This section does not apply to territories excluded from the operation of the Registration Act—see sec. 1. The section has been extended to cantonments by sec. 287 of the Cantonments Act 2 of 1924.

Rights and liabilities of lessor and lessee.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

A.—Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover [*pp. 662-663*] :

(b) the lessor is bound, on the lessee's request to put him in possession of the property [*pp. 664-665*] :

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption [*pp. 665-670*].

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested [*p. 670*].

B.—Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease [*pp. 671-672*] :

(*f*) *Sunder Singh* v. *Ram Saran Das* (1932) 14 Lah. 137, 142 I.C. 754, ('33) A.L. 61.

S. 108

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void [*pp. 672-673*]:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision [*pp. 672-673*]:

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor [*pp. 673-675*]:

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor [*p. 675*]:

(h) the lessee may *even after the determination of the lease* remove, at any time *whilst he is in possession of the property leased but not afterwards* all things which he has attached to the earth: provided he leaves the property in the state in which he received it [*pp. 675-677*]:

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them [*pp.677-678*]:

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease [*pp. 678-687*]:

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying

revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee [*p. 687*]: S. 108

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest [*p. 687*]:

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf [*pp. 687-694*]:

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left [*pp. 694-698*]:

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor [*pp. 698-699*]:

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell *or sell* timber, pull down or damage buildings *belonging to the lessor*, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto [*pp. 699-701*]:

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes [*p. 701*]:

S. 108 (q) (q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property [*pp. 701-702*].

Amendment.—In clause (h) the words "even after the determination of the lease" were inserted by the amending Act 20 of 1929. The words "whilst he is in possession of the property leased but not afterwards" were substituted by the same Act for the words "during the continuance of the lease." In clause (o) the words "or sell" and the words "belonging to the lessor" were inserted by the same Act.

Rights and liabilities.—The rights and liabilities of the lessor and lessee are determined (1) by contract, (2) by local usage, and (3) by this section.

Contract.—These are the covenants expressed in the lease. An express covenant always overrides an implied covenant, *i.e.*, the covenants implied by this section (*g*). Thus the covenant for quiet enjoyment under clause (c) may be excluded by contract to the contrary. In a Calcutta case (*h*) there was an express covenant not to claim compensation for dispossession of any kind. This was valid, but did not relieve the lessor of his duty under clause (b) to put the lessee in possession.

Local usage.—A usage may still be in the course of growth and it may require evidence for its support in each case, but in the result it is enough if it appear to be so well known and acquiesced in that it may reasonably be presumed to have been an ingredient imported by the parties into their contract (*i*). It need not be immemorial or universal if it is the prevalent usage in the neighbourhood where the land lies (*j*). When a usage is proved it overrides the covenants implied by this section, and even express contracts are construed as subject to it.

This section.—This section, as said by Coutts Trotter, J., sets out in a convenient form the implied covenants usually subsisting in a lease (*k*). Nearly all the clauses were said by Rankin, C.J., to be expressions of well settled principles familiar to the law of England (*l*). The section has no application to a tenancy at will, for a tenancy at will is not a lease as defined in the Act (*m*).

Clause (a)—Lessor's duty of disclosure.—This clause adopts the principle applied in the case of bailments by sec. 150 of the Indian Contract Act. The lessor is bound to disclose material defects with reference to the intended use of the property but is not responsible for a defect of which he is himself unaware, or which the lessee is aware or could with ordinary care discover. The duty of disclosure is therefore limited to latent defects of which the lessor is aware. If the defect is patent there is no duty and no occasion for disclosure. Therefore here as in England there is no law against the letting of a tumble down house (*n*), though this was doubted by Kemp, J., in a Bombay case (*o*). In English law there is an implied covenant of fitness on the letting of a furnished house (*p*) but not in the letting of an unfurnished house (*q*). An English decision has even held, in the

(*g*) *Line* v. *Stephenson* (1838) 5 Bing. (N. C.) 183; *Clayton* v. *Leech* (1889) 41 Ch. D. 103, 107 C.A.

(*h*) *Ahamadar Rahaman* v. *Jaminiranjan* (1930) 57 Cal. 114, 125 I.C. 607, ('30) A.C. 385.

(*i*) *Juggomohun* v. *Manickchund* (1859) 7 M.I.A. 263, 282.

(*j*) *Legh* v. *Hewitt* (1803) 4 East 154.

(*k*) *Secretary of State* v. *Venkayya* (1917) 40 Mad. 910, 913, 35 I.C. 254.

(*l*) *Indu Bhusan* v. *Chowdhury Moazam Ali* (1929) 33 Cal. W.N. 106, 110, 117 I.C. 838, ('29) A.C. 272.

(*m*) *Ram Kishun* v. *Bibi Sohila* (1933) 145 I.C. 567, ('33) A.P. 561.

(*n*) *Robbins* v. *Jones* (1863) 15 C.B. (N.S.) 221; *Cavalier* v. *Pope* (1906) A.C. 428; *Lane* v. *Cox* (1897) 1 Q. B. 415.

(*o*) *Lakhmichand* v. *Ratanbai* (1927) 51 Bom. 274, 299, 101 I.C. 210, ('27) A.B. 115.

(*p*) *Smith* v. *Marrable* (1843) 11 M. & W. 5, followed in *Sutton* v. *Temple* (1843) 12 M. & W. 52; *Wilson* v. *Finch Hatton* (1877) 2 Ex. D. 336.

(*q*) *Chappel* v. *Gregory* (1864) 34 Beav. 250; *Hart* v. *Windsor* (1843) 12 M. & W. 68. But see *Bunn* v. *Harrison* (1886) 3 T. L. R. 146.

case of an unfurnished house, that the landlord, in the absence of an express contract, is not liable to the tenant for defects in the house rendering it dangerous or unfit for occupation, even if he has brought about the defect himself or is aware of its existence (r). In England an implied covenant of fitness for human habitation and an undertaking to keep it so have since been imposed by the Housing Act 1936 (26 Geo. 5 & Edw. 8, C. 51) on the letting of certain classes of houses. Under this Act it has been held that the jamming of a bedroom window so that it could not be moved without danger impaired the ventilation of the room and that in the case of a small house this impaired with its ordinary use so as to involve a breach of the implied covenant (s). There is no such enactment in India and the duty of disclosure under clause (a) does not, it is submitted amount to an implied covenant of fitness.

Consequences of breach.—Breach of the duty of disclosure involves the consequence that before execution of the deed of lease the agreement of lease is voidable for fraud or misrepresentation. After the lease is executed it may be set aside for fraud, but not on the ground of innocent misrepresentation (t).

On this point there have been only two cases in India and they were both decided before the Act. In one the landlord was held liable for leasing a thatched cottage, the chimney of which was covered by the thatch so that the cottage was burnt when a fire was lighted (u). This was on the ground of an implied covenant of fitness, but no reference was made to the English authorities. In the other (v) the roof fell in because the beams were rotten. The Court said that the owner was under an implied obligation to let it in a secure and habitable condition, but cited no authority.

Lessor's title.—The sub-section refers to the nature and condition of the property demised and not to a defect in the lessor's title (w). In *Jyotiprasad Sing Deo* v. *H. V. Low & Co.* (x) Rankin, C.J., commented on the absence in sec. 108 of an implied covenant for title corresponding to sec. 55 (1) (a) in the case of sales, and the omission of any clauses corresponding to sec. 55 (1) (b) and sec. 55 (1) (c), and concluded that the intending lessee had no right to call for title, and that if he claimed to rescind the contract of lease it was for him to show that the title was bad. In appeal from the same case their Lordships of the Privy Council observed that the rights and liabilities of lessor and lessee contrast markedly with the rights and liabilities of buyer and seller particularly in the matter of requirements as to title which the seller must satisfy (y). But in the case cited Rankin, C.J., said that though the incidents of the two different types of transfer were different as regards the obligation to give disclosure and to furnish proof thereof, yet the lessor is under the same obligation to give a good title as the seller. Section 25 of the Specific Relief Act makes no distinction between a contract of selling and a contract of letting, for "a person who agrees to let land, agrees to grant a valid lease" (z). It has therefore been said that a lease implies a covenant for title (a), but limited in duration to the interest of the lessor (b).

(r) *Davies* v. *Foots* (1940) 1 K.B. 116.

(s) *Summers* v. *Salford Corporation* (1943) A.C. 283.

(t) *Angel* v. *Jay* (1911) 1 K. B. 666.

(u) *Radha Krishna* v. *O'Flaherty* (1869) 3 Beng. L. R. 277 A.C.

(v) *Doyle* v. *Ross & Wife* (1875) P. R. 33.

(w) *Syed Mukhtar Ahmad* v. *Rani Sunder Koer* (1918) 17 Cal. W. N. 900, 19 I.C. 815.

(x) (1930) 57 Cal. 1189, 128 I.C. 321, ('30) A.C. 561.

(y) *H. V. Low & Co. Ltd.* v. *Jyotiprasad Sing* (1931) 58 I.A. 392, 59 Cal. 699, 35 Cal. W.N. 1246, 54 Cal. L.J. 366, 33 Bom. L.R. 1544, 61 Mad. L.J. 699, 1931 All. L.J. 1112, 135 I.C. 632, ('31) A.PC. 299.

(z) *Stranks* v. *St. John* (1867) L.R. 2 C.P. 376.

(a) *Burnett* v. *Lynch* (1826) 5 B. & C. 589, 609; *Line* v. *Stephenson* (1838) 5 Bing. (N.C.) 183; *Markham* v. *Paget* (1908) 1 Ch. 697; *Vinayakrao* v. *Bhondu* (1942) Nag. 349, 202 I.C. 9, (1942) A.N. 108.

(b) *Baynes & Co.* v. *Lloyd & Sons* (1895) 2 Q. B. 610 C.A.

[S. 108 (b)

Clause (b)—Duty to give possession.—The lessor's implied covenant for title imports a duty to give possession. After possession is given it is protected by the covenant for quiet enjoyment in clause (c).

By granting a lease the lessor undertakes to put the lessee in possession, and it matters not that the lessor has not possession himself. He who lets agrees to give possession and not merely to give the chance of a law suit (*c*). An express covenant excluding the implied covenant for quiet enjoyment will not relieve the lessor of his duty to give possession (*d*).

The lessor is not liable unless the lessee makes a request (*e*), and the lessor is not obliged to put an unwilling and recalcitrant lessee into possession (*f*).

If the land is in the possession of a third person, possession is given by his attorning to the lessee (*g*).

If the lessor fails to give possession, the lessee can maintain a suit on his lease for possession against the lessor and against any third person who may be in possession (*h*). The lessee may also sue the lessor for damages (*i*); and if the lease is registered, limitation will be six years under Art. 116 (*j*). The onus is on the lessor to prove that he has discharged his obligation to put the lessee into possession (*k*). But if the lessee has already paid rent under the lease, the onus of proving that he has not got possession is on him (*l*).

The lessor is not entitled to rent unless and until he has fulfilled his obligation to put the lessee in possession of the land leased to him (*m*). As regards the lessor's right to rent, if he did not put the lessee in possession of the whole of the leased land the decisions were not uniform. In some cases it had been held that if the lessor put the lessee in possession of only a portion of the property leased, the lessee would be entitled to a suspension of the whole rent, and in other cases to a reduction or abatement of rent. If the rent was an entire rent, that is, a lump rent for the whole land treated as an indivisible subject, the whole rent would be suspended until the lessee was put into possession of the whole (*n*). But if the land was let at a separate rent, *i.e.*, at so much per acre or per bhiga, the lessor was held entitled to an apportionment, and the lessee must pay a reduced or abated rent for the portion of which he has possession (*o*). Again, even if the rent was an entire rent, the lessee was only entitled to an abatement of rent if he knew at the beginning of the tenancy that part of the land was in the possession of another and that the lessor would not be able to

(*c*) *Coe* v. *Clay* (1829) 5 Bing. 440; *Wallis* v. *Hands* (1893) 2 Ch. 75; *Smart* v. *Jones* (1864) 15 C. B. (N. S.) 717; *Zamindar of Vizianagram* v. *Behara Suryanarayana* (1902) 25 Mad. 587, 596; *Secretary of State* v. *Venkayya* (1917) 40 Mad. 910, 914, 35 I. C. 254; *Kandasami Pillai* v. *Ramasami Mannadi* (1919) 42 Mad. 203, 216, 51 I.C. 507; *Abdul Karim* v. *Upper India Bank* (1918) P.R. 19, 40 I.C. 684.

(*d*) *Ahamadar Rahaman* v. *Jaminiranjan*, (1930) 57 Cal. 114, 125 I.C. 607, ('30) A.C. 385.

(*e*) *Narayanaswami* v. *Yerramilli* (1910) 33 Mad. 499, 5 I.C. 318.

(*f*) *Gopal Chandra* v. *Chowdhury Krishna* (1910) 9 Cal. L. J. 595, 4 I.C. 63.

(*g*) *Zamindar of Vizianagram* v. *Behara Suryanarayana*, *supra*; *Natesa Chetti* v. *Vengu Nachiar* (1910) 33 Mad. 102, 3 I.C. 701.

(*h*) *Achayya* v. *Hanimantrayudu* (1891) 14 Mad. 269; *Bhutia Dhondu* v. *Ambo* (1887) 13 Bom. 294; *Ahamadar Rahaman* v. *Jaminiranjan*, *supra*; *Bishen Sarup* v. *Abdul Samad* (1931) 29 All. L.J. 606, 136 I.C. 273, ('31) A.A. 649; *Hakim Mohmd. Fasihzaman* v. *Anwar Hussain* (1932) All. L.J. 126, 139 I.C. 828, ('32) A.A. 314; *Ireland* v. *Bircham* (1836) 2 Bing. (N.C.) 90.

(*i*) *Mst. Razia Begum* v. *Shaikh Muhammad* (1927) 6 Pat. 94, 96 I.C. 558, ('26) A.P. 508.

(*j*) *Nabin Chandra* v. *Munshi Mander* (1927) 6 Pat. 606, 101 I.C. 707, ('27) A.P. 248.

(*k*) *Jogesh Chandra* v. *Emdad Meah* (1932) 59 I.A. 29, 59 Cal. 1012, 36 Cal. W. N. 221, 55 Cal. L.J. 72, 62 Mad. L.J. 336, 136 I.C. 398, ('32) A.PC. 28.

(*l*) *Durga Prasad Singh* v. *Rajendra Narayan* (1913) 41 Cal. 493, 40 I.A. 223, 21 I.C. 750; *Arun Chandra* v. *Bhagaban Chandra* (1931) 59 Cal. 155, 133 I.C. 577, ('31) A.C. 537 F.B.

(*m*) *Shama Prasad* v. *Takt Mullik* (1900) 5 Cal. W.N. 816; *Udhab Chandra* v. *Narain* (1920) 58 I.C. 186; *Ganda Singh* v. *Secretary of State* (1934) 152 I.C. 231, ('34) A. Pesh. 101.

(*n*) *Katyayani Devi* v. *Udoy Kumar* (1925) 52 Cal. 417, 52 I.A. 160, 88 I.C. 110, ('25) A.PC. 97; *Holgate* v. *Kay* (1844) 1 Car. & Kir. 341.

(*o*) *Katyayani Debi* v. *Uday Kumar*, *supra*.

give him possession of it. (*p*). This divergence of judicial opinion in India has since been set at rest in a case from Bengal in which the Judicial Committee have held that in the case of a lease for a lump sum rests the English Common Law rule of the suspension of entire rent should not be applied, where the lessor has failed to give possession of only a part of the premises leased (*q*). This decision clearly establishes that where the lessor fails to put the lessee in possession of the whole of the demised premises then, whether the premises were leased at a lump sum rent or at a rent at so much per acre or per bigha there will not be a suspension of the entire rent but that the lessee will be entitled to a proportionate reduction or abatement of the rent. This subject is further discussed under Note "Suspension of rent" under clause (1) below.

Clause (c)—Covenant for quiet enjoyment.—The covenant implied by this section is the absolute covenant expressed in an English lease. The express covenant of an English lease is either (1) absolute or unqualified, or (2) restricted or qualified. This is explained in the following passage from the judgment of Mookerjee, J., in a Calcutta case (*r*) :—" This provision (clause (c) of sec. 108) secures for the lessee the benefit of an unqualified covenant for quiet enjoyment. A qualified covenant for quiet enjoyment protects the lessee against interruption by the lessor, his heirs and assigns, or any other person claiming by or under him, them, or any of them, whereas an unqualified covenant protects the lessee against interruption by the lessor, his heirs and assigns or by any other person or persons whomsoever. The covenant, in the unqualified form covers the case of interruption by the superior landlord or other person claiming by title paramount, exercising a power of re-entry, or otherwise, dispossessing the lessee." The chief distinction is that the restricted covenant does not cover eviction by title paramount, while the absolute covenant does protect the lessee even from title paramount.

In cases decided under the Act the implied covenant under this sub-section has been held to be the unqualified covenant protecting the lessee from title paramount (*s*).

Illustration.

A leased some lands to *B*, who took possession under the lease. Subsequently Government settled the lands with *C* and granted *C* a lease. *B* sued *C* for possession but failed, the decree providing that he should pay rent to *C*. *B* sued *A* for damages for breach of the covenant for quiet enjoyment by reason of the constructive eviction. If *B* had proved that *C*, the Government lessee had a better title than *A*, it would have been a case of eviction by title paramount and *B* would have been entitled to damages. But as *B* failed to prove a defect in *A*'s title it was a tortious eviction and *B* had no cause of action against *A* : *Banka Behari Ghose* v. *Madan Mohan Roy* (1921) 26 Cal. W. N. 143, 68 I.C. 477, ('21) A.C. 532.

Even before the Act the covenant was implied in cases where the lessee was prevented from collecting rents, whether the interference was by the lessor himself (*t*), or other lessees of the lessor (*u*), or by title paramount (*v*).

The covenant does not extend to tortious acts. See note *infra* " Whether covenant . . . . applies to tortious Acts."

(*p*) *Narendra Chandra* v. *Manindra Chandra* (1922) 49 Cal. 1019, 67 I. C. 800, ('22) A.C. 153 ; *Joyram Chandra* v. *Bisnu Charan* (1925) 85 I.C. 781, ('25) 805.

(*q*) *Ram Lal* v. *Dhirendra Nath* (1943) A.P.C. 24, 70 I.A. 18.

(*r*) *Naorang Singh* v. *Meik* (1923) 50 Cal. 68, 72, 70 I.C. 161, ('23) A.C. 41.

(*s*) *Tayawa* v. *Gurshidappa* (1901) 25 Bom. 269 ; *Syed Mukhtar Ahmad* v. *Rani Sundar Koer* (1913) 17 Cal. W.N. 960, 19 I.C. 815 ; *Ram* v. *Pramatha* (1922) 35 Cal. L. J. 146, 63 I.C. 754, ('22) A.C. 237 ; *Dharm Narain* v. *Labh Singh* (1921) 60 I.C. 477 ; *Moti Lal* v. *Yar Muhammad* (1925) 47 All. 68, 85 I.C. 756, ('25) A.A. 275. See also *Indu Bhusan* v. *Moazam Ali* (1929) 33 C.W.N. 106, 117 I.C. 838, ('29) A.C. 272.

(*t*) *Kristo Soondur* v. *Koomar Chunder* (1871) 15 W.R. 230.

(*u*) *Kadumbinee* v. *Kasheenath* (1870) 13 W.R. 338.

(*v*) *Gopanund Jha* v. *Lalla Gobind* (1869) 12 W. R. 109.

S. 108 (c)

An act done under compulsion of a statute is not within the covenant, for the covenant cannot be construed to be an agreement to do an illegal act (*w*). So a lessee who was evicted under the Epidemic Diseases Act (*x*), or under the Land Acquisition Act (*y*), had no cause of action against the lessor.

English covenant for quiet enjoyment.—The covenant for quiet enjoyment in English law was formerly described as a covenant to secure title and possession (*z*). Later decisions have extended the operation of the covenant to interference with the enjoyment of the thing demised (*a*). The covenant operates after possession has been given; for before entry the lessee has his remedy on the covenant to give possession (*b*). The object of the covenant is to secure continuance of possession to the lessee, and it is therefore an assurance against the consequences of a defective title and of disturbance thereupon (*c*). But it does not enlarge the estate of the lessee. For if the lessor build on adjacent premises so as to block the light of the lessee this is not a breach of the covenant unless the easement of light existed at the date of the lease (*d*).

The English covenant for quiet enjoyment is almost always an express covenant. This express covenant is either (1) restricted or qualified, or (2) absolute or unqualified.

Restricted covenant.—The restricted or qualified covenant usually provides for quiet enjoyment without interruption by the lessor or any other person or persons rightfully claiming by, from or under him—or for quiet enjoyment without lawful interruption by the lessor or any person claiming under or in trust for him. Under this covenant the lessor is liable for his own acts and the lawful acts of persons claiming under him but not for the acts of persons claiming by title paramount or of strangers.

A person claiming under the lessor may be a lessee from the same lessor of adjoining premises (*e*); a person claiming under a settlement made by the lessor under a power (*f*); a remainderman under a settlement made by the lessor before the lease (*g*); a lessee from trustees of the lessor, the lessor being one of the trustees (*h*). The phrase claiming under the lessor has been interpreted to mean, claiming under the lessor to do the acts of interference (*i*). So in *Williams* v. *Gabriel* (*j*) where the ground floor of a building was let to the plaintiff but the upper part becoming dilapidated the assignee of the lessor demolished it and in so doing exposed the plaintiff's premises—this was held to be an interruption of enjoyment, but the lessor was not liable as the assignee could not claim under the lessor a right to do acts which caused interruption.

On the other hand acts done under title paramount are not within the covenant. Instances of such cases are when a tenant for life granted a lease and on his death the lessee was evicted by the next remainderman (*k*) or where eviction was procured by a superior landlord (*l*). But if the lessor unnecessarily consents to judgment for eviction by the head lessor and the lessee is evicted, the lessor is liable (*m*).

Absolute covenant.—An express covenant which is absolute and unqualified in English law provides for quiet enjoyment without interruption by the lessor or by any other

(*w*) *Newby* v. *Sharpe* (1878) 8 Ch. D. 39.

(*x*) *Merwanji* v. *Syed Sardar Ali* (1899) 23 Bom. 510; *Mahomedally* v. *Campbell* (1899) 1 Bom. L.R. 739.

(*y*) *Minto* v. *Kalee Charn* (1867) 8 W.R. 527.

(*z*) *Dennett* v. *Atherton* (1872) L.R. 7 Q.B. 316, 326.

(*a*) *Sanderson* v. *Mayor of Berwick-on-Tweed* (1884) 13 Q.B.D. 547, 551; *Harrison, Ainslie & Co.* v. *Lord Muncaster* (1891) 2 Q.B. 680; *Booth* v. *Thomas* (1926) Ch. 109.

(*b*) *Wallis* v. *Hands* (1893) 2 Ch. 75.

(*c*) *Howell* v. *Richarts* (1809) 11 East. 633.

(*d*) *Booth* v. *Alcock* (1873) 8 Ch. App. 663; *Leech* v. *Schweder* (1874) 9 Ch. App. 463; *Robson* v. *Palace Chambers* (1897) 14 T.L.R. 56.

(*e*) *Sanderson* v. *Mayor of Berwick-on-Tweed* (1884) 13 Q.B.D. 547.

(*f*) *Carpenter* v. *Parker* (1857) 3 C.B. (N. S.) 206.

(*g*) *Evans* v. *Vaughan* (1825) 4 B. & C. 261.

(*h*) *Markham* v. *Paget* (1908) 1 Ch. 697.

(*i*) *Harrison, Ainslie & Co.* v. *Muncaster* (1891) Q.B. 680; *Sanderson* v. *Mayor of Berwick-on-Tweed* (1884) 13 Q.B.D. 547.

(*j*) (1906) 1 K.B. 155.

(*k*) *Woodhouse* v. *Jenkins* (1832) 9 Beng. 431.

(*l*) *Kelly* v. *Rogers* (1892) 1 Q.B. 910.

(*m*) *Cohen* v. *Tannar* (1900) 2 Q.B. 609.

S. 108 (c)

person or persons whomsoever. It extends to lawful interruptions by title paramount (*n*). It does not, however, extend to acts done by the lessor under compulsion of a statute. So in *Newby* v. *Sharpe* (*o*) the lessor of premises let for storing cartridges committed no breach in removing the cartridges after the passing of an Act making such storage illegal. In *Matthey* v. *Curling* (*p*) which was an action against the lessee for rent and breach of covenant to repair, Lord Buckmaster said—"Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent."

Implied covenant in English law.—If there is no express covenant in the lease it seems now settled that the common law implies a covenant from the relationship of landlord and tenant (*q*). This covenant is the restricted covenant. The express covenant ensures quiet enjoyment during the whole term of the lease, but the implied covenant is only operative during the continuance of the estate of the lessor (*r*), for the implied covenant is not to be extended to make a man do more than he can (*s*).

The covenant implied by the common law being the restricted covenant is not as wide as the covenant implied by sec. 108 (c) of this Act (*t*).

Whether the covenant implied by sec. 108 (c) applies to tortious acts.—The covenant implied by sec. 108 (c) protects against lawful, and not tortious interruptions; and this is so both in English as well as in Indian law. This is explained in the following classic passage in the judgment of Vaughan, C.J., in *Hayes* v. *Bickerstaff* (*u*):—

> "By covenant in law, the lessee is to enjoy his lease against the lawful entry, eviction, or interruption of any man, but not against tortious entries, evictions or interruptions, and the reason of law is solid and clear, because against tortious acts the lessee hath proper remedy against the wrongdoers."

In a further passage the arguments against so extended a construction were summarized as follows:—

> "Inconveniences if the law should be otherwise—
>
> (1) A man's covenant without necessary words to make it such, is strained, to be unreasonable, and therefore improbable to be so intended; for, it is unreasonable a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing.
>
> (2) The covenantor, who is innocent, shall be charged, when the lessee hath his natural remedy against the wrongdoer: and the covenantor made to defend a man from that from which the law defends every man, that is, from wrong.
>
> (3) A man shall have double remedy for the same injury against the covenantor, and also against the wrongdoer.
>
> (4) A way is opened to damage a third person (that is the covenantor) by undiscoverable practise between the lessee and a stranger, for there is no difficulty for the lessee secretly to procure a stranger to make a tortious entry, that he may therefore charge the covenantor with an action."

(*n*) *Foster* v. *Pierson* (1792) 4 Term. Rep. 617.
(*o*) (1878) 8 Ch. D. 39.
(*p*) (1922) 2 A.C. 180, 227.
(*q*) *Budd Scott* v. *Daniell* (1902) 2 K.B. 351; *Markham* v. *Paget* (1908) 1 Ch. 697.
(*r*) *Adams* v. *Gibney* (1830) 6 Beng. 656; *Messent* v. *Reynolds* (1846) 3 C.B. 194; *Penfold* v. *Abbott* (1862) 32 L.J. (Q.B.) 67. *Bragg* v. *Wiseman* (1614) Browne 22. *Indu Bhusan* v. *Chowdhury Moazam Ali* (1929) 33 Cal. W. N. 106, 117 I.C. 838, ('29) A.C. 272.
(*u*) (1669) Vaugh. 118, 119, 123; *Wallis* v. *Hands* (1893) 2 Ch. 75, 83; *Dudley* v. *Folliott* (1790) 3 Term. Rep. 584; *British India Corporation* v. *Secretary of State* (1945) A.A. 425.

But when the act is that of the lessor himself the lessee may sue on the covenant whether the act is wrongful or not (*v*).

In *Katyayani Debi* v. *Udoy Kumar Das* (*w*) the Privy Council observed that it was the duty of a tenant under a perpetual tenure to protect himself against illegal encroachments by others. This remark applies, however, to all leasehold estates; and Indian cases both before and after the Act do not extend the covenant for quiet enjoyment to wrongful acts (*x*).

Illustration.

A leases a mine to *B* on the 22nd April 1897, and later on the 28th September 1901 *A* leases another adjoining mine to *C*. *B* removes certain pillars in his mine which cause a subsidence and *C*'s mine is flooded. *A* is not liable to *C*, for *B*'s act was a tort. Again *B*, though a lessee of *A*, was not a person claiming under *A*, for the act was not one authorised by *A*: *Noorang Singh* v. *Meik* (1923) 50 Cal. 68, 70 I.C. 161, ('23) A.C. 41.

But where the lessor interfered with the lessee collecting rents from the sub-lessee and was himself the wrongdoer, this was said to be a breach of the covenant which justified a suspension of rent (*y*). Indeed in an old Calcutta case (*z*) the lessor was held to be disentitled to rent because he had omitted to prevent his assignees from wrongfully evicting the lessee in butwara proceedings. The case is a strong one but the decisions may be justified on the ground that the omission of the lessor amounted to active participation in the wrongful eviction (*a*). On the other hand the exception which allows the lessee to sue on the covenant in the case of a wrongful act by the lessor was overlooked in a Madras case (*b*), where it was said that no question of the covenant arose if the lessor instigated his former tenant to set up an unfounded claim and thereby evict the lessee.

Lessor may not derogate from his grant.—There is a class of cases which are not covered by the covenant but in which the lessor is liable on the ground that he must not derogate from his grant. The leading case is *Aldin* v. *Latimer, Clark, Muirhead Co.* (*c*), where the lessor demised land for a timber merchant's business and the lessee covenanted to carry on such business, and it was held that assigns of the lessor were not entitled to erect on adjoining property acquired from the lessor buildings which interfered with the passage of air to the drying sheds of the lessee. Another case on the same point is *Jones* v. *Consolidated Anthracite Colleries Ltd.* (*d*). The lessor had granted a mining lease and then a building lease with reservation of the mines. Such a lease implies the grant of a right of support from the mines. So when the building subsided the lessor was held liable not on the covenant but because he had derogated from his grant. The principle will not apply unless the disturbance is substantial, *e.g.*, interference with privacy by the lessor constructing an external staircase on his adjoining building is not actionable (*e*).

(*v*) *Andrews* v. *Paradise* (1724) 8 Mod. Rep. 318.

(*w*) (1925) 52 Cal. 417, 52 I.A. 160, 88 I.C. 110, ('25) A.PC. 97.

(*x*) *Runglall Sing* v. *Lalla Roodur Pershad* (1872) 17 W.R. 386; *Douzelle* v. *Girdharee* (1874) 23 W.R. 121; *Tayawa* v. *Gurshidappa* (1901) 25 Bom. 269; *Kali Prasanna* v. *Mathura Nath Sen* (1907) 34 Cal. 191; *Uday* v. *Katyani* (1922) 49 Cal. 948, 69 I. C. 126, ('22) A.C. 87; *Noorang Singh* v. *Meik* (1923) 50 Cal. 68, 70 I.C. 161, ('23) A.C. 41; *Indu Bhusan* v. *Chowdhury Moazam Ali*, *supra*. See also *Ayyanna* v. *Gangayya* (1933) 144 I.C. 16, ('33) A.M. 465.

(*y*) See note "Suspension of rent" under s. 108 (1).

(*z*) *Wajed Ali* v. *Mst. Chundrabutty* (1873) 22 W.R. 542.

(*a*) Cf. *Malzy* v. *Eichholz* (1916) 2 K. B. 308; *Phelps* v. *City of London Corporation* (1916) 2 Ch. 255.

(*b*) *Vithilinga Padayachi* v. *Vithilinga Mudali* (1892) 15 Mad. 111, 121.

(*c*) (1894) 2 Ch. 437.

(*d*) (1916) 1 K. B. 123.

(*e*) *Browne* v. *Flower* (1911) 1 Ch. 219.

Breach of covenant.—A breach of covenant occurs when there is a substantial interference with enjoyment, even if it does not amount to dispossession. For instance, in *Sanderson* v. *Berwick-on-Tweed Corporation* (*f*) there was a breach when the lessee's field was flooded by overflow from a drain badly constructed by the lessor. Also in *Shaw* v. *Stenton* (*g*) where the lessor by excavating ironstone caused his lessee's coal mine to be flooded. In *Manchester Sheffield and Licolnshire Railway Co.* v. *Anderson* (*h*) a Railway Company bought the reversion of a lease and started works which caused structural damage to the lessee's house and temporarily blocked the road giving access to it. The Court held that the damage to the house was a breach, but that the temporary inconvenience caused by the blocking of the road was not a breach. S. 108 (c)

Interference with the lessee's use of the premises for the particular purpose for which they were taken is a breach. So in a case already referred to (*i*), when premises were let for drying timber, the lessor could not use the adjoining land so to block the access of air. But interference which does not make the premises less useful generally, but only less useful for some purpose, unknown to the lessor at the time of the letting, is not a breach of the covenant. In *Robinson* v. *Kilvert* (*j*) the lessor let the upper part of a building for a paper warehouse and then installed a heating apparatus in the cellar. This did not interfere with the lessee's comfort or make the house unfit for storing paper generally, but it did affect a particular class of delicate paper that the lessees stored. This was not a breach of the covenant, for the lawful enjoyment of the house as a paper warehouse was not interfered with, and if the lessee required special protection he should have bargained for it.

The disturbance must be the natural consequence of the act done. In *Harrison, Ainsle & Co.* v. *Muncaster* (*k*) the lessee's mine was flooded by water from a mine of another lessee from the same lessor, who, while properly working his mine, tapped what is called a feeder, the effect of which was to release a large quantity of underground water. The lessor was not liable, for this was an extraordinary and accidental consequence of a lawful act. This case must be distinguished from *Shaw* v. *Stenton* (*l*) where the collapse of the upper stratum of ironstone was a consequence which could have been foreseen.

The disturbance must be physical interference; and it has no reference to noise (*m*). The mere likelihood of interference is not enough; so a decree which is not acted upon and therefore does not lead to actual entry and disturbance is not a breach (*n*).

Interference with the lessee collecting rents from his sub-lessee is a breach (*o*). A sub-lease is entitled to recover damages from the lessee, if the head lessor puts an end to the lease during the term of the sub-lease (*p*).

Damages.—Damages for the breach of the covenant for quiet enjoyment are not limited by the rule in *Bain* v. *Fothergill* (*q*) that a purchaser of real estate cannot recover damages for loss of his bargain but only his deposit and expenses; nor is the measure of damages the amount or a proportion of the rent for the two matters are not directly connected (*r*). The lessee in a case of eviction is entitled to recover the value of the

(*f*) (1884) 13 Q.B.D. 547.
(*g*) (1858) 2 H. & N. 858.
(*h*) (1898) 2 Ch. 394.
(*i*) *Aldin* v. *Latimer, Clark, Muirhead & Co.* (1894) 2 Ch. 437.
(*j*) (1889) 41 Ch. D. 88; *Harmer* v. *Jumbil (Nigeria) Tin Areas Ltd.* (1921) 1 Ch. 200.
(*k*) (1891) 2 Q.B. 680.
(*l*) (1858) 2 H. & N. 858.
(*m*) *Jenkins* v. *Jackson* (1883) 40 Ch. D. 71.
(*n*) *Howard* v. *Maitland* (1883) 11 Q.B.D. 695.
(*o*) *Munee Dutt Sing* v. *William Campbell* (1869) 11 W. R. 278; *Gopanand Jha* v. *Lalla Gobind Pershad* (1869) 12 W.R. 109; *Kadumbinee* v. *Kashinath Biswas* (1870) 13 W.R. 338; *Kristo Soondur* v. *Koomar Chunder Roy* (1871) 15 W.R. 230; *Douzelle* v. *Girdharee Sing* (1874) 23 W.R. 127; *Dhunput Singh* v. *Mahomed Kazim* (1891) 24 Cal. 296.
(*p*) *Gujadhar* v. *Rambhau* (1938) A.N. 439.
(*q*) (1874) L.R. 7 H.L. 158.
(*r*) *Indu Bhusan* v. *Chowdhury Moazam Ali* (1929) 33 Cal. W. N. 1069, 117 I.C. 838, ('29) A.C. 272.

S. 108 (c) term (*s*). He is also entitled to recover the cost of any structure he may have erected (*t*) and the costs of defending the action for eviction (*u*).

Payment of rent.—The payment of rent and the performance by the lessee of the contracts binding on him are not conditions precedent to the covenant for quiet enjoyment. This has been held in English cases (*v*) where the covenant usually contains a clause in terms similar to clause (c). These cases have been followed in a Madras decision (*w*) where it is explained that the effect of a different construction would be to give the lessor a right of re-entry in the case of every breach by the lessee.

A similar clause in a different context may or may not operate as a condition precedent. Thus when the right to a lease for a further term was dependent on the lessee paying rent and performing the covenants of the lease, this was construed as a condition precedent (*x*). In another case (*y*) a lessor who had previously purchased the premises from the lessee agreed to reconvey them at a certain date, and the agreement contained the following words: "You are further required to act rightly and in conformity with the deed of rent granted by you on this date, and in the event of your failing so to do this agreement shall be null and void." This clause was not construed as a condition precedent as there was no natural connection between the lease and the right of repurchase and the right of repurchase was not forfeited when the rent fell into arrears.

"The benefit of such contract shall be annexed to, and go with the lessee's interest."—The second paragraph of clause (c) enacts that the covenant for quiet enjoyment runs with the land. It can therefore be enforced by the assignee of the lessee not only against the lessor, but also against the assignee of the lessor whose liability is also referred to in sec. 109.

Leases have always been an exception to the rule that all contracts are personal. The common law of England allowed the assignee of the lessee to enforce the covenant for quiet enjoyment against the lessor; and the Statute 32, Hen. 8 c. 34 extended the liability under the covenant to the assignee of the lessor. The law as to the liability on covenants in leases was settled in 1583 by *Spencer*'s case (*z*) where it was held that the burden of a covenant runs with the land (1) if it directly concerns the land and relates to a thing *in esse* whether assigns are named or not, and (2) if it directly concerns the land demised and relates to a thing in future and the assigns are named. See notes "Leases," "Covenants annexed to the land" and "Covenants running with the land" under sec. 40.

The law as to covenants annexed to the land is also discussed under sec. 40. The liability under the lessee's covenants is explained under sec. 108. The liability under lessor's covenants is the subject of sec. 109.

Any part thereof.—These words refer to the case where the lessee has assigned his interest in a part of the premises leased. They indicate that the covenant for quiet enjoyment can be apportioned under sec. 37. The duty of the lessor to perform the covenant is severed, and must be performed for the benefit of each sharer in the lessee's interest.

(*s*) *Rolph* v. *Crouch* (1867) L.R. 3 Exch. 44; *Nagardas* v. *Ahmedkhan* (1897) 21 Bom. 175, 182; *Tayawa* v. *Gurshidappa* (1901) 25 Bom. 269, 275.

(*t*) *Rolph* v. *Crouch*, *supra*.

(*u*) *Williams* v. *Burrell* (1845) 1 C.B. 402; *Rolph* v. *Crouch*, *supra*.

(*v*) *Edge* v. *Boileau* (1885) 16 Q.B.D. 117; *Dawson* v. *Dyer* (1833) 5 B. Ad. 584.

(*w*) *Meenakshi* v. *Chidambaram* (1912) 23 Mad. L.J. 119, 15 I.C. 711.

(*x*) *Bastin* v. *Bidwell* (1881) 18 Ch. D. 238; *Simon* v. *Associated Furnishers* Ltd. (1931) 1 Ch. 379.

(*y*) *Chidambara* v. *Manikha* (1864) 1 M. H. C. 63, 64.

(*z*) (1583) 5 Co. Rep. 16a.

Clause (d)—Accretions.—The rule of English law is that land which imperceptibly accretes has the legal characteristics of the land on which it is formed (*a*). The language of the English law was adopted by the Privy Council in *Lopez* v. *Muddun Mohun Thakoor* (*b*) which was however a case of diluviated land re-forming *in situ*. Again in the *Secretary of State* v. *Kadirikutti* (*c*) the Madras High Court held that the English rule applied unless excluded by enactment or local usage. But the Bengal Alluvion and Diluvion Regulation 11 of 1825 speaks of "gradual" (and not "imperceptible") accession. The earlier Indian cases (*d*) use the same phrase, and it is now settled that in India it is not necessary for the accretion to be imperceptible and that it is sufficient that it is gradual (*e*). If the accretion is not imperceptible or gradual, no change occurs in the ownership of the land (*f*).

Lessee's right to accretions.—Land gradually or imperceptibly accreted forms part of the demise. The lessee holds it during his term, paying a proportionate increment of rent, and must surrender it to the lessor at the end of the term. This law has been declared in various local Acts (*g*), and in cases decided both before and after this Act (*h*).

Licensee.—But a mere licensee who has no property in the land would acquire no right by an accretion (*i*).

Encroachments.—The English rule as to accretions applies whether the accretion is caused by natural or artificial means, provided the means are lawful and the accretion is gradual (*j*). The dictum of Lord Chelmsford in *A.-G.* v. *Chambers* (*k*), and followed in *Secretary of State* v. *Kadirikutti* (*l*), that if the acts causing artificial accretion were done with that intention, the rule did not apply, seems to have been overruled by *Bradford Corporation* v. *Pickles* (*m*). Therefore, although the clause does not in terms apply to encroachments made by the lessee, the law as to encroachments is the same. If the lessee encroaches upon adjoining land and acquires title thereto by prescription, he must surrender the land to the lessor at the expiry of the term whether the land be waste land or land of a stranger (*n*). The true presumption is that the land so encroached upon is added to the tenure and forms part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of the landlord (*o*). If the land of the lessor is encroached upon the lessor may of course eject the lessee before he

(*a*) *R.* v. *Yarborough* (*Lord*) (1824) 3 B. & C. 91 affirmed sub. nom.; *Gifford* v. *Yarborough* (*Lord*) (1828) 5 Bing. 163.

(*b*) (1870) 13 M.I.A. 467.

(*c*) (1890) 13 Mad. 369.

(*d*) *Doe dem Seebkristo* v. *The East India Co.* (1856) 6 M. I. A. 267; *Nasarvanji* v. *Nasarvanji* (1864) 2 Bom. H. C. 345 A.C.J.

(*e*) *Srinath Roy* v. *Dinabandhu Sen* (1915) 42 Cal. 489, 41 I.A. 221, 25 I.C. 467; *Secretary of State* v. *Rajah of Vizianagram* (1917) 40 Mad. 1083, 40 I.C. 896; *Lala Lachmi Narayan* v. *Maharaja Kesho Prasad* (1920) 5 Pat. L.J. 1, 52 I.C. 147.

(*f*) *Carlisle Corporation* v. *Graham* (1869) 4 L.R. Ex. 361; *A. G. of South Nigeria* v. *Holt & Co.* (1915) A.C. 599; *Thakurain Ritraj Koer* v. *Sarfaraz Koer* (1905) 27 All. 655, 32 I.A. 165; *Narendra* v. *Acchaibar* (1906) 28 All. 647.

(*g*) *e.g.* Beng. Reg. 11 of 1825.

(*h*) *Govind Monee* v. *Dino Bundhoo* (1871) 15 W.R. 87; *Attimoolah* v. *Shaikh Saheoollah* (1871) 16 W.R. 149; *Bhuggobut Singh* v. *Doorg Bijoy Singh* (1871) 16 W.R. 95; *Ramnidhee Munjee* v. *Parbutty* (1880) 5 Cal. 823; *Golam Ali* v. *Kali Krishna* (1881) 7 Cal. 479; *Brojendra Coomar* v. *Woopendra Narain* (1882) 8 Cal. 706; *Gourhari Kaiburto* v. *Bhola Kaiburto* (1894) 21 Cal. 238 F.B.; *Assanullah* v. *Mohini Mohan Das* (1899) 26 Cal. 739; *Mutura Kanto* v. *Meanjan Mundul* (1879) 5 Cal. L.R. 192; *Amjad Ali* v. *Kaderjan* (1902) 13 Cal. W. N. 269, 4 I. C. 518; *Ahmud Bepari* v. *Tohi Mohomed* (1909) 13 Cal. W.N. 267, 4 I.C. 511; *Madhu* v. *Sabar Ali* (1910) 14 Cal. W. N. 681, 6 I.C. 177; *Manjaya* v. *Tammaya* (1924) 26 Bom. L. R. 520, 80 I. C. 427 ('24) A.B. 449.

(*i*) *Beni Pershad* v. *Chaturi Tewary* (1906) 33 Cal. 444, 450.

(*j*) *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859) 4 De G. & J. 55.

(*k*) (1859) 4 DeG. & J. 55.

(*l*) (1890) 13 Mad. 369.

(*m*) (1895) A.C. 587.

(*n*) *Gooroo Doss Roy* v. *Issur Chunder Bose* (1874) 22 W. R. 246; *Nuddyarchand Shaha* v. *Meajan* (1884) 10 Cal. 820; *Indu* v. *Atul* (1925) 42 Cal. L.J. 276, 87 I.C. 630, ('25) A.C. 1114; *Andrews* v. *Hailes* (1853) 2 E. & B. 349; *Kingsmill* v. *Millard* (1855) 11 Exch. 313; *Nesbit* v. *Maplethorpe Urban Council* (1918) 2 K.B. 1.

(*o*) *Muthurakoo* v. *Orr* (1911) 21 Mad. L.J. 615, 10 I.C. 575.

S. 108 (e) has acquired a prescriptive title (*p*), but not in the interval after the acquisition of that title and before the end of the term (*q*). Nor can the lessor eject the lessee before the expiry of the term, if he has recognized him as lessee of the land encroached upon (*r*).

Clause (e)—Destruction.—This clause is a departure from the English law. The clause overrides clause (m) and there is no duty to repair or restore if the property leased is destroyed by fire not caused by the negligence of the lessee (*s*).

English Law.—Under English law the lessee takes the premises subject to events which may subsequently depreciate its value. This is because that law is reluctant to imply covenants (*t*), and expects parties to provide for future contingencies by express agreement. So in the absence of an express covenant a tenant continues to pay rent even though the premises are subsequently destroyed by fire (*u*) or seized by an alien enemy (*v*); and even when there is an express covenant the accident must be strictly within its terms (*w*). In the recent case of *Cricklewood Property and Investment Trust* v. *Leighton's Investment Trust* (*x*) Lord Russell & Lord Goddard expressed the view that the doctrine of frustration could never apply to put an end to a lease, while Viscount Simon, L. C. and Lord Wright thought it might in certain circumstances apply to a lease and Lord Porter did not think it necessary to express any opinion on the point in the circumstances of that case. It is a moot point whether the doctrine of frustration can be applied to a lease in India. According to one view the doctrine of frustration is said to be based on the theory of an implied term in the contract and a question may arise whether the opening words of this section let in the doctrine of frustration in the case of a lease in India.

Clause (e)—Applies.—This clause gives the lessee the option of avoiding the lease by notice if the premises are rendered substantially and permanently unfit for the purposes for which they were let by any of the events described. The clause was applied and the lessee was allowed to avoid the lease when coffee plants (*y*), and godowns (*z*) were destroyed by fire during the term of the lease. The Madras High Court doubted whether the clause applied when the property leased was flooded with sea water (*a*). This was on a statement of law in Bacon's Abridgement (*b*); but it is submitted that that statement is obsolete, for in *Monk* v. *Cooper* (*c*) the Court referred to the old case of *Paradine* v. *Jane* (*d*) where it is said "though the land, be surrounded or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent."

Clause (e)—Does not apply.—The clause was held not to apply when a house was damaged by earthquake so as to need repair but which was not in danger of collapsing (*e*). The clause did not apply when a godown was destroyed by fire caused by the negligence of the lessee's watchman (*f*). Nor will the clause assist a lessee of salt pans who is

---

(*p*) *Prohlad Teor* v. *Kedar Nath Bose* (1898) 25 Cal. 302; *Nuddyarchand Shaha* v. *Meanjan*, *supra*.

(*q*) *Tabor* v. *Godfrey* (1895) 64 L.J. (Q.B.) 245.

(*r*) *Prohlad Teor* v. *Kedar Nath Bose*, *supra*; *Khondakar Abdul* v. *Mohini Kant* (1899) 4 Cal. W.N. 508.

(*s*) *East India Distilleries & Factories* v. *Mathias* (1928) 51 Mad. 994, 114 I.C. 234, ('28) A.M. 1140; *Deputy Lal* v. *Reoli Prasad* (1941) A.A. 327.

(*t*) *Erskine* v. *Adeane* (1873) 8 Ch. App. 756.

(*u*) *Monk* v. *Cooper* (1727) 2 Stra. 763; *Baker* v. *Holtpzaffel* (1811) 4 Taunt. 45; *Izon* v. *Gorton* (1839) 5 Bing. (N.S.) 501; *Taylor* v. *Caldwell* (1863) 3 B. & S. 826.

(*v*) *Paradine* v. *Jane* (1647) Alleyn 26.

(*w*) *Sane* v. *Bilton* (1878) 7 Ch. D. 815, Cf. *Manchester Bonded Warehouse* v. *Carr* (1880) 5 C.P.D. 507.

(*x*) (1945) A.C. 221.

(*y*) *Kunhayen Haji* v. *Mayan* (1894) 17 Mad. 98.

(*z*) *Dhuramsey* v. *Ahmedbhai* (1899) 23 Bom. 15; *Sidick Haji* v. *Breul & Co.* (1910) 12 Bom. L.R. 1055, 8 I.C. 1049.

(*a*) *Subramania Pattar* v. *Kattamballi* (1920) 43 Mad. 132, 53 I.C. 397.

(*b*) Vol. VIII, p. 63: Rolls Abridgement, p. 236, followed in *Sheikh Enayutoolah* v. *Elahie Buksh* (1864) W.R. Act 10 of 1859 Rulings 42.

(*c*) (1727) 2 Stra. 763.

(*d*) (1647) Allyn. 26.

(*e*) *Donaghey* v. *Weatherdon* (1910) 7 I.C. 201.

(*f*) *Girdaridoss* v. *Ponna Pillai* (1920) 39 Mad L.J. 233, 59 I.C. 252.

prevented from manufacturing salt by labour trouble (*g*). The clause does not also apply where the parties have specifically provided for the payment of rent in the contingency contemplated by this clause (*h*). S. 108 (f)

Rent.—The notice avoiding the lease takes effect immediately on service and sec. 106 has no application (*i*). Rent is apportioned and the lessee is liable for rent up to the date of his notice. But if the lessee does not give vacant possession, he will be liable for rent on an implied tenancy by holding over (*j*).

This clause was referred to in a Lahore case (*k*) where a Cantonment market was blown down after the Cantonment Authority had granted license for the sale of vegetables for three years. The Transfer of Property Act applies in cantonments and the Court in one passage of the judgment treated the license as a lease which the lessee had omitted to avoid under sec. 108 (e). Another part of the judgment treated the license as an agreement and suggested that the abandonment of the premises amounted to rescission. The Court omitted to notice that if the document was a lease registration was necessary and the terms of the lease could not be proved. The case seems to have been one of a license revoked by the destruction of the premises and thereafter renewed by permission to set in other premises.

Clause (f)—Lessor not liable to repair.—The lessor is under no liability to repair in the absence of an express contract making him liable (*l*). Indeed, sec. 108 (m) implies that the liability is that of the lessee (*m*). The law is the same in England, for that law implies no covenant by the landlord to do repairs of any kind either at the commencement of the tenancy (*n*) or during the term (*o*). Nor does it make any difference that the tenant has covenanted to repair "fair wear and tear excepted" (*p*), or given the landlord notice that the premises are in a dangerous condition (*q*). Indeed, in the absence of an express stipulation, the lessor's entry for the purpose of repairs would be a trespass (*r*).

Lessor's covenant to repair.—The words in the section "any repairs which he is bound to make to the property" refer to an express covenant to repair. The onus of proving such express covenant is on the lessee (*s*). If the lessor commits a breach of his express covenant the lessee is not entitled to terminate the tenancy; for the section gives him the right after notice to the lessor, to do the repairs himself and deduct the amount from the rent (*t*). The lessor's covenant to repair and the lessee's covenant to pay the rent are independent covenants (*u*).

A lessor's covenant to repair is construed on the same principles as the lessee's covenant to repair (*v*); and does not extend to giving the lessee a different thing from that which he took at the beginning of the tenancy (*w*). A covenant to repair

(*g*) *Hari Laxaman* v. *Secretary of State* (1928) 52 Bom. 142, 108 I.C. 19, ('28) A.B. 61.
(*h*) *Surpat Singh* v. *Sheo Prasad* (1945) A.P. 300, 24 Pat. 197.
(*i*) *Damoda Coal Co.* v. *Harmook Marwari* (1915) 19 Cal. W.N. 1019, 31 I.C. 677.
(*j*) *Sidick Haji* v. *Breul & Co.* (1915) 12 Bom. L. R. 1055, 8 I.C. 1049.
(*k*) *Banarsi Das* v. *Cantonment Authority* (1933) 153 I.C. 241, ('34) A.L. 517.
(*l*) *Charles Stuart* v. *Patrick Playfair* (1897) 2 Cal. W.N. 34; *Bolton* v. *Donald* (1906) 3 All. L.J. 134; *Bijay* v. *Howrah Amta Light Rly.* (1923) 38 Cal. L.J. 177, 72 I.C. 98, ('23) A.C. 524; *Lakhmichand* v. *Ratanbai* (1927) 51 Bom. 274, 101 I.C. 210, ('27) A.B. 115.
(*m*) *Bijay* v. *Howrah Amta Light Rly.*, *supra*; *Lakhmichand Khetsey* v. *Ratanbai*, *supra*.
(*n*) *Chappell* v. *Gregory* (1864) 34 Beav. 250.
(*o*) *Arden* v. *Pullen* (1842) 10 M. & W. 321; *Gott* v. *Gandy* (1853) 2 E. & B. 845, 847. But as to repair to the roof of a building let in flats see *Cockburn* v. *Smith* (1924) 2 K.B. 119.
(*p*) *Arden* v. *Pullen*, *supra*.
(*q*) *Gott* v. *Gandy* (1853) 2 E. & B. 845.
(*r*) *Barker* v. *Barker* (1829) 3 C. & P. 557; *Stocker* v. *Planet Building Society* (1879) 27 W. R. 793, 877.
(*s*) *Bolton* v. *Donald* (1906) 3 All. L.J. 134.
(*t*) *Bijay* v. *Howrah Amta Light Rly.* (1923) 38 Cal. L.J. 177, 72 I.C. 98, ('23) A.C. 524.
(*u*) *Taylor* v. *Webb* (1937) 2 K.B. 283.
(*v*) See note under sec. 108 (m) post.
(*w*) *Torrens* v. *Walker* (1906) 2 Ch. 166.

S. 108 (f) external parts of a house has been construed to apply to a wall left without proper support by reason of the demolition of an adjoining house under a local statute (*x*). Where the lessor of shop premises forming part of the lessor's building which contained a theatre and a rehearsal room covenanted to keep the exterior of the demised premises in good and tenantable repair and condition and owing to a severe frost and not to any default of the lessor certain sprinklers for discharging water in case of fire fitted in the rehearsal room and extending to the demised shop burst and damaged the lessee's goods, it was held that there had been no breach of the covenant (*y*). Where an under-lease contained a covenant by the sub-lessor to "keep the outside walls and roofs in good and tenantable repair as and so far only as is required to be done by them under the head lease" and by the head lease the lessee (the predecessor in title to the sub-lessor) covenanted to keep the premises "in good and tenantable repair (destruction or damage by fire and fair wear and tear excepted)", it has been held that the exception includes damage to the outside walls and roofs caused by natural agencies such as rain, wind and decay and also consequential damage to the interior of the house (*z*). A covenant by a lessor to repair is construed in English law as a covenant to repair upon notice (*a*), and this is also the effect of the section in this Act. The law in England requires the tenant to give notice to the landlord of latent as well as patent defects whether or not the landlord has means of access, otherwise no responsibility attaches to the landlord in respect of the covenant to repair (*b*); but notice is dispensed with if the landlord is in possession of the defective part and has the same means of knowledge as the tenant (*c*). But under this section notice is always necessary.

The lessor's covenant to repair overrides the covenant for quiet enjoyment and gives the lessor a right of entry for a reasonable time to perform his covenant (*d*). The cleaning of a flue comes within the expression "executing repairs" and entitles the lessor to enter upon the demised premises under covenant of the lessee to permit the lessor to enter upon the demised premises for "executing repairs" (*e*).

Breach of express covenant.—The lessor is liable for injury caused to the lessee by breach of an express covenant to repair but not for injuries caused to the lessee's wife (*f*) or children or other inmates, for they are not parties to the contract and he owes them no duty. But this rule does not apply where the lessor is in occupation of that part of the building where the defect occurs (*g*).

The occupier and not the owner is *prima facie* liable for damage for nuisance on the demised premises, or for injury to third persons or to adjoining property due to the house being in a dilapidated condition (*h*). But the lessor may be liable if the house was in a defective condition when it was let, or if he has committed a breach of his covenant to repair, and injury is caused to a neighbouring owner (*i*) or to a passer-by (*j*); for according to the maxim *sic utere tuo ut alienum non laedas*, the owner owes a duty to his neighbour whether the neighbour's title is of property or of passage (*k*).

(*x*) *Green* v. *Eales* (1841) 2 Q.B. 225.

(*y*) *Peters* v. *Prince of Wales Theatre* (1943) 1 K.B. 73.

(*z*) *Taylor* v. *Webb, supra.*

(*a*) *Makin* v. *Watkinson* (1870) L. R. 6 Exch. 25; *Manchester Bonded Warehouse Co.* v. *Carr* (1880) 5 C.P.D. 507, 511.

(*b*) *Morgan* v. *Liverpool Corporation* (1927) 2 K.B. 131 C.A.

(*c*) *Melles & Co.* v. *Holme* (1918) 2 K.B. 100; *Murphy* v. *Hurly* (1922) 1 A.C. 369.

(*d*) *Saner* v. *Bilton* (1878) 7 Ch. D. 815.

(*e*) *Greg* v. *Planque* (1936) 1 K.B. 669.

(*f*) *Cavalier* v. *Pope* (1906) A.C. 428; *Malone* v. *Lasky* (1907) 2 K.B. 141; *Cameron* v. *Young* (1908) A.C. 176, 180.

(*g*) *Cunard* v. *Autofyre Ltd.* (1933) 1 K.B. 551.

(*h*) *Russell* v. *Shenton* (1842) 3 Q. B. 449; *Bai Monghibai* v. *Doongersey* (1917) 19 Bom. L.R. 887, 43 I.C. 273.

(*i*) *Todd* v. *Flight* (1860) 9 C.B. (N.S.) 377; *Nelson* v. *Liverpool Brewery Co.* (1877) 2 C.P.D. 311.

(*j*) *Gandy* v. *Jubber* (1864) 5 B. & S. 78; *Bowen* v. *Anderson* (1894) 1 Q.B. 164; *Mills* v. *Temple-West* (1885) 1 T.L.R. 503; *Wilchick* v. *Marks and Silverstone* (1934) 2 K.B. 56.

(*k*) *Cameron* v. *Young* (1908) A.C. 176, 180.

Illustration.

A's assignor leased a Port Trust godown to *B* for a term of five years beginning on the 1st May 1911. On the 15th April 1912 the assignor assigned the reversion of the lease to *A*. At the time of the assignment the godown was inspected by the Port Trust officials and found to be in good order. On the 19th February 1915 a wall of the godown collapsed and damaged the wall of the adjoining godown of *C*. *C* sued *A* and *B* for damage. Held that *A* was not liable as the godown was in good condition when let. But that the tenant *B* was liable: *Bai Monghibai* v. *Dongersey* (1917) 19 Bom. L.R. 887, 43 I.C. 273. **S. 108(g)(h)**

Remedies of the lessee.—The lessee has the right by this section to do the repairs himself, in case of the lessor's default after reasonable notice; but he is not entitled to terminate the tenancy by reason of the lessor's default and to quit (*l*), unless the performance of the covenant has been made a condition of the continuance of the lease (*m*). The lessee may deduct the cost of repairs with interest from the rent. A covenant by the tenant to pay the rent without deduction does not exclude the tenant's right to make this deduction (*n*).

Clause (g)—Payments made on behalf of lessor.—If the lessee makes a payment which the lessor is bound to make, and which if not made is recoverable from the lessee or from the land, the lessee is a person interested in the payment and is therefore entitled to be reimbursed. This is enacted in sec. 69 of the Contract Act, and the illustration to that section is that of a payment made by a tenant of land revenue payable by the zemindar in order to prevent the sale of his holding. So a patnidar is entitled to recover land revenue due by his superior landlord and paid by him to avoid the risk to his holding (*o*). If the lessor's mortgagee obtains a decree for the sale of the property leased, and the lessee pays the decretal amount and stops the sale, the lessee is entitled to recover the amount so paid under this section (*p*). But a payment which the lessor is not bound by law to make is not within the section (*q*).

Payments under this section may be Government assessment or ground rent or rates and taxes payable by the landlord. The lessee reimburses himself either by deducting the amount paid with interest from the rent or *aliunde*, *e.g.*, by counterclaim to the lessor's suit for rent. The operation of this clause may, however, be excluded by special stipulation in that behalf. By an express condition in the contract, a lessee may undertake to pay all taxes and dues, such as the urban immoveable property tax or riot tax in Bombay (*r*).

A tenant is entitled to a similar deduction in England, unless there is a stipulation in the lease to the contrary (*s*). English cases limit the right of deduction to the next payment of rent (*t*). This is because payment of the landlord's tax operates as a payment *pro tanto* of rent, and if the tenant pays the next rent in full he is considered to have made a voluntary payment of the balance to the landlord.

Clause (h)—Fixtures.—This clause refers to the lessee's right to remove fixtures.

(*l*) *Bijay* v. *Howrah Amta Light Rly.* (1923) 38 Cal. L.J. 177, 72 I.C. 98, ('23) A.C. 524; *Govindasamy* v. *Palaniappa* (1925) 48 Mad. L.J. 397, 87 I.C. 10, ('25) A.M. 833.

(*m*) *Surplice* v. *Farnsworth* (1844) 7 Man. & G. 576.

(*n*) *Katie Graham* v. *The Colonial Government of British Guiana* (1910) 12 Cal. L.J. 351, 6 I.C. 131.

(*o*) *Smith* v. *Dinonath* (1885) 12 Cal. 213; *Bama Sundari Dasi* v. *Adhar Chunder* (1894) 22 Cal. 28; *Faiyazunnissa* v. *Rajranj* (1927) 104 I.C. 358, ('27) A.O. 609.

(*p*) *Iswara* v. *Ramappa* (1934) 152 I.C. 201, ('34) A.M. 658.

(*q*) *Bepin Behari* v. *Kalidas* (1901) 6 Cal. W.N. 336.

(*r*) *Mancherji* v. *Dinbai* (1941) A.B. 260.

(*s*) *Payne* v. *Burridge* (1844) 12 M. & W. 727; *Sweet* v. *Seager* (1857) 2 C.B. (N. S.) 119.

(*t*) *Andrew* v. *Hancock* (1819) 1 Brod. and Bing. 37; *Denby* v. *Moore* (1817) 1 B. & Ald. 123.

S. 108 (h)

Amendment.—This sub-section has been amended by the insertion of the words "even after the determination of the lease" to settle a conflict of decisions referred to in *Angammal* v. *Aslami Sahib* (*u*) as to whether a lessee is entitled to an allowance of a reasonable time after the determination of the lease for the removal of his fixtures. A further amendment by the words "whilst he is in possession of the property leased and not afterwards" fixes definitely the time during which the right may be exercised. The amendment introduces no new principle but limits and defines the tenant's right to remove as one to be exercised during the term and negatives any right to remove when the tenant is not in possession (*v*). If he once quits possession, he may not return and the fixtures become the property of the lessor.

All things which he has attached to the earth.—The phrase "attached to the earth" has been explained in a note under sec. 3, and includes trees, shrubs, buildings and machinery. The lessee's right does not depend upon the maxim of English law *quicquid plantatur solo, solo cedit*, but on the common law of India as stated in *Poramanick*'s case (*w*) which this section follows. In that case a Full Bench of the Calcutta High Court said—"We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

The English law allows a tenant to remove fixtures such as can be removed without causing serious damage to the structure, but under this section the lessee may remove anything he has attached provided he leaves the property in the state in which he received it.

The right to remove the buildings negatives the right to compensation (*x*). The option is with the lessor either to take the building on paying compensation, or if he is unwilling to pay compensation to allow the lessee to remove the building (*y*). If there is nothing to remove, as when the tenants have sunk a well in the property, there is no right to compensation (*z*). But if the land and buildings are acquired under the Land Acquisition Act during the term, the lessee will be entitled to compensation for the buildings he has erected (*a*). The principle of the section was applied when a lease proved to be invalid and the tenant was allowed to remove a building he had erected (*b*). A contrary view has been held by the Patna High Court in *Darbari* v. *Raniganj Coal Association* (*c*). It was held in that case that where a landlord contracts to grant permanent rights, but no valid lease was executed as required by sec. 107, the tenant became a monthly tenant under sec. 106 and his rights as regards structures was as provided in sec. 108 (h) and he was not entitled to compensation for the structures, though such structures

(*u*) (1915) 38 Mad. 710, 21 I.C. 583; *Thavasi Ammal* v. *Salai Ammal* (1918) 35 Mad. L.J. 281, 43 I.C. 643, F.B.; *Raja Avergal* v. *Noor Mahomed* (1922) 66 I.C. 48, ('22) A.M. 349.

(*v*) *Govind Prasad Shaha* v. *Charusheela Dasee* (1932) 60 Cal. 1042, 37 Cal. W.N. 791, 58 Cal. L.J. 161, 147 I.C. 1238, ('33) A.C. 875; cf. *Penton* v. *Robart* (1801) 2 East. 88; *Khimji* v. *Pioneer Fibre Co.* (1941) A.B. 337.

(*w*) (1866) 6 W. R. 228, 229; *Russickloll* v. *Lokenath* (1880) 5 Cal. 688; *Dunia Lal Seal* v. *Gopi Nath* (1895) 22 Cal. 820; *Ismai Kani Rowthan* v. *Nazarali Sahib* (1904) 27 Mad. 211; *Kanai Lal* v. *Rasik Lal* (1915) 19 Cal. W.N. 361, 23 I.C. 762.

(*x*) *Shaikh Hussain* v. *Gowardhandas* (1896) 20 Bom. 1, 6; *Ismail Khan Mahomed* v. *Jaigun Bibi* (1900) 27 Cal. 570, 586; *Usain Rowthen* v. *Nizurali* (1909) 19 Mad. L.J. 208, 4 I.C. 1129.

(*y*) *Ismai Kani Rowthan* v. *Nazrali Sahib* (1904) 27 Mad. 211, 216.

(*z*) *Venkatavaragappa* v. *Thirumalai* (1887) 10 Mad. 112.

(*a*) *Dunia Lal Seal* v. *Gopi Nath, supra*; *Narayan Das Khettry* v. *Jatindra Nath* (1927) 54 Cal. 669, 54 I.A. 218, 102 I.C. 198, ('27) A.PC. 135.

(*b*) *Govindasami* v. *Ethirajammal* (1916) Mad. W.N. 180, 34 I.C. 1.

(*c*) (1944) A.P. 30.

may have been erected on the faith of the alleged right, for equitable principles could not override the operation of sec. 108 (h).

The section is subject to a contract to the contrary and has no application if there is special stipulation in the lease as to the lessee's right of removal and of compensation (*d*).

Trees.—Trees are part of the land, and the right of the tenant to cut them down depends upon custom and the terms of the lease (*e*). The question generally arises in agricultural tenancies which are outside the scope of this Act. The tenant's rights vary in different provinces according to local usages and local Acts. In Bengal the tenant's right has varied at different times. Before the Bengal Tenancy Act 8 of 1885, the tenant had the right to enjoy the benefit of trees on his holding but not to cut them down, unless they had been planted by himself (*f*). After the Bengal Tenancy Act his right was enlarged, and he had the right to fell trees which were on the land when it was leased to him, unless the landlord could prove a custom prohibiting him from doing so (*g*); but the trees when felled were the property of the landlord (*h*), unless they had been planted by the tenant himself or his predecessor (*i*). The Allahabad High Court has held that a tenant at fixed rates has rights of ownership and that the trees belong to him (*j*), yet an occupancy tenant has only the right to enjoy the trees so long as his tenure lasts (*k*) and is not entitled even to trees which he has planted himself (*l*). The Bombay and Madras High Courts recognize the right of a permanent tenant to trees planted by himself (*m*). So also the Calcutta High Court when the tenancy has come into existence after the Transfer of Property Act (*n*).

The lessor cannot cut down trees that belong to him during the continuance of the term unless he has reserved a right of re-entry for that purpose (*o*), for his entry would be a trespass (*p*). But if the trees are expressly exempted from the demise, such exemption would probably carry with it the incidental right of re-entry for removal (*q*). In the absence of special custom to the contrary, the principle underlying sec. 108 can be invoked in the case of agricultural leases. Such a lessee is not entitled to claim the timber of trees which have spontaneously grown on the land (*r*).

Clause (i)—Crops.—When the lease is of uncertain duration and the lessee's interest is determined otherwise than by his fault, the lessee is entitled to the benefit of all crops growing on the land and planted or sown by him.

Leases of uncertain duration are the leases referred to in sec. 111 (b), (c) and (h), as for instance leases from year to year terminable by notice to quit, or leases granted by a tenant for life which determine on the death of the grantor. A tenancy determined

(*d*) *Cook & Co.* v. *C. L. Phillips* (1931) 34 Cal. W.N. 785, 130 I.C. 222, ('31) A.C. 133.

(*e*) *Ruttonji Edulji* v. *Collector of Tanna* (1867) 11 M.I.A. 295.

(*f*) *Abdool Ruhoman* v. *Dataram* (1865) W.R. Gap. 367; *Goluck* v. *Nubo* (1874) 21 W.R. 344; *Radhika Nath* v. *Samir Fakir* (1917) 21 Cal. W.N. 636, 38 I.C. 49; *Hemangini Dassi* v. *Ashutosh Das* (1929) 113 I.C. 568, ('29) A.C. 330.

(*g*) *Nafar Chandra* v. *Ram Lal Pal* (1894) 22 Cal. 742.

(*h*) *Nafar Chandra* v. *Ram Lal Pal*, *supra*; *Kedar Nath* v. *Govinda* (1928) 32 Cal. W. N. 366, 108 I.C. 242; *Prodyot Kumar* v. *Gopichandra* (1910) 37 Cal. 322, 5 I.C. 243.

(*i*) *Mofiz Sheikh* v. *Rasik Lal* (1910) 37 Cal. 815, 6 I.C. 796.

(*j*) *Harbans Lal* v. *Maharaja of Benares* (1901) 23 All. 126.

(*k*) *Deoki Nandan* v. *Dhian Singh* (1886) 8 All. 467; *Janki* v. *Sheoadahar* (1901) 23 All. 211; *Ganga Dei* v. *Badam* (1908) 30 All. 134.

(*l*) *Imdad Khatun* v. *Bhagirath* (1888) 10 All. 159.

(*m*) *Sitabai* v. *Sambhu Sonu* (1914) 38 Bom. 716, 28 I. C. 140; *Vasudevan* v. *Valia Chathu* (1901) 24 Mad. 47 F.B.

(*n*) *Kedar Nath* v. *Govinda* (1928) 32 Cal. W.N. 366, 108 I.C. 242.

(*o*) *Kamalkrishna Sanyal* v. *Madhusudan Chaudhuri* (1930) 57 Cal. 344, 123 I. C. 316, ('30) A.C. 240; *Ganga Dei* v. *Badam* (1908) 30 All. 134; *Pokardas* v. *Amir* (1917) P. R. (Rev.) 5, 41 I.C. 907.

(*p*) See *Barker* v. *Barker* (1829) 3 C. & P. 557; *Neale* v. *Wyllie* (1824) 3 B. & C. 533.

(*q*) *Kamalkrishna Sanyal* v. *Madhusudan Chaudhuri*, *supra*; *Ganga Dei* v. *Badam*, *supra*; *Ruttonji Edulji* v. *Collector of Tanna* (1867) 11 M.I.A. 295; Foa 6th Ed., p. 109.

(*r*) *Gur Prasad* v. *Mehdi Husain* (1942) 201 I.C. 728, (1942) A.O. 860.

S. 108 (j) by forfeiture is determined by the lessee's fault, for although forfeiture is the election of the lessor yet it is the fault of the lessee which has led to the determination of the lease (s).

As ancillary to the right to remove growing crops the lessee has the right of free ingress to and egress from the property in order to carry them away, for "when the law doth give anything to one, it giveth impliedly whatsoever is necessary for the taking and enjoying of the same (t)."

The right under this section is similar to that given by sec. 51 to a *bona fide* transferee who has sown crops and is evicted by a person having a better title.

A similar right is reserved by the common law of England in regard to emblements grown by a tenant from year to year whose tenancy is determined by no fault of his. This section has therefore been described as representing the common law of India (u).

The English common law right has been to a great extent superseded by statute, for the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25) sec. 1 substitutes for the right to emblements the right to hold till the expiration of the current year of the tenancy.

The section does not apply directly to agricultural tenancies but the principle would no doubt be applied. Various local Acts safeguard the evicted tenant's right to their crops.

Clause (j)—Assignment.—In English law a tenant can, as an ordinary incident of the estate granted to him, both assign his term and create sub-tenancies (v). Except as to some non-transferable agricultural tenancies, this has been the law in India both before and after the Act (w). The clause does not apply to tenancies of homestead land in Bengal created before the passing of the Act, and these are not transferable except by custom (x). The clause refers to assignments that are absolute and to assignments by way of mortgage and sublease.

Absolute assignments.—Absolute assignments are assignments of the whole interest of the lessee. Such an assignment creates privity of estate between the lessor and the assignee, and the assignee becomes liable to the lessor on covenants running with the land including the covenant to pay rent (y). But this liability does not extend to pay interest on the arrears of rent (z).

In English law a sublease for the whole residue of the lessee's term operates as an absolute assignment of the lease (a). So does a sublease for a term exceeding that of the head lease (b). The Privy Council has pointed out that this is not the law in India and that a sublease for the whole of the unexpired term does not operate otherwise than as a sublease (c).

(s) *Davis* v. *Eyton* (1830) 7 Bing. 154.

(t) Co. Litt. 55b.

(u) *Narayanan* v. *Krishna Patter* (1914) 26 Mad. L. J. 348, 22 I.C. 515.

(v) *Doe d. Mitchinson* v. *Carter* (1798) 8 Term. Rep. 57, 60; *Church* v. *Brown* (1808) 15 Ves. 258, 264.

(w) *Venkatasamy Naick* v. *Kulandapuri* (1871) 5 Mad. H.C. 227, 247; *Doorga Pershad* v. *Brindabun* (1871) 15 W.R. 274; *Banee Madhub Banerjee* v. *Joy Krishna Mookerjee* (1871) 12 W.R. 495; *Kishori Lal* v. *Krishna Kamini* (1910) 37 Cal. 377, 383, 5 I.C. 500; *Jyoti Prasad* v. *Har Prasad* (1932) 1932 All. L.J. 567, 139 I.C. 346, ('32) A.A. 473.

(x) *Hari Nath* v. *Raj Chandra* (1897) 2 Cal. W.N. 122; *Hanuman Prasad* v. *Deo Charan* (1908) 7 Cal. L.J. 309; *Madhu Sudan* v. *Kamini* (1905) 32 Cal. 1023; *Umar Kanta* v. *Kashiram* (1914) 23 I.C. 246; *Mohendra* v. *Krishna Kumari* (1918) 46 I.C. 656; *Ananda Mohan* v. *Gobinda Chandra* (1916) 20 Cal. W.N. 322, 33 I.C. 565; *Safar Ali* v. *Abdul Rasid* (1924) 30 Cal. L.J. 585, 84 I.C. 28, ('24) A.C. 1012; *Sarada Kanta* v. *Nabin Chandra* (1927) 54 Cal. 333, 97 I.C. 817, ('27) A.C. 39.

(y) *Walker* v. *Reeves* (1781) 2 Doug. 455, 461; *Williams* v. *Bosanquet* (1819) 1 Brod. and Bing. 238; *Monica Kitheria Saldhana* v. *Subraya Hebbara* (1907) 30 Mad. 410; *Kamala Nayak* v. *Ranga Rau* (1861) 1 Mad. H.C. 24; *Ram Kinkar* v. *Satya Charan* (1939) A.PC. 14.

(z) *Virabhadraya* v. *Basangowda* (1940) A.B. 154, (1940) Bom. 328, 42 Bom. L.R. 279, 187 I.C. 680.

(a) *Beardman* v. *Wilson* (1868) 4 C.P. 57; *Bryant* v. *Hancock* (1898) 1 Q.B. 716.

(b) *Milmo* v. *Carreras* (1946) 1 K.B. 306.

(c) *Hunsraj* v. *Bejoy Lal Seal* (1930) 57 Cal. 1176, 57 I.A. 110, 122 I.C. 20, ('30) A.PC. 59; *Ram Kinkar* v. *Satya Charan* (1939) A.PC. 14; *Nanjappa* v. *Ranga Swami* (1940) A.M. 410, (1940) 1 M.L.J. 200. 51 M.L.W. 258, (1940) M.W.N. 266.

Assignment by way of mortgage or sublease.—An Indian mortgage is not as a rule an absolute assignment and does not create privity of estate between the lessor and the mortgagee (*d*); though, of course, the mortgagee of the term when he forecloses stands in the shoes of the lessee (*e*). It has been held that a privity of estate is created where the usufructuary mortgagee pays rent to the lessor who accepts it (*f*) but this does not seem to be consistent with the decision of the Privy Council in *Ram Kinkar Banerjee*'s case (*infra*). As pointed out by the Privy Council in a later case (*g*) even after a mortgage the lessor retains certain interest. The mortgagee cannot be liable to the lessor for the whole of the rents and covenants and cannot be liable for any part of it without apportionment even if he takes possession. In such circumstances if the mortgagee in possession pays the whole rent to the lessor he may be regarded as doing so on behalf of the lessor and such payment will not by itself create a privity of estate between the lessor and the mortgagee. Nor will taking of possession by the mortgagee create such privity. An English mortgage is in form an absolute assignment, and when a mortgage in India took this form it was thought that it made the mortgagee of the term liable by privity of estate to the lessor. This rule was laid down by Wallis, C.J., in *Thethalan* v. *The Eralpad Rajah* (*h*). The same view was adopted by Rankin C.J., in *Bengal National Bank* v. *Janakinath Roy* (*i*). This was, however, doubted by Mukerji J., in the undernoted case (*j*). There was thus a conflict of decisions as to whether an English mortgage by a lessee of his leasehold interest operated as an absolute assignment so as to create a privity of Estate with the lessor. This conflict has now been set at rest by the decision of the Judicial Committee in *Ram Kinkar* v. *Satya Charan* (*k*) in which it has been held that a mortgagor in India, when he assigns his interest under a lease to a mortgagee, does not under any of the forms of mortgage specified in sec. 58 transfer an absolute interest and consequently the mortgagee is not liable by privity of estate for the burdens of the lease. S. 108 (j)

As an English mortgage in England vests the whole legal interest in the mortgagee and creates privity of estate between the mortgagee of the term and the lessor (*l*), it has long been the practice of English conveyancers to make the assignment to the mortgagee by sub-demise to prevent the mortgagee being liable for rent (*m*). But privity of estate is not created by an equitable assignment whether by way of agreement (*n*), or by equitable mortgage by deposit of title deeds (*o*).

A sublease is an assignment of a lesser term and accordingly there is no privity of estate between the lessor and the sublessee (*p*), and this is so in Indian law although

(*d*) *Thethalan* v. *The Eralpad Rajah* (1917) 40 Mad. 1111, 40 I.C. 841, followed in *Keshavlal* v. *Maganlal* (1934) 58 Bom. 327, 36 Bom. L.R. 197, 148 I.C. 993, ('34) A.B. 134 (but doubting the application of the doctrine of privity of estate in India).

(*e*) *MacNaghten* v. *Bheekaree Singh* (1878) 2 Cal. L.R. 323.

(*f*) *Girendra Narayan* v. *Ganga Narayan* (1938) A.A. 167, (1938) All. 288 (1938) A.L.J. 66, 174 I.C. 245.

(*g*) *Jagadamba Loan Co.* v. *Raja Shiva Prosad* (1941) A.P. C. 36.

(*h*) (1917) 40 Mad. 1111, 40 I.C. 841, discussing *Kunhanujan* v. *Anjelu* (1894) 17 Mad. 296 and *Kannye Loll Sett* v. *Nistoriny* (1884) 10 Cal. 443.

(*i*) (1927) A.C. 725, I.L.R. 54 Cal. 813, 104 I.C. 484.

(*j*) *Fala Krishna Pal* v. *Jagannath* (1932) A.C. 775, (1932) I.L.R. 59 Cal. 1354, 56 C.L.J. 187.

(*k*) (1939) A.P.C. 14, 66 I.A. 50. See also *Jagadamba Loan Co.* v. *Shivaprasad* (1941) A.P.C. 36, 68 I.A. 67.

(*l*) *Williams* v. *Bosanquet* (1819) 1 Brod. & Bing. 238; *Stone* v. *Evans* (1796) Peake. Add. Cas. 94; *Haig* v. *Homan* (1880) 8 Bli. (N.S.) 380; *Shiv Prasad* v. *Tom Smith* (1938) 17 Pat. 499, 180 I.C. 292, (1939) A.P. 146 (cannot now be regarded as correct in view of the decision in Ramkinan's case and Jagadamba's case).

(*m*) Cf. *Bonner* v. *Tottenham and Edmonton, etc. Society* (1899) 1 Q.B. 161 C.A.

(*n*) *Cox* v. *Bishop* (1857) 8 DeG. M. & G. 815.

(*o*) *Moores* v. *Choat* (1839) 8 Sim. 508.

(*p*) *Halford* v. *Hatch* (1779) 1 Doug. 183; *South of England Dairies* v. *Baker* (1906) 2 Ch. 631; *MacKusick* v. *Carmichael* (1917) 2 K.B. 581; *Akhoy Kumar Chatterjee* v. *Akman Molla* (1915) 19 Cal. W.N. 1197, 27 I.C. 397; *Timmappa* v. *Rama Venkanna* (1897) 21 Bom. 311, 313, (but in the report privity of contract is a mistake for privity of estate).

S. 108 (j) the sublease is for the whole residue of the term (q). A sublease which specifies no term is construed as one for the whole residue of the term (r).

Liability of the lessee after the transfer.—The section expressly enacts that the lessee by transferring the whole or part of his interest does not absolve himself from his contractual liabilities to the lessor (s). Notice to the lessor of the transfer does not affect the liability (t). The original lessee is liable on his covenant, *i.e.*, by privity of contract and the assignee is liable by privity of estate. There is no inconsistency between the liability of the two (u). The word " only " shows that mere transfer does not absolve the lessee and that the transfer coupled with other circumstances may do so. Thus the liability of the lessee ceases when the lessor releases the lessee. The release may be express or implied. The facts that the lessor served a notice on the assignee determining the lease that the lessor filed a suit against the assignee describing the latter as lessee in the plaint and recovered judgment which, however, remained unsatisfied, have been held, in the last mentioned Bombay Case, not to be enough to justify an inference that the lessor had released the lessee. In *James Smith & Sons (Norwood) Ltd.* v. *Goodman* (v) certain premises were demised to a limited company for a term. The lessee Company with the consent of the lessor assigned the lease to an individual. The lessee Company then went into voluntary liquidation and the defendant was appointed the liquidator. The assignee of the lease paid rent for some quarters and assigned the lease to another limited Company. This assignee Company became hopelessly insolvent and was unable to pay any rent. In the meantime the defendant as liquidator distributed the assets of the lessee Company without making any provision for payment of future rent under the lease. It was held that the liability of the lessee Company was one which ought to have been admitted to proof by the liquidator and that he committed breach of his duty under sec. 247 of the Companies Act 1929 to pay or provide for the liabilities of the Company and to have the value of the contingent liability ascertained and was, therefore, liable in damages to the lessors.

Privity of estate.—In early times the action of debt for rent in England was proprietary (w). The idea of a personal obligation played a very small part in the relation of landlord and tenant; and the landlord who demanded a rent in arrear was not seeking to enforce a contract, but was seeking to recover a thing (x). The result was that under the old system of pleading the lessor, in the absence of an express covenant, could not maintain an action for debt against the lessee for rent accruing due after an assignment of the term, for in the language of the old cases—" the land was debtor " (y). Hence in *Walker*'s case (z) it was said that, as the land was liable, the assignee, who had the land, was liable for the rent. The Judges said—" For if the lessee grants over all his interest, the lessor may have an action of debt against the assignee, with whom there was no contract by deed. But for asmuch as the rent issues out of the land the assignee who hath

(q) *Hunsraj* v. *Bejoy Lal Seal* (1930) 57 Cal. 1176, 57 I.A. 110, 122 I.C. 20, ('30) A.PC. 59.

(r) *Hurish Chunder Roy* v. *Sree Kalee* (1874) 22 W.R. 274.

(s) *Eaton* v. *Jacques* (1780) 2 Doug. 455, 459; *Auriol* v. *Mills* (1790) 4 Term Rep. 94; *Bholanath Das* v. *Raja Durgu Prosad* (1907) 12 Cal. W.N. 724; *Ardeshar* v. *K. D. & Bros.* (1925) 27 Bom. L.R. 553, 88 I.C. 79, ('25) A.B. 330; *Akrurmani* v. *Madhab Chandra* (1918) 47 I.C. 800; *Manmatha Nath* v. *Nalinaksha Rai* (1925) 79 I.C. 557, ('25) A.C. 428.

Sasi Bhushun v. *Tara Lal* (1895) 22 Cal. 494; *Manmatha Nath* v. *Balaichandra* (1924) 70 I.C. 411, ('24) A.C. 359; *Raja Satya Niranjan* v. *Sarajubala Debi* (1930) 33 Cal. W.N. 865, 127 I.C. 749, ('30) A.PC. 13.

(u) *Bombay Municipal Corporation* v. *Vasantlal* (1938) A.B. 360, (1938) Bom. 471, 40 Bom. L.R. 497, 177 I.C. 479; *Saradindu* v. *Kunja Kamini Ray* (1942) A.C. 514, 46 C.W.N. 798, 202 I.C. 663.

(v) (1938) 1 Ch. 216.

(w) Pollock and Maitland History of English Law Vol. II p. 205.

(x) Pollock and Maitland, *supra* Vol. II, p. 127.

(y) Foa 'The Law of Landlord and Tenant,' 6th Ed., p. 188; *Mills* v. *Auriol* (1760) 1 Hy. Bl. 433.

(z) (1587) 3 Co. Rep. 22a, 22b.

the land, and is privy in estate is a debtor in respect of the land." This is probably the first case in which the phrase privity of estate is used and it expresses the idea that as the land is liable, the person who has the land must be liable. Subsequently when the personal and contractual nature of the action for debt was recognized it became necessary to explain how a person who was not party or privy to the contract could be made liable. This difficulty was got over by applying the principle that the assignee who takes the whole interest of the lessee in the land takes it subject to the burdens (*a*). As between himself and the lessor the assignee stands in the place of the lessee, acquiring his rights and being subject to his liabilities, and in fact becomes a tenant (*b*). This principle was expressed by reverting to the words used in *Walker*'s case and it was said that there was privity of estate between the lessor and the assignee of the whole term (*c*). In the case of a sublease the sublessee becomes a tenant of the lessee and does not stand in the lessee's place. Therefore there is neither privity of estate nor privity of contract between the head lessor and the sublessee and a sublessee is not liable for rent nor on the covenants in the head lease to the headlessor (*d*).

The doctrine of privity of estate has been applied in India in cases referred to in the next paragraph. But in *Keshavalal* v. *Maganlal* (*e*) Beaumont, C.J., doubted whether the doctrine could be applied in India, because the lessee in India has no estate and because there is no reversion in the case of a perpetual lease. The word "estate" originally referred to the feudal tenure under which all real property was held for some estate under the Crown. It first meant personal status, and then status in relation to land, and now means simply the interest of a tenant in his land. In this sense it applies to the interest of a lessee in Indian law, for the lessee is recognized as having an interest in sec. 108 (c) and sec. 108 (j). Then as to reversion it is true that in English law a lease in perpetuity would operate as a grant in fee simple and there would be no reversion. But in Indian law there is a reversion, for as Sir Lawrence Jenkins said—"A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest (*f*)." It seems therefore that Beaumont, C.J., referred to privity of estate in the strictest sense of English law, that is the relationship between a legal term and a legal estate in reversion. The phrase "privity of estate" when applied in India cannot carry precisely the same implication as in English law, since the common law of England attached very special results to the relationship between the tenant of a legal term and the owner of a legal estate in reversion, which differed in many respects from the relationship between a tenant and a landlord who had no legal reversion. But if the expression is used with reference to the relationship of landlord and tenant, there seems no reason why the principle underlying the doctrine, *viz.*, that the assignee who takes the whole interest of the lessor should take it subject to the burden, should not apply in India.

Liability of assignee to the lessor.—The doctrine of privity of estate has been applied in India, and in India also the liability of the assignee of the term to the lessor is founded upon privity of estate. An absolute assignee is liable by privity of estate to the lessor for rent (*g*), and on all covenants running with the land. There is neither privity of estate nor privity of contract between the head lessor and the sublessee or mortgagee

(*a*) *Walker* v. *Reeve* (1782) 2 Doug. 461 note at p. 462; *Lucas* v. *Comerford* (1790) 3 Ves. Jnr. 235.

(*b*) *Williams* v. *Bosanquet* (1829) 1 Brod. & Bing. 238; *Purchase* v. *Lichfield Brewery* (1915) 1 K.B. 184, 187.

(*c*) *Williams* v. *Bosanquet*, *supra* at p. 263.

(*d*) *Halford* v. *Hatch* (1779) 1 Doug. 183; *South of England Dairies* v. *Baker* (1906) 2 Ch. 631.

(*e*) (1934) 58 Bom. 327, 36 Bom. L.R. 197, 148 I.C. 493, ('34) A.B. 134.

(*f*) *Kally Dass Ahiri* v. *Monmohini Dassee* (1897) 24 Cal. 440 approved by the Privy Council in 36 I.A. 148 and 45 I.A. 158.

(*g*) *Monica* v. *Subraya Hebbara* (1907) 30 Mad. 410; *Ardeshar* v. *K. D. & Bros.* (1925) 27 Bom. L.R. 553, 88 I.C. 79, ('25) A.B. 83; *Sukhdeo Pandey* v. *Rameshwar Prasad* (1939) 185 I.C. 557, (1939) A.P. 522.

S. 108 (j) and therefore the sublessee or mortgagee is not liable for rent nor on covenants in the head lease to the head lessor (*h*).

The respective liabilities may be expressed in a table as follows :—

Lessor

Lessee	*Absolute assignee.*
Liable to lessor by privity of contract and privity of estate	Liable to lessor by privity of estate.

Sublessee and Mortgagee.
Not liable to lessor as there is no privity of estate or of contract.

The lessor can therefore enforce payment of rent from the lessee by privity of contract; and also from the assignee of the lessee by privity of estate. But he can only have execution against one (*i*).

The lessee ceases to be liable and the privity of contract is extinguished when the lessor accepts rent from the assignee or otherwise recognizes him as his tenant (*j*) in circumstances implying that the lessor has released the lessee. Mere acceptance of rent from the assignee by itself, it is submitted, is not enough to release the lessee (see cases under footnote (*t*) (*u*) and (*v*) *supra*). But there is no such recognition when the assignee pays the rent not as assignee but as the agent of the lessee (*k*).

The liability of the assignee is founded upon privity of estate, and it therefore continues only so long as his estate lasts and he is only liable for rent due and for breaches of covenant incurred during his time (*l*). For this purpose the rent will be apportioned (*m*). As the liability rests upon privity of estate it ceases when the assignee makes a reassignment (*n*).

Illustration.

A leases a house to *B* for a term of 9 years commencing on the 1st January 1900. *B* on the 1st January 1901 assigns the lease to *C*. *C* on the 1st July 1901 assigns the lease to *D*. *B* is liable by privity of contract to *A* for the rent of the years 1900 and 1901. *C* is liable to *A* by privity of estate for the rent of the first half year of 1901. *D* is liable to *A* by privity of estate for the rent of the second half year of 1901.

But if there be a special covenant by the assignee to pay the rent as there was in *J. Lyons & Co. Ltd.* v. *Knowles* (*o*) the liability of the assignee continues even after assignment by him. Further a covenant by the assignee with the lessee to pay the rent is not a mere

(*h*) *Thethalan* v. *The Eralpad Rajah* (1917) 40 Mad. 1111, 40 I.C. 841; *Timmappa* v. *Rama Venkanna* (1897) 21 Bom. 311; *Akhoy Kumar Chatterjee* v. *Akman Molla* (1915) 19 Cal. W.N. 1197, 27 I.C. 397; *Sitaram Maharaj* v. *Narayan* (1922) 56 I.C. 268, ('22) A.N. 224; *Jetha Nand* v. *Udho Das* (1931) 131 I.C. 121, ('31) A. L. 614; *Syed Nawabali* v. *Mohammed Ramzan* (1944) A.N. 141; *Ram Kinkar* v. *Satya Charan* (1939) A.PC. 14; *Jagadamba Loan Co.* v. *Shivaprasad* (1941) A.PC. 36.

(*i*) *Kunhanujan* v. *Anjelu* (1894) 17 Mad. 296; *Manmatha Nath* v. *Nalinaksha* (1925) 79 I.C. 557, ('25) A.C. 423.

(*j*) *Swansea Corporation* v. *Thomas* (1882) 10 Q.B.D. 48; *Thethalan* v. *The Eralpad Rajah* (1917) 40 Mad. 1111, 1113, 40 I.C. 841; *Bombay Municipal Corporation* v. *Vasantlal*, *supra* and *Saradindu* v. *Kunja Kamini Ray* see *supra*.

(*k*) *Digbijoy Roy* v. *Shaikh Ata Rahman* (1912) 17 Cal. W.N. 156, 15 I.C. 156.

(*l*) *Chancellor* v. *Poole* (1781) 2 Doug. K.B. 764; *Paul* v. *Nurse* (1828) 8 B. & C. 486; *Mehta* v. *Gadadhar Rai* (1910) 37 Cal. 683, 7 I.C. 198; *Palin Behari* v. *Ram Ranjan* (1944) A.C. 219; *Saradindu* v. *Kunja Kamini Ray*. See *supra*.

(*m*) *Swansea Bank* v. *Thomas* (1879) 4 Ex. D. 94.

(*n*) *Manjappa* v. *Venkatesh* (1907) 31 Bom. 159; *Mehta* v. *Gadadhar Rai*, *supra*.

(*o*) (1943) 1 K.B. 366.

covenant of indemnity but is an absolute covenant the benefit of which may be assigned by the lessee to the lessor who may sue upon it although the assignee is no longer possessed of the rent (*p*).

The assignee can determine his liability even though the second assignee be a man of straw (*q*), provided of course the assignment is not fraudulent or colourable (*r*).

The liability of the assignee does not depend upon possession (*s*), for mere possession does not render a man liable for rent if there has not been a complete assignment (*t*). The contrary decision in a Bombay case (*u*) is based on a misreading of the English authorities as shown in the judgment of Wallis, C.J., in *Thethalan* v. *Eralpad Rajah* (*v*). The assignee is liable for rent from the date of the assignment and not from the date of taking possession (*w*).

Liability of assignees of part of the demised premises to the lessor.—The question of the liability of assignees of parts of the demised premises to the lessor for the whole rent was referred to but not decided in a recent English case (*x*), where one of such assignees had under a threat of distress paid the whole rent and claimed contribution from the other assignee. The question of apportionment of rent or other covenant in the case of the assignment of a part of the demised premises by the lessee is not free from difficulty. In one case the Patna High Court has taken the view, with some doubt that in such a case the lessor is entitled to sue the assignee for the whole rent and the assignee is liable jointly and severally with the lessee for the entire rent (*y*). In a later case the same High Court has held that if the assignee of a part is in separate possession of that part, he is liable only for proportionate part of the rent (*z*).

As between the lessee and absolute assignee.—The primary liability to the lessor being that of the assignee who has the property, the liability of the lessee has been said to be that of a surety for the assignee (*a*). So if the lessee has had to pay rent accruing during the period of the assignment (*b*) or damages for breach of covenant during the holding of the assignee (*c*), he can recover from the assignee. It is usual to express this liability in a covenant for indemnity, and when so expressed it is a contractual liability which the assignee cannot get rid of by reassignment (*d*). In the case of a sublease of the property which is subject to a maintenance charge and the sublease contains a covenant for quite enjoyment, on the sublessor failing to pay the maintenance charge, the sublessee is entitled to pay the same in order to secure quiet enjoyment of the property and to recover the same from the sublessor (*e*).

Covenants running with the land.—The liability of the assignee is on covenants running with the land. This expression has been explained in the note under sec. 40 and again in the note under sec. 108 (c). These are covenants which directly concern the land demised (*f*) or which affect the nature and quality of the land (*g*).

(*p*) *Butter Estates Company* v. *Bean* (1942) 1 K.B. 1.

(*q*) *Taylor* v. *Shum* (1797) 1 Bos. & P. 21.

(*r*) *Fagg* v. *Dobie* (1838) 3 Y. & C. (Ex.) 96.

(*s*) *Walker* v. *Reeve* (1781) 2 Doug. 461; *Williams* v. *Bosanquet* (1819) 1 Brod. & Bing. 238; overruling on this point *Eaton* v. *Jarques* (1780) 2 Doug. 455; *Kunhi Sou* v. *Mulloli Chathu* (1915) 38 Mad. 86, 17 I.C. 933; *Thethalan* v. *The Eralpad Raja*, *supra*; *Srimanavedan* v. *Anjela* (1908) 3 Mad. L.J. 292; *Monica Kitheria Saldanha* v. *Subraya Hebbara* (1907) 30 Mad. 410; dissenting from *Kamala Nayak* v. *Ranga* (1864) 1 Mad. H.C. 24 and *McNaghten* v. *Lalla Mewa Lall* (1879) 3 Cal. L.R. 285.

(*t*) *Ananda Chandra* v. *Abdullah Hossein* (1914) 41 Cal. 148, 155, 20 I.C. 679; *Cox* v. *Bishop* (1857) 8 De G. M. & G. 815.

(*u*) *Vithal Narayan* v. *Shriram Savant* (1905) 29 Bom. 391.

(*v*) (1917) 40 Mad. 1111, 40 I.C. 841.

(*w*) *Bengal National Bank* v. *Janaki* (1927) 54 Cal. 813, 104 I.C. 484, ('27) A.C. 725.

(*x*) *Witham* v. *Bullock* (1939) 2 K.B. 81.

(*y*) *Jyoti Prasad Singh* v. *Sedden* (1940) 19 Pat. 433, 192 I.C. 17 (1940) A.P. 516.

(*z*) *Madhabilata Devi* v. *Bisto Kristo Ray* (1944) A.P. 129.

(*a*) *Wolveridge* v. *Steward* (1833) 1 Cr. & M. 644.

(*b*) *Wolveridge* v. *Steward*, *supra*.

(*c*) *Pepin* v. *Chunder Seekur* (1880) 5 Cal. 811; *Moule* v. *Garratt* (1870) L.R. 5 Exch. 132 affirmed 7 Exch. 101; *Burnett* v. *Lynch* (1826) 5 B. & C. 589.

(*d*) *Harris* v. *Goodwyn* (1841) 9 Dowl. 409.

(*e*) *Nanjappa* v. *Ranga Swami* (1940) A.M. 410, (1940) 1 M.L.J. 200, 51 M.L.W. 258, (1940) M.W.N. 261.

(*f*) *Spencer's* case (1583) 5 Co. Rep. 16a.

(*g*) *Rogers* v. *Hosegood* (1900) 2 Ch. 888; *Dyson* v. *Forster* (1909) A.C. 98.

S. 108 (j) Instances of such covenants are a covenant to pay rent (*h*); a covenant to repair (*i*); a covenant to grind all the corn that grew on the land at the lessor's mill, as it affected the land and benefited the owner and no one else (*j*); a covenant by the lessee of a public house to conduct the business so as not to endanger the licence (*k*); a covenant by the lessee of a public house to buy liquor from the lessor (*l*); a covenant by the lessee of a mining lease to pay compensation for subsidence of the surface (*m*); a covenant not to assign without the license of the lessor (*n*); a covenant by the lessor to renew, as it affects the very existence and continuance of the term (*o*); a covenant to pay rates and taxes (*p*); a covenant to build on the land demised (*q*); a covenant by the lessor not to build on his adjoining land in front of the building line (*r*). The following are instances from Indian case law: a covenant by the lessor to grant a perpetual lease of a part of the land demised in case the lessee required it for an indigo factory (*s*); a covenant for renewal (*t*); a covenant giving the lessee an option to purchase (*u*); a covenant in a lease of a mine to leave a barrier of coal of a certain thickness between it and the adjoining mine (*v*).

Collateral or personal covenants.—A collateral or personal covenant is a covenant which affects land other than that demised or affects the covenantor personally. Such a covenant does not run with the land, and except under the equity referred to in the next paragraph cannot be enforced against assigns.

Illustrations.

(1) *A* leases a house to *B* who covenants to build another house on other land of *A*, *B* assigns the lease to *C*. *A* cannot enforce the covenant against *C*: *Spencer*'s case (1583) 5 Co. Rep. 16a.

(2) *A* leases a house to *B* who covenants to pay the rates and taxes of another house of *A*. *B* assigns the lease to *C*. *A* cannot enforce the covenant against *C*: *Gower* v. *Post-master General* (1887) 57 L. T. 527.

(3) *A* leases a public house to *B* and *B* covenants not to build or keep any house for the sale of liquor within half a mile of the demised premises. *B* assigns the lease to *C*. *A* cannot enforce the covenant against *C*: *Thomas* v. *Hayward* (1869) L.R. 4 Exch. 311.

Restrictive covenants.—Covenants relating to land may bind an assignee in equity, if they are of a restrictive nature, though they are not made by a lessee in relation to the land comprised in the lease or are otherwise not binding on the assignee at law (*w*). This is on the principle that "a party shall not be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased" (*x*). This is so whether the covenant be that of the lessor or of the lessee.

(*h*) *Stevenson* v. *Lambard* (1802) 2 East. 575.
(*i*) *Williams* v. *Earle* (1868) L.R. 3 Q.B. 739.
(*j*) *Vyvyan* v. *Arthur* (1823) 1 B. & C. 410.
(*k*) *Fleetwood* v. *Hull* (1889) 23 Q.B.D. 35.
(*l*) *Clegg* v. *Hands* (1890) 44 Ch. D. 503.
(*m*) *Dyson* v. *Forster*, *supra*.
(*n*) *McEacharn* v. *Cotton* (1902) A.C. 104.
(*o*) *Simpson* v. *Clayton* (1834) 4 Bing. (N.C.) 758; *Secretary of State for India* v. *Volkart Bros.* (1927) 50 Mad. 595, 102 I.C. 246, ('27) A.M. 513.
(*p*) *South of England Dairies Ltd.* v. *Baker* (1906) 2 Ch. 631.
(*q*) *Spencer's* case, *supra*.
(*r*) *Ricketts* v. *Enfield Church Wardens* (1909) 1 Ch. 544.
(*s*) *Mathewson* v. *Ram Kanai Singh* (1909) 36 Cal. 675, 1 I.C. 626.
(*t*) *MacLeod* v. *Kissan* (1906) 30 Bom. 250: *Secretary of State* v. *Volkart Bros.*, *supra*, reversed on another point in *Secretary of State* v. *Volkart Bros.* (1928) 51 Mad. 885, 55 I.A. 423, 111 I.C. 404, ('28) A.PC. 258; *Secretary of State* v. *A. H. Forbes* (1912) 16 Cal. L.J. 217, 17 I.C. 180; *Nara Kishore* v. *Madan Mohan* (1924) 69 I.C. 600, ('24) A.C. 346; *Onkarprasad* v. *Badri Das* (1927) 23 Nag. L.R. 26, 89 I.C. 273, ('25) A.N. 281.
(*u*) *Ladhabhai* v. *Sir Jamsetji* (1917) 42 Bom. 103, 42 I.C. 882.
(*v*) *Lodhna Colliery Co.* v. *Bepin Behari* (1919) 55 I.C. 113.
(*w*) *Luker* v. *Dennis* (1877) 7 Ch. D. 227; *Wilson* v. *Hart* (1866) 1 Ch. App. 463.
(*x*) *Wilson* v. *Hart* (1866) 1 Ch. App. 463.

Covenant not to assign.—The lessee's right to transfer or assign his interest is subject to a contract to the contrary. Section 10 shows that the right of the lessee to alienate may be restricted. If the restrictive clause gives the lessor a right of re-entry, its breach may under sec. 111 (g) involve the forfeiture of the lease and the consequent extinction of the right of the assignee (*y*). If there is no provision for re-entry the breach does not give the lessor a right to determine the lease (*z*), but only a personal right to an injunction or damages (*a*). Since the amendment of sec. 111 (g), a provision in the lease that it shall be void in case of assignment without a right of re-entry is not sufficient to determine the lease, and the undernoted cases (*b*) are now obsolete.

Section 10 recognises the validity of conditions restrictive of alienation in leases "where the condition is for the benefit of the lessor or those claiming under him." The construction put upon these words in some cases (*c*) is that the restriction is invalid, unless accompanied by a proviso giving the lessor a right of re-entry on breach. This view was dissented from on the ground that every such restriction is for the benefit of the lessor (*d*). The covenant cannot be invalid, for such a covenant by itself will support a suit for injunction and damages (*e*). The words in sec. 10 seem to be words of explanation rather than of limitation.

In some cases (*f*) the covenant not to assign has been described as inoperative. This can only mean inoperative as being *per se*, and without words giving a right of re-entry, insufficient to determine the lease. Section 111 (g) has been amended to show that a mere provision that the lease shall be void on breach of a condition is not enough to determine the lease.

Whether the restriction is by simple covenant or by covenant to which a right of re-entry is annexed, an assignment in breach of the condition is valid. This is because the condition is construed as making the lease voidable at the lessor's option; and until the lessor exercises his right of re-entry the assignment stands. This is the law in England (*g*) and is followed in India (*h*). But it has been suggested that the lessor could treat the assignment as a nullity (*i*). This point was referred to by Wallis, C.J., in *Udipi Seshagiri* v. *Seshawa* (*j*) and again by the Judicial Committee in *Hunsraj* v. *Bejoy Lal Seal* (*k*), but in neither case was it decided.

A covenant against absolute assignment is not broken by a sub-lease for the whole residue of the term. The English law that such a sub-lease operates as an absolute assignment does not apply in India (*l*).

Consent of lessor.—A lessee who is under a covenant not to assign may not assign without the consent of the lessor. This is frequently expressed in the covenant,

(*y*) *Kristo Nath* v. *Brown* (1887) 14 Cal. 176.

(*z*) *Narayan* v. *Ali Saiba* (1894) 18 Bom. 603; *Madar Saheb* v. *Sannabawa* (1897) 21 Bom. 195; *Netrapal Singh* v. *Kalyan Das* (1906) 28 All. 400; *Udipi Seshagiri* v. *Seshamma* (1920) 43 Mad. 503, 61 I.C. 658; *Jogesh Chandra Roy* v. *Mokbul Ali* (1921) 25 Cal. W.N. 857, 60 I.C. 984, ('21) A.C. 474; *Reajuddin* v. *Basuda Sundari* (1918) 28 Cal. L.J. 278, 48 I.C. 330; *Khetra Nath* v. *Sheikh Baharali* (1928) 49 Cal. L.J. 89, 116 I.C. 153, ('29) A.C. 228.

(*a*) *Tamaya* v. *Timapa* (1883) 7 Bom. 262; *Parameshri* v. *Vittappa* (1903) 26 Mad. 157.

(*b*) *Vyankatraya* v. *Shivrambhat* (1883) 7 Bom. 256; *Vishweshwar* v. *Mahableshwar* (1919) 43 Bom. 28, 47 I.C. 198.

(*c*) *Nil Madhab* v. *Narattam Sikdar* (1890) 17 Cal. 826; *Udipi Seshagiri* v. *Seshamma* (1920) 43 Mad. 503, 61 I.C. 658.

(*d*) *Parameshri* v. *Vittappa* (1903) 26 Mad. 157.

(*e*) *Gurushantappa* v. *Mallaya* (1921) 45 Bom. 1197, 63 I.C. 240, ('21) A.B. 27.

(*f*) *Akram Ali* v. *Durga Prasanna* (1911) 14 Cal. L.J. 614, 10 I.C. 489; *Mahananda Roy* v. *Saratmani Debi* (1914) 14 Cal. L.J. 585, 10 I.C. 374.

(*g*) *Williams* v. *Earle* (1868) L.R. 3 Q.B. 739; *Parker* v. *Jones* (1910) 2 K.B. 32; *Commissioners of Works* v. *Hull* (1922) 1 K.B. 205.

(*h*) *Basarat Ali* v. *Manirulla* (1909) 36 Cal. 745, 20 I.C. 416; *Promode Ranjan* v. *Aswini* (1914) 18 Cal. W.N. 1138, 26 I.C. 23; *Golak Nath Roy* v. *Mathura Nath* (1893) 20 Cal. 273; *Sital Prasad* v. *Nawab Dildar* (1916) 1 Pat. L.J. 1, 33 I.C. 408.

(*i*) *Parameshri* v. *Vittappa*, *supra*.

(*j*) (1920) 43 Mad. 503, 61 I.C. 658.

(*k*) (1930) 57 Cal. 1176, 57 I.A. 110, 122 I.C. 20, ('30) A.PC. 59.

(*l*) See note *supra*, "Absolute assignment."

S. 108 (j) and with the added term that such consent shall not be unreasonably withheld. This is construed not as a covenant by the lessor not to withhold consent unreasonably but as a qualification of the covenant not to assign (*m*). So if consent is unreasonably refused, the lessee may assign without consent (*n*), or may obtain from the Court a declaration of his right to assign (*o*), and such a declaration can be made on an originating summons (*p*). Consent is unreasonably withheld if the lessor refuses to consent because he wishes to regain possession of the premises (*q*); but not if he genuinely believes that the assignment would be detrimental to the property (*r*).

Consent on payment.—Section 144 of the Law of Property Act, 1925, engrafts upon every covenant not to assign without consent a proviso that no money shall be payable in respect of such consent unless the lease contains an express provision to the contrary (*s*). There is no such enactment in India but the same rule would certainly be followed, for profit to the lessor is not the proper purpose of the covenant.

Involuntary assignment.—An involuntary assignment by operation of law is not a breach of the covenant; for the covenant is not the same as one to do no act from which an assignment may result (*t*). Hence it is not broken by the insolvency of the lessee (*u*), even on his own petition (*v*); nor by an execution unless the proceeding is collusive (*w*); nor when the lease is acquired under a statutory power (*x*). On the other hand a covenant may be so framed as to restrain involuntary assignment (*y*).

Runs with the land.—A covenant not to assign or sub-let runs with the land (*z*). But a contractual restriction on assignment does not apply to an assignment by a person upon whom the property has devolved by operation of law and who is under an obligation to assign, and so a trustee in Bankruptcy may assign in spite of the covenant (*a*). A liquidator of a company in voluntary winding up is bound by the covenant (*b*), and so is the liquidator of a company in a compulsory winding up, for he represents the company and acts on their behalf (*c*).

Strictly construed.—The Courts do not favour restrictions on alienation, and covenants not to assign are strictly construed. An assignment of a part is not a breach of a covenant against assignment of the whole (*d*). A covenant against assignment does not prevent sub-letting (*e*), and a covenant against sub-letting does not prevent sub-letting of a part (*f*). Nor does a mere contract to sub-let which does not create the relation of landlord and tenant between the parties amount to a breach of covenant not to sub-let (*g*).

(*m*) *Treloar* v. *Bigge* (1874) L.R. 9 Exch. 151; *Sear* v. *House Property and Investment Society* (1880) 16 Ch. D. 387.

(*n*) *Treloar* v. *Bigge, supra.*

(*o*) *Young* v. *Ashley Gardens Properties Ltd.* (1903) 2 Ch. 112 C.A.; *Ducasse* v. *Cohen* (1921) 48 Cal. 176, 24 Cal. W.N. 1007, 60 I.C. 105.

(*p*) *Ducasse* v. *Cohen, supra.*

(*q*) *Bates* v. *Donaldson* (1896) 2 Q.B. 241; *In re Winfrey & Chatterton's Agreement* (1921) 2 Ch. 7.

(*r*) *Premier Confectionery Co.* v. *London Commercial Sale Rooms Ltd.* (1933) Ch. 904.

(*s*) *West* v. *Gwynne* (1911) 2 Ch. 1 C.A.; *Jenkins* v. *Price* (1907) 2 Ch. 229.

(*t*) *Croft* v. *Lumley* (1858) 6 H.L. Cas. 672.

(*u*) *Doe d. Goodbehere* v. *Bevan* (1815) 3 M. & S. 353.

(*v*) *Re Riggs, Ex parte Lovell* (1901) 2 K.B. 16.

(*w*) *Doe d. Mitchinson* v. *Carter* (1798) 8 Term. Rep. 57 and 300; *Croft* v. *Lumley, supra*; *Vyankatraya* v. *Shivrambhat* (1883) 7 Bom. 256, 261; *Tamaya* v. *Timapa* (1883) 7 Bom. 262; *Golak Nath* v. *Mathura* (1893) 20 Cal. 273.

(*x*) *Slipper* v. *Tottenham, etc., Rly.* (1867) L.R. 4 Eq. 112.

(*y*) *Re Walker, Ex parte Gould* (1884) 13 Q.B.D. 454 (bankruptcy); *Fryer* v. *Ewart* (1902) A. C. 187 (voluntary or compulsory liquidation); *Vyankatraya* v. *Shivrambhat, supra*; *Dwarika Nath Roy* v. *Mathura Nath* (1916) 21 Cal. W.N. 117, 34 I.C. 883.

(*z*) *McEacharn* v. *Colton* (1902) A.C. 104; *Williams* v. *Earle* (1868) L.R. 3 Q.B. 739; *Goldstein* v. *Sanders* (1915) 1 Ch. 549; *Re Stephenson & Co. Poole* v. *The Company* (1915) 1 Ch. 802.

(*a*) *Doe d. Goodbehere* v. *Bevan, supra.*

(*b*) *Cohen* v. *Popular Restaurants Ltd.* (1917) 1 K. B. 480.

(*c*) *Re Farrows Bank Ltd.* (1921) 2 Ch. 164 C.A.

(*d*) *Church* v. *Brown* (1808) 15 Ves. 258.

(*e*) *Crusoe d. Blancoe* v. *Bugby* (1770) 2 Wm. B. 766.

(*f*) *Wilson* v. *Rosenthal* (1906) 22 T.L.R. 233.

(*g*) *Secretary of State for India* v. *Kuchwar Lime & Stone Co. Ltd.* (1937) 65 I.A. 45, (1938) A.P. 20.

S. 108 (l)

The whole or any part.—These words recognize the right of the lessee to assign or sub-lease not only the whole but also a part of the property. An assignment of a part creates privity of estate (*h*), and the assignee is liable for a proportionate part of the rent (*i*)—See note "Apportionment by estate" under sec. 37.

The assignee of a part of the property leased is entitled to the benefit of covenants which run with the land and which can be apportioned under sec. 37, so far as they affect his part of the land. Such covenants may be a covenant to repair or a covenant for quiet enjoyment. In *Simpson* v. *Clayton* (*j*) an assignee of a share of a sub-lease was allowed to recover damages for breach of the lessee's covenant to obtain a fresh lease from the head lessor without joining the owner of the other share of the sub-lease as a party. But a covenant for renewal of a lease is a covenant to renew the lease as a whole, and a lessee who has assigned his interest in a part cannot by suit for specific performance require renewal of the lease as to the part that he has not assigned (*k*).

Non-transferable tenures.—These are tenures which are by custom not transferable. They are generally agricultural tenures to which this chapter does not apply. A similar exception was added to section 6 of this Act by Act 3 of 1885. Agricultural tenancies are generally regulated by local Acts. See note under sec. 6(i).

If a non-agricultural tenancy is by custom not transferable that custom overrides the provision of this section (*l*).

The incident of non-transferability was common to tenancies of homestead lands and of agricultural lands before the passing of the Transfer of Property Act in the absence of a custom to the contrary (*m*). By sec. 26B of the Bengal Tenancy Act as amended by Bengal Act 4 of 1928, the holding of an occupancy raiyat in Bengal is subject to the provisions of that Act, capable of being transferred like other immoveable property.

Clause (k)—Lessee's duty of disclosure.—The lessor is by sec. 108 (a) under an obligation to disclose defects of which he is aware and which affect the intended use of the property, but the duty of the lessee is more limited. He is only bound to disclose facts affecting the lessor's title which increase the value of the lease and of which the lessor is unaware. The section is similar to sec. 55 (5) (a) which imposes a similar duty on the buyer and refers to title and not to physical advantages. A lessee like a buyer would be under no duty to disclose the existence of a coal mine of which the lessor was unaware—See note under sec. 55 (5) (a). But if the lessee obtained an agreement for a renewed lease, in consideration of the surrender of the old lease, suppressing the fact that the person on whose life the old lease depended was then on his death-bed, the agreement could not be enforced (*n*).

Clause (l)—Obligation to pay rent.—Under this sub-section there is an implied covenant by the lessee to pay rent. But there is no charge for unpaid premium (*o*) as in the case of unpaid price. Again as all leases have now to be executed by both parties,

(*h*) *United Dairies* v. *Public Trustee* (1923) 1 K. B. 469.

(*i*) *Madhabilata Debi* v. *Butto Kristo Roy* (1944) A.P. 129 (assignee having exclusive and separate possession of the part assigned).

(*j*) (1838) 4 Bing. (N.C.) 758.

(*k*) *Secretary of State* v. *Volkart Bros.* (1928) 51 Mad. 885, 55 I.A. 423, 111 I.C. 404, ('28) A. PC. 248.

(*l*) *Ananda Mohan Saha* v. *Gobinda Chandra* (1916) 20 Cal. W.N. 322, 33 I.C. 565.

(*m*) *Madhab Chandra* v. *Bejoy Chand* (1899) 4 Cal. W.N. 574; *Madhu Sudan* v. *Kamini* (1905) 32 Cal. 1023; *Ram Charan* v. *Hari Charan* (1908) 7 Cal. L. J. 107; *Safar Ali* v. *Abdul Rasid* (1924) 39 Cal. L. J. 585, 84 I.C. 28, ('24) A.C. 1012; *Sarada Kanta* v. *Nabin Chandra* (1927) 54 Cal. 333, 97 I.C. 817, ('27) A.C. 39; *Nabu Mondal* v. *Cholim Mullik* (1898) 25 Cal. 896; *Sm. Kamal Mayee Dasi* v. *Nibaran Chandra Pramanik* (1932) 36 Cal. W.N. 149, 138 I.C. 72, ('32) A.C. 431.

(*n*) *Ellard* v. *Llandaff (Lord)* (1810) 1 Ball. & Beatty 241, cf. illustration (a) to s. 22, Specific Relief Act, 1877.

(*o*) *Venkatacharayulu* v. *Venkatasubba Rao* (1915) 48 Mad. 821, 90 I.C. 725, ('26) A.M. 55, not following *Kandasami* v. *Ramasami* (1919) 42 Mad. 203, 51 I.C. 507 and *Shepheard* v. *Beetham* (1877) 6 Ch. D. 597.

S. 108 (l) the covenant will always be expressed. The obligation to pay rent begins as soon as the lessor has fulfilled his obligation under sec. 108 (b) and put the lessee in possession (*p*). This would be so, even if one of the joint lessees is in actual possession and the other lessee is not obstructed by lessor in getting joint possession (*q*).

Payment to one of several joint lessors is a payment to all (*r*) and conversely payment by one of several joint lessees is a payment by all (*s*). But payment to a landlord by a stranger to the tenancy of a sum equivalent to the amount of the rent owing by the tenant is not a good satisfaction of the rent, even if it be accepted by the landlord, unless it is made by the payer as agent for and on behalf of or in the name and account of the tenant or with his authority or subsequent ratification. Thus where the tenant being in arrear, the estate agent of the landlord paid the amounts in arrears out of his own pocket in the hope of recouping himself when the tenant would pay and the tenant not still paying the estate agent on behalf of the landlord put in a distraint and recovered the amount, it has been held that there had been no satisfaction of arrears of rent and the distraint was not unlawful (*t*).

Joint lessors may sue together, or any one of them may sue alone for the whole rent (*u*); for a lease by lessors who are the joint-tenants of a property operates as a lease by each and by all.

If the lessors are tenants-in-common the lessee should pay rent on a joint receipt to all or to one who is authorised by the others. Payment to one co-sharer landlord is not a discharge against all (*v*).

Lessors who are tenants-in-common can maintain a joint action for rent or one co-sharer may sue for the whole rent if he joins the other co-tenants as parties (*w*). But one co-sharer cannot sue separately for his share of the rent, unless there is an agreement that the lessee shall pay each his share separately (*x*). But the mere fact that they have been recovering rent separately in the past does not prevent them from suing jointly (*y*). Where the plaintiff and defendants were joint owners of a zemindari and the defendants purchased the lessee's interest in certain parcels it was held that the plaintiff could not maintain a suit for rent for those parcels, apparently because the rights of the parties could only be worked out in a partition suit (*z*).

Where premises were let out to two persons who jointly and severally covenanted for payment of rent and on the death of one the other paid the whole rent it has been held in England that as the lease created a joint tenancy both at law and in equity and as the surviving tenant succeeded to the whole benefit of the lease there was no reason why equity should compel the executors of the deceased tenant to contribute (*a*). In India, it is

---

(*p*) *Shama Prosad* v. *Taki Mullik* (1901) 5 Cal. W. N. 816.

(*q*) *Nur Mahommad* v. *Ahmad Alikhan* (1936) A.L. 815.

(*r*) *Oodit Narain* v. *Hudson* (1865) 2 W.R. (Act 10 of 1859 Rulings) 15; *Krishnarav* v. *Manaji* (1874) 11 Bom. H.C. 106; *Sambhu* v. *Kamalrao* (1898) 22 Bom. 794.

(*s*) *Nillumber Mustophy* v. *Doorgachurn* (1865) 2 W.R. (Act of 1859 Rulings) 94.

(*t*) *Smith* v. *Cox* (1940) 2 K.B. 558.

(*u*) *Robinson* v. *Hofman* (1828) 4 Bing. 562, 565.

(*v*) *Azim Sirdar* v. *Ramlall* (1898) 25 Cal. 324.

(*w*) *Shashi Kumar* v. *Seeta Nath* (1908) 35 Cal. 744; *Pergash Lal* v. *Akhowri* (1892) 19 Cal. 785.

(*x*) *Pramada* v. *Ramani Kanta Roy* (1907) 331, 35 I.A. 73; *Nepal Chandra Ghose* v. *Mohendra Nath* (1904) 31 Cal. 707; *Jadoo Shat* v. *Kadumbinee Dassee* (1881) 7 Cal. 150; *Guni Mahomed* v. *Moran* (1879) 4 Cal. 96; *Brijo Kishore* v. *Ooma Soonduree* (1874) 23 W. R. 37; *Bykunt Kyburto* v. *Shushee Mohan Pal* (1874) 22 W. R. 526; *Msst. Lalun* v. *Hemraj Singh* (1873) 20 W.R. 76; *Dinobundhoo Chowdhery* v. *Dinonath Mookerjee* (1870) 19 W. R. 168; *Haradhun Gossamee* v. *Ram Mewaz* (1872) 17 W. R. 414; *Sree Misser* v. *Crowdy* (1871) 15 W. R. 243; *Gunga Narain Doss* v. *Sharoda Mohun Roy* (1869) 12 W.R. 30; *Decharms* v. *Horwood* (1834) 10 Bing. 526.

(*y*) *Akshoy Kumar* v. *Gopal Kamini Debi* (1906) 33 Cal. 1010; *Girish Chunder* v. *Chhatradhar Ghose* (1905) 3 Cal. L. J. 379.

(*z*) *Girindra Chandra Pal* v. *Sreenath Pal* (1905) 32 Cal. 567.

(*a*) *Cunningham Reid* v. *Public Trustee* (1944) 1 K.B. 602.

submitted the two tenants would be regarded as co-tenants and the benefit of the lease will also devolve upon the legal representative of the deceased and the surviving tenant will be entitled to contribution.

A stipulation for interest on arrears of rent is enforcible (*b*). Even if there is no such stipulation, as rent is a sum certain payable at a certain time, interest on arrears of rent is recoverable under the Interest Act if the lease is in writing, or otherwise from the date of demand in writing giving notice that interest will be claimed. The Patna High Court has, however, held that in the absence of any term in the lease providing for the payment of interest, the claim for interest upto the date of the suit cannot be allowed (*c*). A mere omission by the lessor to charge interest is not a waiver of his right (*d*).

Where in a mining lease the lessee covenanted to pay the royalty and also to "pay and discharge all taxes, rates, assessments and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed upon the said mines" it has been held that the lessee was under this covenant liable to reimburse the lessor for the Road and Public works cess and the expenses of the Mines Board of Health paid by the lessor but not for income-tax paid by the lessor on the royalty (*e*).

An increased payment is sometimes stipulated for in case of breach of covenant, *e.g.*, not to carry on certain trades (*f*); to restore to its original condition land on which slag had been placed (*g*); not to sell hay off the premises (*h*). English cases turn upon the distinction between a penalty and liquidated damages. If it is a penalty, only the actual damage suffered is recoverable but if it is liquidated damages the full amount is recoverable as increased rent. But in India the distinction between a penalty and liquidated damages having been abolished, the lessor cannot recover more than reasonable compensation not exceeding the amount named—see sec. 74, Indian Contract Act. In a Madras case (*i*) increased rent in the event of a breach of any of several stipulation was allowed as liquidated damages. No reference was made to sec. 74 of the Indian Contract Act and it is submitted that the increased rent should not have been allowed except on the finding that it was reasonable compensation. In *Tejendro Narain Singh* v. *Bakai Singh* (*j*), the lessee held fields under a kabulayet, some at rents of 8, some of 4, and some of 2 annas for seven years and by that kabulayet agreed that on the expiry of the term he would execute a fresh kabulayet and then cultivate, and that if he cultivated without executing a kabulayet he would pay at the uniform rent of Rs. 4. The defendant did not execute a fresh kabulayet and was charged at the rate of Rs. 4. The Court held, Rampini, J., dissenting, that the increase was a penalty. It is submitted that Rampini, J., was right. The agreement to execute a fresh kabulayet was not a condition of the existing tenancy. At the determination of the tenancy that agreement gave the tenant the option (1) to restore possession or (2) to execute a kabulayet for a fresh tenancy on such terms as might be agreed, or (3) to continue in possession on an oral tenancy at a rental of Rs. 4; and he accepted the oral tenancy.

Time of payment.—The section does not specify the proper time for payment. That may be fixed by the terms of the lease or by custom, and if not it is at the end of the period for which the rent is reserved (*k*). Rent may be reserved payable in advance

---

(*b*) *Raj Narain* v. *Panna Chand* (1908) 30 Cal. 213; *Bhyrub Chunder* v. *Meer Ameeroodeen* (1872) 17 W.R. 173.

(*c*) *Jwala Prasad* v. *Harihar Prasad* (1940) 192 I.C. 776, (1941) A.P. 106.

(*d*) *Johoory Lall* v. *Bullab Lall* (1880) 5 Cal. 102; *Shyama Charan Mandal* v. *Heras Mollah* (1899) 26 Cal. 160.

(*e*) *Bengal Coal Co.* v. *Janardan Kishore Lal Singh Deo* (1938) 65 I.A. 354.

(*f*) *Western* v. *Metropolitan Asylum District (Managers)* (1882) 9 Q.B.D. 404 C.A.

(*g*) *Elphinstone (Lord)* v. *Monkland Iron & Coal Co.* (1886) 11 App. Cas. 332.

(*h*) *Wilson* v. *Love* (1896) 1 Q.B. 626.

(*i*) *Balkuraya* v. *Sankamma* (1899) 22 Mad. 453.

(*j*) (1895) 22 Cal. 658.

(*k*) *Rangayya* v. *Bobba Sriramulu* (1904) 27 Mad. 143, 31 I.A. 17, 20; *Rama Naidu* v. *Sri Mahant Rama Kissori* (1900) 10 Mad. L.J. 26.

S. 108 (l) as fore-hand rent. But if rent is paid before it is due, it is treated as an advance to the landlord with an agreement that on due date such advance will be treated as a fulfilment of the obligation to pay rent—See note "Rent paid in advance" under sec. 50.

Place of payment.—The common law rule is that in the absence of an express covenant the lessee must be ready to pay the rent on the land demised. If there is an express covenant for payment, the lessee must seek out the lessor and pay him wherever he may be (*l*). It is not necessary that the lessor should make a demand for rent (*m*). This rule has been adopted as to the implied covenant in this clause, and it has been held that if no place is specified, the lessee must seek out the landlord to make the payment (*n*). A tender at the landlord's or his agent's usual place of business is valid and sanctioned by custom (*o*).

Mode of payment.—The mode of payment is the same as in the case of any other debt. Rent reserved is money payable in cash (*p*). Payment through the post is at the tenant's risk (*q*), unless the landlord has led the lessee to believe that he may resort to the post for payment (*r*). If the landlord accepts a bill or promissory note for the rent this may, if that is the agreement, be taken as an absolute payment (*s*). But if that is not the agreement, the bill of the note, if a negotiable instrument, operates as a conditional payment, and the lessor, if he has not endorsed the instrument, may sue for the rent if the bill or note is dishonoured. If the bill or note is not a negotiable instrument it operates only as security for the rent and does not extinguish the debt.

Suspension of rent.—If the lessee is evicted by the lessor from the whole of the property leased, the lessee is not liable for rent for the period of the eviction (*t*). Such eviction, therefore, involves suspension of rent. The word suspension implies that the liability for rent is not finally determined, but revives as soon as the lessee is restored to possession.

Eviction.—To constitute an eviction it is not necessary that the lessee should be forcibly dispossessed (*u*). In the case of *Upton* v. *Townend* (*v*) an eviction was said to be "not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." Substantial interference by the landlord with the tenant's enjoyment will suffice even if there is no complete dispossession (*w*). It is an eviction if the lessor induced the lessee's tenants to pay rent to him (*x*); or if he prevents the lessee collecting rent from the sub-lessees (*y*); but not when he merely takes kabulayets from the sub-lessee which do not result in any interference with the lessee (*z*). Where, however,

(*l*) *Haldane* v. *Johnson* (1853) 8 Exch. 689, 695.

(*m*) *Nasiruddin* v. *Umerji Adam & Co.* (1941) L.B. 286.

(*n*) *Jatadhari* v. *Shamsul* (1912) 16 Cal. L.J. 552, 14 I.C. 713. In the Mallir of Maung (1939) 186 I.C. 69, (1940) A.R. 84.

(*o*) *Fakir Lal Goswami* v. *Bonnerji* (1899) 4 Cal. W. N. 324; *Allibhoy* v. *Gordhandas* (1929) 23 S.L.R. 29, 111 I.C. 530, ('29) A. S. 13.

(*p*) *Henderson* v. *Arthur* (1907) 1 K. B. 10 C.A.

(*q*) *Hawkins* v. *Rutt* (1793) Peake 248.

(*r*) *Warwick* v. *Noakes* (1791) Peake 98; *Norman* v. *Ricketts* (1886) 3 T. L. R. 182 C.A.; *Luttges* v. *Sherwood* (1895) 11 T.L.R. 233.

(*s*) *Lewis* v. *Lyster* (1835) 2 Cr. M. & R. 704; *Sard* v. *Rhodes* (1836) 1 M. & W. 153.

(*t*) *Kadumbinee Dossia* v. *Kasheenath Biswas* (1870) 13 W. R. 338; *Dhunpat Singh* v. *Mohamed Kazim* (1897) 24 Cal. 296; *Rani Lalita Sundari* v. *Rani Surnomoyee Dasi* (1900) 5 Cal. W. N. 353; *Mahomed Jeaullya Mean* v. *Sukheannessa Bibi* (1910) 14 Cal. W. N. 446, 5 I. C. 352; *Godai Molla* v. *Aminuddi Howladar* (1913) 18 Cal. L.J. 509, 21 I.C. 957; *Chandrakant Das* v. *Rama Nath Barman* (1910) 11 Cal. L.J. 591, 6 I.C. 478; *Manindra Chandra* v. *Narendra Chandra* (1919) 46 Cal. 956, 52 I.C. 13.

(*u*) *Noorijan Sardar* v. *Bimola Sundari* (1913) 18 Cal. W.N. 552, 18 I.C. 87; *Jogendra Lal* v. *Mohesh Chandra* (1928) 55 Cal. 1013, 112 I.C. 172, ('29) A.C. 22. See also *Abdul Latif* v. *Hamed Gazi* (1933) 60 Cal. 1082, 38 Cal. W.N. 61, 148 I.C. 1177, ('33) A.C. 898.

(*v*) (1885) 17 C.B. 30, 64-65; *Neale* v. *Mackenzie* (1836) 1 M. & W. 747; *Dhunput Singh* v. *Mahomed Kazim* (1897) 24 Cal. 296.

(*w*) *Mahomed Jeaullya Mean* v. *Sukheannessa Bibi* (1910) 14 Cal. W.N. 446, 5 I.C. 352.

(*x*) *Mst. Hoymobutty* v. *Sreekishen* (1871) 14 W.R. 58.

(*y*) *Kristo Soondur* v. *Koomar Chunder* (1871) 15 W.R. 230; *Raseswari* v. *Saurendra Mohun* (1910) 11 Cal. L.J. 601, 5 I.C. 105; *Dhunput Singh* v. *Mahomed Kazim*, *supra*.

(*z*) *Srinivas Aiyangar* v. *Rangaswami* (1945) 25 I.C. 812.

the lessor recovered rent from a sub-lessee by mistake, it was held that such act does not amount to eviction. It must be shown that the lessor deliberately and intentionally evicted the lessee (*a*).

Effect of partial eviction by lessor.—It has already been noted that if the lessee is evicted by the lessor from the whole of the property leased the lessee is not liable for rent for the period of the eviction (see note *supra* "Suspension of rent"). What is the effect of the eviction of the lessee by the lessor from a part of the demised premises? The answer to this question appears, from the decided cases, to have been given differently on a consideration of different factors, namely (i) whether the lease was for a lump sum rent, (ii) whether the lease was for separate or divisible rent *e.g.*, so much per acre or per bigha and (iii) whether the eviction was a deliberate act of the lessor. It will be convenient to note the decisions under these different heads.

(i) *Effect of partial eviction in case of a lease at a lump sum rent.*—If the premises are let for one rent, the rule of English law is that the eviction of the lessee by the lessor from *part* of the demised premises suspends the rent for the *whole* (*b*). The reason of the rule given in the earlier cases is that the landlord being in feudal times the defender and protector of the tenant should not be encouraged to disturb him. In later cases the reason given is that the landlord is not entitled to apportion his wrong. Judicial decisions in India on this point have not been uniform. In some cases this rule of English law has been followed and it has been held that if the rent is an entire rent for all the property leased, eviction by the lessor of the lessee from part of the property leased suspends the whole rent (*c*). In some cases (*d*) decided by the Madras High Court, it was said that if the lessee is in possession of any part of the premises demised, he is estopped from pleading that he is not liable for the rent of that part. In a later Calcutta case it was said in such a case that if the rent is an entire rent, the tenancy is indivisible and it is not open to the landlord to assert that any portion of the rent is payable in respect of any portion of the premises demised (*e*). Further, the Madras cases would seem to have been practically overruled by the Privy Council decision in *Katyayani Debi* v. *Odoy Kumar* (*f*) where their Lordships said that the doctrine of suspension of rent applied when the rent was an entire rent and the tenant had not been put in possession of part of the subject leased; for it is tantamount to an eviction if the lessor is unable to put the lessee in possession of any portion of the premises demised (*g*). In a recent Calcutta case it was held that where two tenancies comprising different plots of land in two different rouzas and held at different jamas are amalgamated so as to form one tenancy in law and the tenant is dispossessed by the landlord from a portion of one of the plots, the tenant cannot claim suspension of the whole rent, but only of the rent of the plot from a portion of which he has been dispossessed (*h*).

(*a*) *Basantilal Marwari* v. *Jamuna Prasad* (1941) A.P. 417, (1941) 193 I.C. 280; *Sukhraj Rai* v. *Dip Narain* (1941) 197 I.C. 160, (1942) A.P. 266.

(*b*) *Upton* v. *Townend* (1855) 17 C.B. 30; *Neale* v. *Mackenzie* (1836) 1 M. & W. 747.

(c) *Rasheswari* v. *Saurendra Mohun* (1910) 11 Cal. L.J. 601, 5 I.C. 105; *Purna Chandra Sarbajna* v. *Rasik Chakrabarti* (1910) 13 Cal. L.J. 119, 9 I.C. 568; *Sarip Jan Bibi* v. *Aftabuddin Miah* (1910) 13 Cal. L.J. 115, 8 I.C. 30; *Ashutosh Dhar* v. *Joy Lal Sardar* (1913) 17 Cal. L.J. 50, 8 I.C. 621; *Rajani Manna* v. *Satish Chandra* (1919) 48 I.C. 699; *Ramani Kanta* v. *Hara Chandra* (1923) 68 I.C. 495, ('23) A.C. 162; *Abhayacharan* v. *Hemchandra* (1929) 57 Cal. 137, 123 I.C. 653, ('29) A.C. 568; *Krishna* v. *Surendra Nath* (1932) 36 Cal. W.N. 72, 137 I.C. 696, ('32) A.C. 385; *Rai Bahadur Dulip Narayan Singh* v. *Suraj Narayan Missir* (1935) 14 Pat. 323, 153 I.C. 298, ('35) A.P. 38.

(*d*) *Meenakshi Sundara* v. *Chidamburam Chetty* (1912) 23 Mad. L.J. 119, 15 I.C. 711; *Suryanarayana* v. *Rajah of Takkiah* (1923) 69 I.C. 517, ('23) A.M. 459; *Hanumantha Goundan* v. *Doraiswami Pillai* (1928) 54 Mad. L.J. 354, 109 I.C. 465, ('28) A.M. 380.

(*e*) See the judgment of Page, J., in *Dhirendra Nath Roy* v. *Bhabatarini Debi* (1929) 33 Cal. W.N. 367, 119 I.C. 297, ('29) A.C. 395.

(*f*) (1925) 52 Cal. 417, 52 I.A. 160, 88 I.C. 110, ('25) A.PC. 97.

(*g*) *Holgate* v. *Kay* (1844) 1 Car. and Kir. 341; *Katyayani Debi* v. *Udoy Kumar*, *supra*.

(*h*) *Bibi Samsunehar* v. *Hari Nath* (1943) A.C. 91, (1942) 2 Cal. 406, 76 C.L.J. 425, 46 C.W.N. 861, 205 I.C. 502.

S. 108 (l) (ii) *Effect of partial eviction in case of a lease at separate or divisible rent.*—In the case of a partial eviction by the lessor the whole rent is not suspended, unless the rent is a lump sum rent for the whole land treated as an indivisible subject (*i*). In *Sajjad Ahamad* v. *Trailakhya Nath* (*j*), Rankin, C.J., said that " the doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised." When the land is let at a stipulated rent at so much per acre or per bhiga, the whole rent is not suspended and the lessor is entitled to an apportionment. In such cases there is an abatement of rent and the lessee pays a reduced or abated rent for the portion of which he is in possession (*k*).

(iii) *Where the partial eviction was not a deliberate act of the lessor.*—Again, as suspension of the whole rent is in the nature of a penalty, it is not enforced if the eviction is not the deliberate act of the landlord. When the lessor by inadvertence included a part of the lessee's lands in a rent suit filed against other tenants and the lessee was dispossessed of that part the lessee was only entitled to an abatement of rent (*l*), although the rent was an entire rent. So also where the lessor recovered rent from a sub-lessee by mistake it was held that such act does not amount to eviction so as to entitle the lessee to suspension of the entire rent (*m*). Nor will suspension be enforced if the lessee has consented to give up possession of part of the demised premises (*n*). This exception is similar to the equity of apportionment which the lessor has when he is unable to put the lessee in possession of part of the land leased, and the lessee knows at the beginning of the tenancy that that part is in the possession of another and that the lessor will not be able to give him possession (*o*).

It has already been noted (see note *supra* " covenant to give possession " under clause (b) of this section) that where the lessor fails to put the lessee in possession of the whole of the demised premises the English rule of suspension of the entire rent whether it was a lump sum rent or a separate rent, was not applicable in India. In laying this down the Privy Council in *Ramlal Dutt Sarkar* v. *Dhirendra Nath Roy* (*p*) observed: " As the case before the Board has been held to be a case not of eviction by the lessors, but of their failure to give possession, their Lordships in this ex parte appeal confine themselves to the law applicable to the latter class of cases. To that class they think that the doctrine of suspension of rent should not be applied in Bengal. Whether it should be applied at all to cases of eviction of the lessee by the lessor from a part of the land, and if so, whether it is limited to rents reserved as a lump sum, and whether it is a rigid or discretionary rule—these questions will call for careful review when they are presented by the facts of a particular case. Their Lordships must guard themselves from being supposed to assume that had Srinath been ousted from any portion of the lands in 1886 it would be open to his successors to set up for the first time in 1931 that the entire rent must be suspended. Their Lordships explained *Katyayani*'s case (*supra*) and stated that it had been wrongly taken to lay down that if rent was a lump sum rent then in all cases of failure to give possession of any part there must be a suspension of the entire rent. *Katyayani*'s case being thus out of the way and having regard to the last sentence in the observations quoted above it now seems fairly clear that there is no rigid and inflexible

(*i*) *Deoki Koer* v. *Sheo Prasad Singh* (1939) A.P. 356, (1939) 180 I.C. 98.

(*j*) (1928) 55 Cal. 464, 472, 116 I.C. 375, ('28) A.C. 479.

(*k*) *Katyayani Debi* v. *Udoy Kumar* (1925) 52 Cal. 417, 52 I.A. 160, 88 I.C. 110, ('25) A.PC. 97; *Bisweswar* v. *Kali Charan* (1926) 44 Cal. L.J. 27, 94 I.C. 418, ('26) A.C. 908; *Tarap Sheikh* v. *Kunja Behary* (1926) 44 Cal. L.J. 191, 98 I.C. 215, ('26) A.C. 1226; *Susil Kumar Biswas* v. *Rajani Kanta* (1928) 55 Cal. 689, 104 I.C. 775, ('27) A.C. 737; *Raja Keshee* v. *Satish Chandra* (1931) 35 Cal. W.N. 46, 132 I.C. 81, ('31) A.C. 397. Contra—*Harro Kumari* v. *Purna Chandra* (1900) 28 Cal. 188 (bad law).

(*l*) *Bisweswar Sarkar* v. *Kali Charan* (1926) 44 Cal. L.J. 27, 94 I.C. 418, ('26) A.C. 908.

(*m*) *Basantlal Marwari* v. *Jamuna Prasad* (1941) A.P. 417, 193 I.C. 280; *Subraj Rai* v. *Dip Narain* (1942) A.P. 266, 197 I.C. 160.

(*n*) *Rameshwar Lal* v. *Butto Kristo Rai* (1934) 13 Pat. 396, 152 I.C. 992, ('34) A.P. 653.

(*o*) *Narendra Chandra* v. *Manindra Chandra* (1922) 49 Cal. 1019, 67 I.C. 800, ('22) A.C. 153; *Joyram Chandra* v. *Bissu Charan* (1925) 85 I.C. 781, ('25) A.C. 805.

(*p*) (1942) 70 I.A. 18, (1943) A.PC. 24.

rule and the technical common law rule of suspension of the entire rent on partial eviction in a case where a lump sum rent is reserved by the lease ought not to be applied rigidly in India in every case. It is submitted that the Courts in India should apply the principle of justice, equity and good conscience and decide each case on its own particular facts, where, for example, the dispossession does not amount to a tortious or wrongful act deliberately done by the lessor, or where the area from which the tenant has been dispossessed is insignificant or when the claim for suspension of rent is put forward after the lapse of a long period it would not, it is submitted be in accordance with rules of justice, equity and good conscience to allow suspension of the entire rent even if a lump sum rent is reserved by the lease. So it has been held, by the Calcutta High Court in a recent case (q).

Eviction by title paramount.—Eviction by title paramount does not involve the penalty of suspension of rent and the lessor is entitled to have the rent apportioned. Title paramount is a title superior to both that of the lessor and of the lessee, against which neither is able to make a defence (r). To constitute eviction by title paramount Foa says that three conditions must be fulfilled: "the eviction must have been from something actually forming part of the premises demised; the party evicting must have a good title; and the tenant must have quitted against his will (s)." The lessee is not entitled to have the whole rent suspended, but must pay rent in proportion to the part of which he has possession (t). The onus is on the lessor to show what is the fair rent of the land out of which the tenant was not evicted (u). If the lessee is evicted from the whole of the property leased by title paramount he is, of course, not liable to pay any rent at all for the period of the eviction (v).

It is tantamount to an eviction if the lessee is obliged to attorn to the person having the superior title (w); but not if he attorns because he has been bribed by the offer of a lower rent (x).

Diluvion.—If part of the tenant's holding is lost by diluvion, he is, in the absence of any special stipulation in the lease, entitled to a proportionate abatement of rent (y). He will not be entitled to suspension of the whole rent even if the land reforms by alluvion and the landlord settles it with a stranger (z).

If the tenant is entitled to a proportionate abatement of rent by reason of diluvion or partial eviction by title paramount, the onus is on the tenant to prove from what

(q) *Ashutosh Roy* v. *Indu Bhusan Sen Gupta* (1945) 49 C.W.N. 470.

(r) *Neale* v. *Mackenzie* (1836) 1 M. & W. 747; *Jogendra Lal* v. *Mohesh Chandra* (1928) 55 Cal. 1013, 1028, 112 I.C. 172, ('29) A.C. 22.

(s) Foa on Landlord and Tenant, 6th Ed., p. 194.

(t) *Gopanund Jha* v. *Lalla Gobind Pershad* (1869) 12 W.R. 109; *Rani Dassi* v. *Asutosh Roy* (1910) 15 Cal. L.J. 310, 6 I.C. 206; *Banka Behari* v. *Madan Mohan Roy* (1921) 26 Cal. W.N. 143, 68 I.C. 477, ('21) A.C. 532; *Imambandi Begum* v. *Kamleswari Pershad* (1894) 21 Cal. 1005, 21 I.A. 118; *Jatindra Nath* v. *Udoy Kumar* (1931) 58 Cal. 1281, 58 I.A. 141, 131 I.C. 809, ('31) A.PC. 104; *Jogesh Chandra Roy* v. *Emdad Meah* (1932) 59 I.A. 29, 59 Cal. 1012, 36 Cal. W.N. 221, 55 Cal. L.J. 72, 34 Bom. L.R. 481, 62 Mad. L.J. 336, 136 I.C. 398, ('32) A.PC. 28; *Surendra Narain* v. *Dina Nath* (1915) 43 Cal. 554, 36 I.C. 33.

(u) *Surendra Narain* v. *Dina Nath, supra*.

(v) *Chandrakant Das* v. *Rama Nath Barman* (1910) 11 Cal. L.J. 591, 6 I.C. 478; *Noorijan Sardar* v. *Bimola Sundari* (1913) 18 Cal. W.N. 552, 18 I.C. 87; *Moti Lal* v. *Yar Muhammad* (1925) 47 All. 63, 85 I.C. 756, ('25) A.A. 275.

(w) *Hill* v. *Saunders* (1825) 4 B. & C. 529; *Noorijan Sardar* v. *Bimola Sundari, supra*; *Jogendra Lal* v. *Mohesh Chandra, supra*; *Amritlal* v. *Uttamlal* (1939) A.C. 216, (1938) 2 Cal. 559, 181 I.C. 529; *Padmakumari* v. *Nanda Padhan* (1940) 195 I.C. 203, (1941) A.P. 219.

(x) *Noorijan Sardar* v. *Bimola Sundari, supra*.

(y) *Kali Prasanna* v. *Dhananjai Ghose* (1884) 11 Cal. 625; *Krista Das* v. *Abdul Karim* (1921) 25 Cal. W.N. 328, 62 I.C. 474, ('21) A.C. 220. See also *Ram Ran Bijaya* v. *Aprup Tewary* (1942) 201 I.C. 504, (1942) A.P. 466 a case relating to agricultural land—following *Arun Chandra* v. *Shumsul Huqe* (1931) A.C. 537, 59 Cal. 155, 35 C.W.N. 1011 (F.B.) on the question of onus.

(z) *Rai Charan Shar* v. *Administrator-General of Bengal* (1909) 36 Cal. 856, 2 I.C. 169.

S. 108 (m) portion he has been evicted and the extent to which the rent should be reduced (a). The fact that the tenant has proved dispossession in a previous suit is not sufficient to shift the onus (b).

Where part acquired under Land Acquisition Act.—When part of the land is acquired under the Land Acquisition Act the compensation includes the value of the leasehold and of the reversion. The right to an abatement of rent will depend upon whether the whole compensation is paid to the landlord (c).

The Landlord and Tenant (War Damage) Act, 1939 (2 & 3 Geo. 6 C. 72): Sec. 1 of this Act avoids the obligation either of the landlord or the tenant to repair where the necessity for repair arises from war damage and sec. 4 provides that where land comprised in a lease is unfit by reason of war damage the tenant may serve a "notice of disclaimer" stating that he elects to disclaim the lease. The landlord on being served with such notice may serve a counter notice objecting to the disclaimer on the ground that he is prepared to do the repairs. This Act, therefore, enables the tenant to disclaim the lease where the demised premises is rendered unfit by war damage and avoid payment of rent or if the rent had been paid in advance, to recover the rent paid, in respect of the period beginning from the date of service of the notice of disclaimer and ending when the premises are rendered fit (d). There is no such legislation in India and the matter is to be governed by express covenant, if any, or by the provisions of this section.

Doctrine of Frustration.—In England the doctrine of frustration was supposed never to apply to put an end to a lease and relieve the lessee of his liability to pay rent. This doctrine has been somewhat shaken of late by the observation of Viscount Simon, L.C., and Lord Wright in the case of *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.* (e). Lord Russell and Lord Goddard, however, upheld the old view of the matter. As to whether the doctrine of frustration may be applied to leases in India see notes *supra* under clause (e).

Apportionment of rent.—Rent may be apportioned either by time or by estate. This subject is dealt with in the notes under secs. 36 and 37.

Illegal or immoral purpose.—Rent is not recoverable for premises leased for an illegal or immoral purpose. See note "Immoral" under sec. 6 (h).

Clause (m)—Repairs.—This clause imposes the same obligation in the case of all leases, and sec. 108 (o) requires the lessee to use the premises as a person of ordinary prudence would use them if they were his own. The lessee is liable for permissive waste (f), and must keep the property in as good a condition as he found it, and must yield up the property in the same condition subject only to fair wear and tear and irresistible force.

There are thus two implied covenants: (1) to keep in repair, on which suits may be filed from time to time during the term, and (2) to restore in repair, *i.e.*, in as good a condition as he found the property, on which covenant a suit can only be filed at the end of the term.

(a) *Arunchandra Singh* v. *Shamsul Huq* (1932) 59 Cal. 155, 133 I.C. 577, ('31) A.C. 537, dissenting from a dictum of Sir Barnes Peacock in *Gopanund Jha* v. *Lalla Gobind* (1869) 12 W.R. 109, and overruling on this point; *Krista Das* v. *Abdul Karim* (1921) 25 Cal. W.N. 328, 62 I.C. 474, ('21) A.C. 220; *Durga Prasad Singh* v. *Rajendra* (1913) 41 Cal. 493, 40 I.A. 223, 21 I.C. 750; *Jogesh Chandra Roy* v. *Emdad Meah* (1932) 59 I.A. 29, 59 Cal. 1012, 36 Cal. W.N. 221, 55 Cal. L.J. 72, 34 Bom. L.R. 481, 62 Mad. L.J. 338, 136 I.C. 398, ('32) A.PC. 28.

(b) *Satishchandra Pal* v. *Hrisheekesh Law* (1933) 60 Cal. 247, 36 Cal. W.N. 1134, 57 Cal. L.J. 403, 143 I.C. 30, ('33) A.C. 290.

(c) *Uma Sunkur* v. *Tarini Chunder* (1882) 9 Cal. 571; *Watson & Co.* v. *Nistarini Gupta* (1883) 10 Cal. 544; *Peari Mohan* v. *Audhiraj Aftab Chand* (1882) 10 Cal. L.R. 526; *Ganu Dadu* v. *Panditrao* (1930) 32 Bom. L.R. 1243, 128 I.C. 899, ('30) A.B. 592.

(d) *Turner* v. *Stella Bond Ltd.* (1941) 1 K.B. 569.

(e) (1945) A.C. 221.

(f) *Doongersey* v. *Keshavji Meghji* (1917) 19 Bom. L.R. 878, 883, 43 I.C. 273.

English law.—The lessee's liability under this clause has been said to be the same as under English law (*g*). But though in English law a tenant for years has been said to be liable for permissive waste (*h*); this rule has never been applied to a tenant from year to year (*i*), and more recently it has been held that a tenant for years is not liable for permissive waste in the absence of a covenant to repair (*j*). It is now thought that the liability of a tenant for years is limited as in the case of a tenant at will, to an implied obligation to use the premises in a husbandlike manner (*k*) and to keep a house, wind and watertight (*l*).

Keep.—The word "keep" refers to the state in which the property is to be maintained (*m*), and obliges the lessee to maintain the property in the same condition at all times during the whole term (*n*). The breach of the obligation is continuous so long as the premises are not in the requisite state of repair (*o*).

Restore.—The obligation to restore the premises in good repair is not affected by the mode in which the tenancy is terminated, whether by efflux of time or by forfeiture (*p*). This obligation is subject to sec. 108 (e) and does not apply if the property is destroyed by a fire not caused by the negligence of the lessee (*q*).

Reasonable wear and tear.—This exception exonerates the lessee in case of dilapidation caused by the friction of the air, by exposure and by ordinary use (*r*).

Irresistible force.—The lessee is not liable to repair damage due to extraordinary causes such as storm, flood or accidental fire. Under English law accidental fire involved liability for waste, until this was remedied by statute (*s*). But under this section the lessee is not responsible for accidental fire unless he has definitely taken that burden on his shoulders by covenant (*t*). The lessee is of course liable for fire lighted intentionally or caused by negligence (*u*). The storage of cotton in an unventilated room where it is ignited by spontaneous combustion is negligence which makes the lessee liable (*v*). But the storage of spirits does not make the lessee liable on the principle of *Ryland* v. *Fletcher* (*w*) which says that a dangerous thing may be only kept at a man's own peril (*x*), for the rule in that case does not apply unless there is a special use bringing increased danger to others and is not applicable to such matters as domestic use of gas and electricity (*y*). If the property is destroyed by accidental fire the lessee can avoid the lease under sec. 108 (e). In a case in which a godown was burnt down owing to the negligence of the lessee's watchman, the lessee sought to avoid the lease and escape responsibility on this ground. But the Court held that the lessee was liable in damages and that his disclaimer of liability was a waiver of notice under this section (*z*).

(*g*) See the judgment of Mookerjee, J., in *Bijay* v. *Howrah Amta Light Railway* (1923) 38 Cal. L.J. 177, 180, 72 I.C. 98, ('23) A.C. 524.

(*h*) Coke 2 Inst. 145.

(*i*) *Torriano* v. *Young* (1833) 6 C. & P. 8; *Harnett* v. *Maitland* (1847) 16 M. & W. 257; *Yellowby* v. *Gower* (1855) 11 Exch. 274.

(*j*) *In re Cartwright, Avis* v. *Newman* (1889) 41 Ch.D. 532.

(*k*) *Horsefall* v. *Mather* (1315) Holt. (N.P.) 7.

(*l*) *Auworth* v. *Johnson* (1832) 5 C. & P. 239; *Leach* v. *Thomas* (1835) 7 C. & P. 327; *Wedd* v. *Porter* (1916) 2 K.B. 91, 100.

(*m*) *Lurcott* v. *Wakely & Wheeler* (1911) 1 K.B. 905, 918.

(*n*) *Luxmore* v. *Robson* (1818) 1 B. & Ald. 584.

(*o*) *Spoor* v. *Green* (1874) L.R. 9 Ex. 99, 111: *Plumer* v. *Johnson* (1902) 18 T.L.R. 316.

(*p*) *Sarafali* v. *Subraya* (1896) 20 Bom. 439.

(*q*) *East India Distilleries & Factories* v. *Mathias* (1928) 51 Mad. 994, 114 I.C. 234, ('28) A.M. 1140.

(*r*) *Terrell* v. *Murray* (1901) 17 T.L.R. 570; *Davies* v. *Davies* (1888) 38 Ch. D. 499, 505.

(*s*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3 C. 78), sec. 86, which is of general application though the Act refers to the Metropolis; *Richards* v. *Easto* (1846) 15 M. & W. 244, 251.

(*t*) *East India Distilleries & Factories* v. *Mathias*, *supra*.

(*u*) *Filliter* v. *Phippart* (1847) 11 Q.B. 347; *Girdaridoss* v. *Ponna Pillai* (1920) 39 Mad. L.J. 233, 59 I.C. 252.

(*v*) *Mulchand Nemi Chand* v. *Basdeo Ram Sarup* (1926) 48 All. 404, 94 I.C. 425, ('26) A.A. 695.

(*w*) (1868) L.R. 3 H.L. 330.

(*x*) *East India Distilleries & Factories* v. *Mathias*, *supra*.

(*y*) *Rickards* v. *Lothian* (1913) A.C. 263; *Dhanal Soorma* v. *Rangoon Indian Telegraph Association Ltd.* (1935) 13 Rang. 369, ('35) A.R. 401.

(*z*) *Girdaridoss* v. *Ponna Pillai*, *supra*.

S. 108 (m) Section 108 (e) refers to destruction which renders the house substantially unfit for inhabitation so that if the chimney of an uninhabited room were blown down the lessee could neither avoid the lease nor call upon the lessor to restore it unless there was an express covenant for repair by the lessor. The lessee would not be liable to replace it, but if the broken chimney let in rain he would be under an obligation to do such repairs as were necessary to prevent damage to the house by wetness.

Right of entry and view.—The lessor is given, by this section, statutory authority to enter the premises for the purpose of inspecting the state of repair. In the absence of such authority or of an express power in the lease, he would be liable on such entry to be treated as a trespasser (*a*), even though the non-repair renders the landlord liable to forfeiture under a superior lease (*b*).

At all reasonable times.—This condition would no doubt be satisfied by the lessor giving notice of his coming (*c*).

Express covenant to repair.—An express covenant by the lessee to repair is a contract to the contrary and excludes the implied covenant (*d*). The express covenant to repair is either special or general. The special covenant is for particular decorative repairs such as papering or painting. The general covenant is for general repairs.

A general covenant to repair includes repair not only of buildings existing when the demise is made, but all those which may be erected during the term (*e*). In a Calcutta case (*f*) Page, J., stated the rule as follows:—"Now, the general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected on the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as 'the said buildings' or 'the said houses,' unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections."

The covenant for general repairs may be expressed in different ways such as to keep in good repair (*g*) or "in good and substantial repair" (*h*) or "in good and tenantable order and repair" (*i*) or "in habitable repair" (*j*) or "in thorough repair and good condition" (*k*). But all these forms have no technical significance and are satisfied by substantial repairs (*l*).

The covenant for general repair is construed with reference to the condition of the building at the commencement of the lease, and if the house is an old house the lessee is bound only to keep the house in good repair as an old house (*m*) and not to give the lessor the benefit of improvements (*n*). On the other hand repair implies renewal and

(*a*) *Barker* v. *Barker* (1829) 3 C. & P. 557; *Neale* v. *Wyllie* (1824) 3 B. & C. 533.
(*b*) *Stocker* v. *Planet Building Society* (1879) 27 W.R. 877 C.A.
(*c*) *Doe d. Wetherall* v. *Bird* (1836) 6 C. & P. 195 (at convenient times).
(*d*) *Standen* v. *Christmas* (1847) 10 Q.B. 135.
(*e*) *Field* v. *Curnick* (1926) 2 K.B. 374; *Cornish* v. *Cleife* (1864) 3 H. & C. 446; *Ezra Meyer Aaron Cohen* v. *Kumar Debendra* (1928) 32 Cal. W.N. 154, 107 I.C. 86, ('28) A.C. 89.
(*f*) *Debendra Lal* v. *Cohen* (1927) 54 Cal. 485, 490, 491, 106 I.C. 477, ('27) A.C. 908, citing *Doe d. Worcester Trustees* v. *Rowlands* (1840) 9 C. & P. 734; *Smith* v. *Mills* (1889) 16 T.L.R. 59, and *Cornish* v. *Cleife*, *supra*.
(*g*) *Payne* v. *Haine* (1847) 16 M. & W. 541.
(*h*) *Debendra Lal* v. *Cohen* (1927) 54 Cal. 485, 486, 106 I.C. 479, ('27) A.C. 908.
(*i*) *Stanley* v. *Towgood* (1836) 3 Bing. (N.C.) 4.
(*j*) *Belcher* v. *M'Intosh* (1839) 8 C. & P. 720.
(*k*) *Lurcott* v. *Wakely & Wheeler* (1911) 1 K.B. 905, 906.
(*l*) *Harris* v. *Jones* (1832) 1 Mood. & R. 173; *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129; *Stanley* v. *Towgood*, *supra*; *Mantz* v. *Goring* (1838) 4 Bing. (N.C.) 451; *Payne* v. *Haine* (1847) 16 M. & W. 541; *Scales* v. *Lawrence* (1860) 2 F. & F. 289 (lessor may not claim for every crack in glass or scratch in paint); *Perry* v. *Chotzner* (1893) 9 T.L.R. 488 (cracks in plaster and nail holes in walls not a breach).
(*m*) *Payne* v. *Haine*, *supra*; *Harris* v. *Jones*, *supra*.
(*n*) *Gutteridge* v. *Munyard*, *supra*; *Soward* v. *Leggatt* (1836) 7 C. & P. 613; *Scales* v. *Lawrence*, *supra*; *Truscott* v. *Diamond Rock Boring Co.* (1882) 20 Ch. D. 251.

replacement of parts that have decayed and when that is done the new is put in place of the old. So if the floor of a house had become rotten the tenant must put down a new floor (*o*); or if an external wall has decayed and become dangerous he must demolish and rebuild it (*p*). The landlord does, therefore, get the benefit of improved and renewed parts; and the dictum of Tindall, C.J., in *Gutteridge* v. *Munyard* (*q*) that "what the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value constitute a loss which so far as it results from time falls upon the landlord," is not correct if applied to parts. But it is correct if applied to the whole fabric for the obligation to replace decayed parts does not extend to the recreation of the whole. Thus in *Lister* v. *Lane & Nesham* (*r*), where a house built upon a timber platform resting on mud decayed to such an extent that the platform could not be renewed and it was necessary to seek a new foundation on the solid gravel below the mud, this work was held not to be included in the covenant for general repairs. Lord Esher said—"However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant." The lessee is not bound to give the lessor a new house at the end of the term, but he is bound to make timely repairs, for, as said by Fletcher Moulton, L.J., in *Lurcott* v. *Wakely and Wheeler* (*s*):—"If you properly repair as you go along the consequence will be that you will always get a house which will be in repair and usable as a house, but you will not get a house that does not suffer from age, nor a house which when old is the same as when it was new." S. 108 (m)

The covenant is also construed with reference to the class of house and the locality in which it is situate for the state of repair necessary for a house in Grosvenor Square would be totally different from the state of repair necessary for a house in Spitalfield (*t*).

Alterations that are not authorised are as much a breach of the covenant as dilapidations, *e.g.*, opening a door in a wall (*u*), or pulling down a wall across a courtyard (*v*), or converting the ground floor into a shop (*w*).

The express covenant is more extensive than the implied covenant, for if the premises are in a bad state of repair when let, the covenant to "put" in good repair obliges the lessee to give up the premises in a better state of repair than when he got them, and he is not justified in keeping them in bad repair because they were in a bad state when he took them (*x*). Again the covenant to "keep" in good repair implies that the lessee must put them in good repair, for he cannot keep them in good repair, unless he puts them in good repair (*y*). Moreover the express covenant may require the lessee to rebuild if the property is totally destroyed by fire or other inevitable accident. An Indian illustration is the case of *Hechle* v. *Tellery* (*z*). The lessee covenanted to "keep the premises wind and water-tight and in habitable condition," and when the house was damaged by earthquake he was liable to repair it to the extent of making it wind and water-tight and habitable.

Breach of covenant.—Breach of a covenant to repair will not be restrained by injunction or specific performance (*a*). The remedy is damages.

(*o*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, 53.
(*p*) *Lurcott* v. *Wakley & Wheeler*, *supra*.
(*q*) (1834) 7 C. & P. 129.
(*r*) (1893) 2 Q.B.D. 212, 216-217 C.A. See also *Wright* v. *Lawson* (1903) 19 L.T.R. 203; *Torrens* v. *Walker* (1906) 2 Ch. 166.
(*s*) (1911) 1 K.B. 905, 919.
(*t*) *Payne* v. *Haine* (1847) 16 M. & W. 541; *Haldane* v. *Newcomb* (1863) 9 L.T. 420.
(*u*) *Doe d. Vickery* v. *Jackson* (1817) 2 Stark. 293; *Gange* v. *Lockwood* (1860) 2 F. & F. 115.
(*v*) *Doe d. Wetherall* v. *Bird* (1833) 6 C. & P. 195.
(*w*) *Marsden* v. *Edward Heyes Ld.* (1927) 2 K.B.
(*x*) *Belcher* v. *M'Intosh* (1839) 8 C. & P. 720; *Payne* v. *Haine*, *supra*; *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.
(*y*) *Lurcott* v. *Wakely, etc.* (1911) 1 K.B. 905; *Proudfoot* v. *Hart*, *supra*.
(*z*) (1899) 4 Cal. W.N. 521.
(*a*) *Hill* v. *Barclay* (1810) 16 Ves. 402.

S. 108 (n) If the covenant is to put in good repair, there can be only one breach for which only one suit can be maintained (*b*). If the covenant is to keep in good repair, the breach is a continuing one as long as the premises are out of repair, and suits can be maintained from time to time during the term (*c*). The damages being for injury to the reversion, the lessor is under no obligation to expend damages recovered on the repair of the premises. The measure of damages is the depreciation in the market value of the reversion (*d*). But no hard and fast rule can be laid down and all the circumstances of the case must be taken into consideration and damages assessed at such sum as represents the loss to the covenantee (*e*). Now in England under the Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 C. 36) sec. 18, sub-section 1 "Damages for a breach of a covenant or agreement to keep or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid". But the covenant may be so worded as to give rise to a debt and not merely a claim for damages for breach of covenant. Thus where in a lease the lessee covenanted "to expend during each year of the said term on .... repairs and decoration a sum of five hundred pounds and at the end of each year of the said term to produce to the lessors evidence of such expenditure or to pay to them at the end of each such year a sum equal to the difference between the amount so expended and five hundred pounds" it has been held that the performance of the repairing covenant and the obligation to pay were so inextricably bound together that the latter could not be served or treated as a collateral promise to pay money and therefore the whole clause touched the thing demised and ran with the land and that the obligation to pay created a debt and was not a covenant to pay damages for breach of covenant to repair within the Act and the lessors could recover the amount as a debt without reference to the diminution of the value of the reversion (*f*).

If the covenant is to leave or restore in good repair or in the same condition as when the lessee took possession, only one suit can be brought at the end of the term, and the damages will be the cost of putting the premises in the state of repair required by the covenant (*g*). Any sum recovered during the term as damages for breach of covenant to keep in repair will be taken into account (*h*).

Clause (n)—Lessee's duty to the lessor.—There is no provision of English law corresponding to this section. It is correlative to the covenant for quiet enjoyment, for while the lessor secures undisturbed possession to the lessee, the lessee is under an obligation to give notice to the lessor, if his title is in jeopardy: Rankin, C.J., explained the clause as throwing a duty on the lessee in order that the lessor may if he chooses protect his own interest and that the lessor may be safeguarded against the results of a collusive eviction submitted to by the lessee (*i*). Even before the Act the Calcutta High Court said that it is incumbent on every lessee to protect his lessor's property from encroachment or unlawful eviction (*j*).

The lessor's cause of action to recover possession accrues when the tenancy is determined and there can be no adverse possession against him till then (*k*). In *Katyayani*

(*b*) *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153.
(*c*) *Luxmore* v. *Robson* (1818) 1 B. & All. 584.
(*d*) *Doe d. Worcester Trustees* v. *Rowlands* (1841) 9 C. & P. 734; *Henderson* v. *Thorn* (1893) 2 Q.B. 164.
Conquest v. *Ebbetts* (1896) A.C. 490, 494.
Moss' Empires Ld. v. *Olympia (Liverpool) Ld.* (1939) A.C. 544 (H.L.).
(*g*) *Joyner* v. *Weeks* (1891) 2 Q.B. 31, 43; *Sarafali* v. *Subraya* (1896) 20 Bom. 439, 449.
(*h*) *Ebbetts* v. *Conquest* (1900) 82 L.T. 560.
(*i*) *Indu Bhusan* v. *Chowdhury Moazam Ali* (1929) 33 Cal. W.N. 106, 111, 117 I.C. 838, ('29) A.C. 272.
(*j*) *Prosonnomoyi* v. *Kali Das* (1881) 9 Cal. L.R. 347.
(*k*) *Davis* v. *Kazee Abdool* (1868) 8 W.R. 55; *Womesh Chunder* v. *Raj Narain Roy* (1869) 10 W.R. 15; *Krishna Gobind* v. *Hari Churn* (1883) 9 Cal. 367; *Sharat Sundari* v. *Bhobo Pershad* (1886) 13 Cal. 101; *Vinayak Janardhan* v. *Mainai* (1895) 19 Bom. 138; *Kishwar Nath* v. *Kali Sankar* (1905) 10 Cal. W. N. 343; *Thamman Pande* v. *Maharaja of Vizianagram* (1907) 29 All. 593.

Debi v. *Udoy Kumar* (*l*) the Privy Council pointed out that the lessor could not maintain an action against a trespasser at his own hand for ejectment as he might be met with the objection that the apparent trespass had been acquiesced in by the tenant. But if his title is endangered the landlord may sue for a declaration of his rights and for a decree giving him formal possession as against the trespasser (*m*). The landlord holds possession through his tenant, and if the tenant is dispossessed, the landlord may sue for recovery of the land demised under sec. 9 of the Specific Relief Act (*n*). The lessor may also sue for the purpose of giving possession to a person to whom he has granted a lease (*o*).

Clause (o)—User—This clause requires the lessee to use the land as a man of ordinary prudence would use his land, and not to use it for a purpose different to that for which it was leased.

Amendment.—The words "or sell" were added by the amending Act of 1929. The words "belonging to the lessor, or" were inserted by the same amending Act.

Waste.—Waste is said to be voluntary, *i.e.*, doing an act which is destructive of the premises; or permissive, *i.e.*, an omission to make necessary repairs. The liability for permissive waste arises out of the obligation under sec. 108 (m) to keep the property in a good condition subject to fair wear and tear. This clause deals with voluntary waste and imposes a liability similar to that imposed upon bailees by secs. 151 & 154 of the Indian Contract Act. An act which a person of ordinary prudence using his own property would commit is not waste although it damages the property. Thus where a warehouse was damaged by the weight of the goods placed in it, and the user was reasonable having regard to the class of building, the lessee was not liable (*p*). But even in a lease which permits of excavation the lessee will be liable if the excavation is done in such a manner as to cause substantial damage (*q*).

Structural additions and alterations.—The tenant cannot make structural additions and alterations without the consent of the landlord. It has already been noted that alterations that are not authorised amount to a breach of the implied covenant mentioned in clause (m). Such alterations will also be a breach of the implied covenants mentioned in clauses (o) and (p). In England it is usual to insert in a lease an express covenant against erecting any building on or making any structural alterations in or additions to the demised premises without the previous consent in writing of the landlord. To protect the tenant against capricious withholding of consent by the landlord the Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36) sec. 19 (2) provides that such a covenant is to be deemed to be subject to a proviso that the licence or consent is not to be unreasonably withheld and further provides for payment by the tenant of a reasonble sum in respect of any damage to or diminution in the value of the premises and an undertaking by the tenant to reinstate the demised premises. As to what additions and alterations constitute "improvements" within the meaning of that Act see the undernoted cases (*r*).

(*l*) (1925) 52 Cal. 417, 52 I.A. 160, I.C. 110, ('25) A.PC. 97.

(*m*) *Raj Cumar* v. *Ali Mia* (1923) 37 Cal. L.J. 94, 70 I.C. 792, ('23) A.C. 192; *Damodar Prasad* v. *Lachmi Prasad* (1928) 7 Pat. 496, 110 I.C. 642, ('28) A.P. 354; *Ghulam Husain* v. *Muhammad Husain* (1904) 31 All. 271, 2 I.C. 209; *Tiruvengada* v. *Venkatachala* (1916) 39 Mad. 1042, 32 I.C. 198; *Bissesuri Dabea* v. *Baroda Kanta* (1883) 10 Cal. 1076.

(*n*) *Jagannatha Charry* v. *Rama* (1905) 28 Mad. 238; *Shyama Churn* v. *Mahomed Ali* (1908) 13 Cal. W.N. 835, 3 I.C. 466; *Nabin Das* v. *Koylas Chunder* (1911) 12 Cal. L.J. 483, 7 I.C. 924; *Akhil Chandra Dey* v. *Akhil Chandra* (1911) 15 Cal. W.N. 715, 10 I.C. 455.

(*o*) *Mohideen Ravuthar* v. *Jayarama Aiyar* (1921) 44 Mad. 937, 62 I.C. 284, ('21) A.M. 42.

(*p*) *Manchester Bonded Warehouse Co.* v. *Carr* (1880) 5 C.P.D. 507; *Saner* v. *Bilton* (1878) 7 Ch. D. 815; *Koegler* v. *Yule* (1870) 14 W.R. 45 O.C., 5 Beng. L.R. 401.

(*q*) *Girish Chandra* v. *Sirish Chandra* (1904) Cal. W.N. 255.

(*r*) *F.W. Woolworth and Company* v. *Lambert* (1937) 1 Ch. 37; *Lambert* v. *F. W. Woolworth and Company Ld.* (1938) 1 Ch. 883; *National Electric Theatres Ltd.* v. *Hudgell* (1939) 1 Ch. 553.

S. 108 (o) There is no such statute in India and the matter is left to be dealt with by sec. 108, clauses (m), (o) and (p), in the absence of any express covenant in that behalf.

Diversion to a different use.—The lessee may not use the property for a purpose other than that for which it was leased, for it is waste to change the nature of the premises. If this were done by structural alterations, it would involve demolition and reconstruction which is expressly forbidden by this and the next clause. But a different user may be waste even if it does not involve structural alterations. Thus a house let for residential purposes may not be used as a shop by the exhibition of goods therein without structural alteration (*s*). If such different user is not injurious to the premises it is technical waste and not actionable under English law, and in the case last cited an injunction was refused on the ground that no substantial injury had been done. The law under this clause is probably the same, for the last words of the sub-section seem to indicate that the different user referred to is injurious. In *U Po Naing* v. *Burma Oil Co.* (*t*) land was leased with the right to win oil from it. The lessees sank oil wells but the wells yielded not oil but gas which the lessees used for their own purposes. The Privy Council held that they were entitled to do so without doing any damage to the property leased.

English cases mostly turn on express covenants, such as, to use the premises as a private residence only and not to carry on a trade or business (*u*). Indian cases mostly arise with reference to agricultural tenancies but the principle is the same. A tenant may not on land let for cultivation construct a tank (*v*) or an orchard (*w*). When an agricultural tenant let his land temporarily to a theatrical company this was held not to be a diversion (*x*). Thus a land leased for the purposes of a grove cannot be used for building even temporary structures (*y*).

Timber.—Timber is as a rule trees used for building or repairing houses, see note "Timber" under sec. 3. Felling timber is an act of waste. The words "or sell" have been inserted by the amending Act of 1929 apparently to make it clear that the lessee may not sell the standing timber to a vendee to be felled and carried away by him. The prohibition must refer to timber which was standing when the lessee entered, for the lessee has the right under sec. 108 (h) to fell and remove trees that he has planted himself, but not those which he has not planted (*z*).

Building.—The words "belonging to the lessor" have been inserted by the amending Act of 1929. They make it clear that the right of the tenant to remove the materials of buildings erected by himself recognised in sec. 108 (h) is not affected. The prohibition against pulling down buildings of the lessor includes making any structural alterations (*a*). Pulling down a house is waste even if it is rebuilt (*b*).

Mines and quarries.—The right of the lessee to minerals depends upon the terms of the leases—see note "Attached to the earth" under sec. 8. In the absence of such right the lessee has no right to work quarries or mines other than those open when

(*s*) *Wilkinson* v. *Rogers* (1864) 2 De G. J. & Sm. 62 C.A.

(*t*) (1929) 7 Rang. 157, 56 I.A. 140, 115 I.C. 705, ('29) A.PC. 108.

(*u*) *German* v. *Chapman* (1877) 7 Ch.D. 271 C.A. (use as a school); *Hobson* v. *Tulloch* (1898) 1 Ch. 424 (use as a boarding house); *Lorden* v. *Brooke-Hitchin* (1927) 2 K.B. 237 (use as a restaurant).

(*v*) *Tarini Charan Bose* v. *Debnarayan Mistri* (1872) 8 Beng. L.R. App. 69; *Monindro Chunder Sirkar* v. *Muneeroodleen Biswas* (1873) 20 W.R. 230 (express covenant not to dig a tank); *Noyna Misser* v. *Rupikun* (1883) 9 Cal. 609.

(*w*) *Bholai* v. *Rajah of Bansi* (1881) 4 All. 174; *Lakshmana* v. *Ramachandra* (1887) 10 Mad. 351; contra—*Venkayya* v. *Ramasami* (1899) 22 Mad. 39 (because the tenancy was permanent and the act was good husbandry); cf. *Krishna Doss* v. *Venkatappa* (1899) 9 Mad. L.J. 146.

(*x*) *Yusuf Ali* v. *Hira* (1898) 20 All. 469.

(*y*) *Bansidhar Misra* v. *Burdeshwari Dutt* (1940) 190 I.C. 620, (1940) A.O. 411.

(*z*) *Gur Prasad* v. *Mehdi Husain* (1942) 201 I.C. 728, (1942) A.O. 460.

(*a*) *Doe d. Vickery* v. *Jackson* (1817) 2 Stark. 293.

(*b*) 2 Roll. Abr. 816.

S. 108 (p) (q)

he entered (c); or to dig and carry away soil (d) or shells (e), or even to take stones lying loose and exposed on the surface (f). The lessee may not make bricks on land not let for that purpose (g). Subsoil rights in a tenure are assumed not to have been granted unless an express grant is made. A tenant may, however, have a right to make bricks for his own domestic or agricultural purpose (h).

If the lease confers a right to work a mineral field, the right is, of course, not cut down by this section (i).

Any other act.—The last clause embraces every act which causes permanent injury to the property. If land leased for the construction of a reservoir is used as a rubbish shoot, this is waste, because the level of the land being raised it would be more expensive to lay the foundations of a house (j). But small excavations which caused no damage are not actionable (k).

Clause (p).—Erection of buildings.—On an agricultural holding a tenant may not erect a building not connected with agricultural operations (l). An occupancy tenant in Bengal may build a pucca dwelling house as is suitable to his holding (m); or an indigo factory if indigo is grown on his holding (n).

Before the Act it was held that a tenant building a pucca house on a holding which had ceased to be agricultural improves the property and does not change the nature of the tenancy (o). In the case of another lease which was also executed before the Act, the Madras High Court said that if the rent was fixed and payable, whether the land is cultivated or not, the erection of a building improves the landlord's security, and will not be restrained by injunction (p).

Clause (q).—Restoration of possession.—At the expiration of the term whether it terminates by notice or by efflux of time the lessee is bound to put the lessor in vacant possession. This is known as the rule in *Henderson* v. *Squire* (q). In the case of an agricultural tenancy Farran, C.J., said that the tenant not giving vacant possession after giving notice of relinquishment did not create a tenancy by holding over, but gave rise to a claim for damages by the landlord (r). If there are several lessors and partition has not been effected between them, it is sufficient that vacant possession should be given to one of them.

Illustration.

A and *B* lease a shop to *C*. *C* gave notice to *A* and *B* determining the tenancy. *C* then gave vacant possession to *A* alone. *A* alone gave a fresh lease of the shop to another tenant. *B* sued *C* for rent. Held that the tenancy was determined and that *C*

(c) *Christian* v. *Tekaitni* (1914) 20 Cal. L.J. 527; *Ras Behari* v. *Jagdish Chandra* (1935) 160 I.C. 114, (1936) A.P. 111 (Shooting Stone).

(d) *In re Purmanandas Jeewandas* (1883) 7 Bom. 109.

(e) *Chaladom* v. *Kakkath* (1902) 25 Mad. 669.

(f) *Kusum Kumari* v. *Jagdish Chandra* (1940) 20 Pat. 96, 193 I.C. 760, (1941) A.P. 13 dissenting from *Ras Behari* v. *Jagdish Chandra* (1936) A.P. 111.

(g) *Anund Coomar Mookerjee* v. *Bissonath Banerjee* (1872) 17 W.R. 416; *Nicholl* v. *Tarinee Churn Bose* (1875) 23 W.R. 298.

(h) *Purnandu Nath Narayan* v. *Narendra Nath* (1942) 203 I.C. 442 (1943) A.P. 31.

(i) *Satya Niranjan* v. *Ram Lal* (1925) 4 Pat. 244, 52 I.A. 109, 86 I.C. 289, ('25) A.PC. 42.

(j) *West Ham Central Charity Board* v. *East London Waterworks Co.* (1900) 1 Ch. 624.

(k) *Barada Prasad* v. *Bhupendra Nath* (1923) 50 Cal. 694, 75 I.C. 55, ('24) A.C. 56.

(l) *Jugut Chunder* v. *Eshan Chunder* (1874) 24 W.R. 220; *Lal Sahoo* v. *Deo Narain* (1878) 3 Cal. 781; *Ramanadhan* v. *Zemindar of Ramnad* (1893) 16 Mad. 407; *Orr* v. *Mrithyunjaya* (1901) 24 Mad. 65. See also *Venkayya* v. *Ramasami* (1899) 22 Mad. 39.

(m) *Hari Kisore Barna* v. *Baroda Kisore* (1904) 31 Cal. 1014; *Nyamutoola* v. *Gobind Churn* (1866) (Act 10 of 1869 Rulings) 6 W.R. 40.

(n) *Hari Mohun Misser* v. *Surendra Narayan* (1907) 34 Cal. 718, 34 I.A. 133.

(o) *Prosunno Coomar* v. *Jagannath* (1882) 10 Cal. L.R. 25.

(p) *Periyan Chetty* v. *Govind Rao* (1932) 62 Mad. L.J. 496, 137 I.C. 487, ('32) A.M. 328.

(q) (1869) L.R. 4 Q.B. 170; *Marsden* v. *Edward Heyes Ltd.* (1927) 2 K.B. 1; *Venkatesh Narayan* v. *Krishnaji Arjun* (1884) 8 Bom. 160.

Baliaramgiri v. *Vasudev* (1898) 22 Bom. 348.

S. 108 (q) was not liable for not giving vacant possession to *B*, as he had given vacant possession to one landlord: *Ram Gopal* v. *Parmeshri Das* (1924) 6 Lah. L. J. 197, 78 I.C. 570, ('24) A.L. 474.

The liability under this clause as under the other clauses is subject to contract to the contrary. Thus when the lease provided that "the lessee shall always and in any event be entitled to be paid the price of the superstructure built (by the lessee) on the said plot of land before he surrenders possession of the land either on the expiry of the lease hereby granted or any other future lease or at any time. The price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment" the Privy Council held that the lessee was entitled to hold over as tenant by virtue of the above clause at the rent reserved by the lease until he was paid the then market price (*s*).

Damages.—If the lessee fails to restore vacant possession he is liable in damages for the breach of this obligation (*t*). Under the Landlord and Tenant Act, 1730 (*u*), a tenant for years in England who in spite of demand made for the premises after the expiry of the term contumaciously holds over, *i.e.*, holds over though conscious that he has no right to retain possession (*v*), is liable to a penalty at the rate of double the value of the premises. This penalty has been taken as a guide in the Punjab for the assessment of damages when the lessee contumaciously holds over (*w*). The proper measure of damages is the loss sustained by the landlord. This will be mesne profits and damages in tort for the trespass (*x*). Damages will also include premium received from a subtenant (*y*) and the cost of evicting a subtenant (*z*).

Joint lessees.—If one of two joint lessees fails to restore vacant possession to the lessor, both will be liable (*a*), unless the other has not assented to the holding over (*b*).

Boundaries.—It is the duty of the lessee to preserve the boundaries of the land intact and to leave them distinct at the end of the term (*c*), particularly if his own land is adjoining. If there is a confusion of boundaries the lessor is entitled to have them ascertained at the end of the term (*d*). If the boundary cannot be ascertained the lessee will be compelled to make up land of equal value (*e*).

Emergency Legislation.—During or immediately following the two Great Wars it was found necessary to give special protection to tenants against enhancement of rent and ejectment in supersession of the ordinary law of landlord and tenant laid down in the Transfer of Property Act. Thus during or after the first Great War (1914-1918) there were the Bombay Rent (war restrictions) Act (II of 1918), the Calcutta Rent Act (III of 1920) and Madras City Tenants Protection Act 1922 (III of 1922). During or immediately after the last Great War (1939-1946) also special legislation has been enacted in different Provinces. Thus in Bengal an order was made under the Defence of India Rules called "The Bengal House Rent Control Order, 1942" which applied to the whole of Bengal except the city of Calcutta as defined in the Calcutta Municipal Act 1923. For Calcutta so defined was passed "The Calcutta House Rent Control Order, 1943" which was followed

(*s*) *Ethirajulu Naidu* v. *Ranganatham Chetti* (1944) 72 I.A. 72.
(*t*) *Watson* v. *Lane* (1856) 11 Exch. 769, 774.
(*u*) 4 Geo. 2, c. 28, s. 1.
(*v*) *Wright* v. *Smith* (1805) 5 Esp. 203.
(*w*) *Narain Dass* v. *Dharam Das* (1932) 13 Lah. 216, 138 I.C. 290, ('32) A.L. 275; *Sunder Singh* v. *Ram Saran Das* (1933) 14 Lah. 137, 142 I.C. 754, ('33) A.L. 61.
(*x*) *Sundermull* v. *Ladhuram* (1923) 50 Cal. 667, 83 I.C. 757, ('24) A.C. 240.
(*y*) *Gulam Mohiuddin* v. *Dayabhai* (1923) 25 Bom. L.R. 447, 73 I.C. 442, ('23) A.B. 398; *Ubedul Rahman* v. *Darbari* (1933) 146 I.C. 845, ('33) A.L. 509.
(*z*) *Henderson* v. *Squire* (1869) L.R. 4 Q.B. 170; *Baliaramgiri* v. *Vasudev* (1898) 22 Bom. 848.
(*a*) *Christy* v. *Tancred* (1840) 7 M. & W. 127.
(*b*) *Draper* v. *Crofts* (1846) 15 M. & W. 166.
(*c*) *Dugappa* v. *Tirthasami* (1883) 6 Mad. 263; *Khemamoyee* v. *Shushee Bhooshun* (1868) 9 W.R. 94; *Brojonauth* v. *Gilmore* (1865) 2 W.R. (Act 10 of 1859 Rulings) 48; *A. G.* v. *Fullerton* (1813) 2 Ves. & B. 263.
(*d*) *Spike* v. *Harding* (1878) 7 Ch.D. 871.
(*e*) *Ismail Khan Mahomed* v. *Broughton* (1900) 5 Cal. W.N. 846; *Aston* v. *Exeter* (Lord) (1801) 6 Ves. 288.

by "The Calcutta Rent Ordinance 1946" (Bengal Ordinance No. V of 1946). In Bombay there are Bombay Rent Restriction Act (XVI of 1939) and the Bombay Rents, Hotel Rates and Lodging House Rates (control) Act (VII of 1944). The object of these enactments, generally speaking, is to give relief to tenants by ensuring (i) that rents may not be enhanced except to the extent and in the manner specified in the Act and (ii) that the tenant observing and performing the terms of the tenancy may not be ejected except as provided in the Act. The language of the Calcutta order or ordinance and the Bombay Act are slightly different with the result that different views have been expressed by the two High Courts on the important sections. It will suffice to give only a few references to recent decisions.

Calcutta decisions.—Bengal House Rent Control Order.—*Kiron Chandra Bose* v. *Kalidas Chatterjee* (1943) 2 Cal. 272, 47 C.W.N. 460; *Nanda Lal* v. *Suresh Chandra* 50 C.W.N. 171; *Tarak Chandra De* v. *Asoke Prasanna Bal* (1946) 50 C.W.N. 750. Calcutta House Rent Control Order.—*Babulall Chowdhari* v. *Hari Prosad Roy* (1943) 48 C.W.N. 487 (1943) 1 Cal. 690; *Narendra Kumar* v. *Jugal Kishor* (1944) 48 C.W.N. 711; *Sarat Chandra Dutta* v. *Sm. Ushanjini Dassi* (1945) 49 C.W.N. 430; *Kanto Mohon Mullick* v. *Jyotish Chandra Mukherjee* (1945) 49 C.W.N. 433; *Sm. Radharani Dassi* v. *Genat Kumar* (1945) 49 C.W.N. 647; *Keshav Mitter* v. *Mrs. P. Ghose* (1945) 49 C.W.N. 728; O. C.; *Ganguli* v. *Kamalpal Sing* (1946) 51 C.W.N. 208.

Bombay decisions:—*Punam Chand Velraj* v. *The Bombay Cloth Market Co.* (1943) Bom. 480; *Ismail Dada Bhamani* v. *Bai Zulukha Bai* (1944) Bom. 361; *Navnitlal Chunilal* v. *Baburao K. Pai* (1945) Bom. 82; *Shah Mangaldas Girdhardas* v. *Govindlal Ishwarlal* (1945) Bom. 310 F.B. *Re Peregrino Antonio Rodrigues, Ex parte The Official Assignee* (1945) Bom. 702.

Rights of lessor's transferee.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case

S. 109 they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Assignment of the reversion.—An assignment of the reversion is an assignment of the lessor's interest. The case of an assignment of the term, *i.e.*, the lessee's interest, has been dealt with under sec. 108 (j). An assignment of the reversion may be as the section indicates (1) an assignment of the whole reversion or an absolute assignment, or (2) an assignment of the reversion in part of the property, or (3) an assignment of part of the reversion in the property. In the first case there is no severance of the reversion. In the second and third cases there is a severance of the reversion.

Absolute assignment.—At common law an assignment was not complete without attornment by the lessee to the assignee, except when the assignment was by will. But the necessity for attornment was done away with by secs. 9 and 10 of the Statute 4 5 Anne c. 3, (now repealed and re-enacted in sec. 151 (1) of the Law of Property Act, 1925), and attornment is not necessary under the Transfer of Property Act. Before the Act there is only one reported case in which it was said that the lessor's assignee could not sue for rent without the lessee attorning to him (*f*). A fresh attornment by the lessee to the lessor's assignee is not necessary under this Act (*g*). In practice, however, attornment is generally insisted upon as it is useful as an acknowledgment of the tenancy.

On an assignment of the reversion the assignee succeeds to the rights and liabilities of the lessor in respect of covenants which run with the land. The assignee takes the benefit of the lessee's covenants, *e.g.*, to pay rent (*h*), or to repair (*i*), and the burden of the lessor's covenants, *e.g.*, for quiet enjoyment (*j*). The lessee was held liable to the assignee for rent even though he had, after the assignment, made an invalid surrender of the lease to the original lessor (*k*). The words "as to the property" in this section no doubt refer to covenants running with the land (*l*). The assignee of the reversion, accordingly, is not liable in respect of lessor's covenants which do not run with the land. Thus a covenant by the lessor to pay a sum to the lessee on the expiration or sooner determination of the lease does not touch and concern the demised property and so does not bind the assignee of the reversion, even if the lease provides also that, should the lessor be unwilling to pay the sum, the lessee may hold over and demand a new lease on the same terms including the term as to payment (*m*). On the other hand where in a lease there was a covenant by the lessee that a particular individual should not be concerned in the conduct of the business to be carried on on the demised premises, it has been held that the covenant was one running with the land as touching and concerning the thing demised and could be enforced by the assignee of the reversion against the assignee of the lessee by terminating the lease on the ground of forfeiture for breach of the covenant (*n*).

But the liability of the lessor continues after the assignment, and the lessee is given the option of holding either the lessor or the assignee liable. A lessee paid off a mortgage

(*f*) *Ram Lall Misser* v. *Chundrabullee* (1870) 13 W.R. 228.

(*g*) *Daulat Ram* v. *Haveli Shah* (1939) A.L. 49, 41 P.L.R. 346, 182 I.C. 533. See also *Pasupati* v. *Durjadhan* (1943) A.C. 160, (1942) 2 Cal. 546, 46 C.W.N. 893, 204 I.C. 349 (a decision under o. 39, r. 9 C.P.C.).

(*h*) *Stevenson* v. *Lambard* (1802) 2 East. 575.

(*i*) *Narayan Das* v. *Parasram* (1891) 4 C.P.L.R. 61.

(*j*) *Iswara* v. *Ramappa* (1934) 152 I.C. 201, ('34) A.M. 658; *Campbell* v. *Lewis* (1820) 3 B. & Ald. 392.

(*k*) *Ramachandra* v. *Sheikh Hussain* (1901) 3 Bom. L.R. 679.

(*l*) See instances cited under note "Covenants running with the land" under s. 108 (j).

(*m*) *In re Hunter's Lease,—Giles* v. *Hutchings* (1942) 1 Ch. 124.

(*n*) *Lewin* v. *American and Colonial Distributors Ltd.* (1945) 1 Ch. 225.

for which his lessor was liable and then sued to recover the amount from the assignee of the lessor in enforcement of the liability under sec. 108 (g). Having exercised his election against the assignee, he could not also make the lessor liable (o). This has been said to be an illustration of the equitable principle that a man cannot assign obligations, *i.e.*, cannot substitute someone else as the performer of his duties, without the consent or the authority of those to whom the duty is owing (p). The lessor remains under a contractual liability under his express covenants (q).

So long as he is the owner of it.—These words indicate that the liability of the assignee lasts only so long as his estate lasts. He can get rid of his liability for that period by a reassignment. This is because his liability depends upon privity of estate. This is also the case with the liability of the lessee's assignee to the lessor. See note *supra* "Liability of assignee to lessor" under sec. 108 (j).

Rights of the assignee.—The assignee of the lessor has against the lessee all the rights that the lessor had, and can enforce not only covenants but conditions (r). The Act does not distinguish conditions from covenants, and in England conditions in a lease were put on the same footing as covenants by sec. 10 of the Conveyancing Act, 1881, now replaced by sec. 141 of the Law of Property Act, 1925. He can recover rent due subsequent to the assignment, and he can give notice to quit under sec. 106 (s). The assignee's rights like his liabilities commence with the assignment. The section expressly enacts that he cannot sue for arrears of rent before his assignment (t), and he cannot sue on breaches of covenant committed before the assignment (u). It was accordingly held that he could not determine a lease by forfeiture for a breach of condition before the assignment (v). But sec. 141 (3) of the Law of Property Act, 1925, replacing sec. 2 of the Conveyancing Act, 1911, expressly empowers an assignee to enforce any condition of re-entry or forfeiture for a breach before the assignment, provided such breach has not been waived or released before the assignment (w). In a Bombay case the assignee of a lessor was allowed to forfeit a lease for a breach committed three years before the assignment (x). This seems altogether indefensible.

Severance of the reversion.—The reversion may be severed by an assignment of the reversion in part or by an assignment of part of the reversion. If *A* leases 300 acres to *B* and then assigns 200 acres to *C*, there is an assignment of the reversion in part. But if *A* leases to *B* from year to year and then grants a lease for 21 years to *C*, there is an assignment of part of the reversion. In either case covenants which run with the land run with the severed parts, and the assignee in respect of the part has the benefit of the lessee's covenants and bears the burden of the lessor's covenants. There is a similar provision in sec. 141 of the Law of Property Act, 1925, and also in sec. 37 of this Act. In the first case *C* may recover the rent of 200 acres from *B*, and *A* the rent of 100 acres from *B*. In the second case, *C* as transferee of part of the reversion by the lease of 21 years, is entitled to recover rent from *B* for that period (y). An assignee of a part can enforce a covenant for repair of that part (z).

(o) *Iswara* v. *Ramappa* (1934) 152 I.C. 201, ('34) A.M. 658.

(p) *Cherukomen* v. *Ismala* (1872) 6 Mad. H.C. 145, per Innes, J.

(q) *Stuart* v. *Joy* (1904) 1 K.B. 362.

(r) *Kannyan Baduvan* v. *Alikutti* (1919) 42 Mad. 603, 51 I.C. 286.

(s) *Manickam Pillai* v. *Ratnasami Nadar* (1917) 33 Mad. L.J. 684, 43 I.C. 210; *Parbhu Ram* v. *Tek Chand* (1919) 1 Lah. 241, 53 I.C. 865.

(t) *Flight* v. *Bentley* (1835) 7 Sim. 149; *Sharp* v. *Key* (1841) 8 M. & W. 379 ("Rent in arrear is no part of the reversion; it is a chose in action").

(u) *Martyn* v. *Williams* (1867) 1 H. & N. 817; *Johnson* v. *St. Peters Hereford Churchwardens* (1836) 4 Ad. & El. 520.

(v) *Fenn d. Matthews and Lewis* v. *Smart* (1810) 12 East. 444; *Cohen* v. *Tannar* (1900) 2 Q.B. 609; *Kristo Nath* v. *Brown* (1887) 14 Cal. 176.

(w) *Davenport* v. *Smith* (1921) 2 Ch. 270.

(x) *Vishveshwar* v. *Mahableshwar* (1919) 43 Bom. 28, 47 I.C. 198.

(y) *Ram Anant Singh* v. *Shankar Singh* (1908) 30 All. 369; *Harmer* v. *Bean* (1853) 3 Car. & Kir. 307.

(z) *Twynam* v. *Packard* (1818) 2 B. & Ald. 105; *Roberts* v. *Holland* (1893) 1 Q.B. 665.

Illustration.

Ss. 109, 110

A leases a house and stable to *B* who covenants to keep the premises in good repair. During the term *A* sells the stable to *C*. *C* can enforce the covenant to repair as regards the stable.

At the expiry of the term the lessor's assignee can sue to evict the lessee from that part (*a*). If two joint lessors effect partition, one of them can enforce a forfeiture for non-payment of the rent of his moiety (*b*).

A usufructuary mortgagee is an assignee of part of the reversion but as the right of enjoyment and the right of possession have been transferred to him he can sue to recover all the rents. He can also give notice to quit determining a periodical lease (*c*). After the transfer of the reversion by usufructuary mortgage, the lessor-mortgagor cannot accept a surrender of the lease (*d*).

A lessee for a term is assignee of part of the reversion and can give notice to quit to a monthly tenant of the original lessor (*e*).

Proviso.—The assignee is not, as already stated, entitled to rent before the assignment. Such rent is not part of the reversion but a mere debt (*f*). There is no obligation on the assignee to give notice of the assignment to the lessee but it is desirable to do so, for if in the absence of notice the lessee pays rent to the lessor he will not be liable to pay it again to the assignee (*g*). See sec. 50.

Apportionment.—Notice to tho tenant is by virtue of sec. 37 sufficient to convert the single obligation to pay rent to the lessor into a several obligation to pay rent to the lessor and the assignee of part. On receipt of notice the lessee is bound to pay each the proportionate part of the rent (*h*). The lessor, the assignee and the lessee may make the apportionment amicably or failing an agreement a suit may be filed for the purpose.

Exclusion of day on which term commences.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Duration of lease for year.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

(*a*) *Kannyan Baduvan* v. *Alikutti* (1919) 42 Mad. 603, 51 I.C. 286.

(*b*) *Korapalu* v. *Narayana* (1914) 38 Mad. 445, 20 I.C. 930.

(*c*) *Barjorji* v. *Shripatprasadji* (1927) 29 Bom. L.R. 215, 100 I.C. 1033, ('27) A.B. 145.

(*d*) *Havu* v. *Ganapati* (1930) 32 Bom. L.R. 679, 125 I.C. 689, ('30) A.B. 329.

(*e*) *Manickam Pillai* v. *Ratnasami Nadar* (1917) 33 Mad. L.J. 684, 43 I.C. 210; *Prabhu Ram* v. *Tek Chand* (1919) 1 Lah. 241, 53 I.C. 865.

(*f*) *Sharp* v. *Key* (1841) 8 M. & W. 379.

(*g*) *Bhola Nath* v. *Supper* (1923) 72 I.C. 86, ('23) A.L. 389.

(*h*) *Sri Raja Simhadri* v. *Prattipati Ramayya* (1906) 29 Mad. 29.

S. 110

Option to determine lease.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Application of section.—There is a difference of opinion whether the section applies to verbal leases or is confined to written leases only (*i*). In *Calcutta Landing and Shipping Co's* case (*supra*) it was said that the first paragraph of the section contemplated that a time or period should be limited by the lease and the period must be expressed to commence from a particular day and that when these two conditions were fulfilled the rule of interpretation laid down in the section would apply. It follows from this that as a monthly tenancy does not limit the time within the meaning of the section, the section cannot apply to such tenancy and so has it been held (*j*). Where a lease for years expressed to commence from the first day of a particular year also expressly stipulates that the lease is to terminate with the end of the last year of the term, such term is "an express agreement to the contrary" within the meaning of the second paragraph (*k*). In such a case the strict application of the first paragraph will make the lease self contradictory and therefore the first paragraph, it has been suggested in the *Calcutta Landing and Shipping Co's* case (*supra*), should be read as qualified by some such expression as "unless the context otherwise requires."

Computation of time.—The rule here enacted for the computation of time is the same as that in sec. 9 (1) of the General Clauses Act 10 of 1897. A lease "from the day of date" or a lease "from henceforth" means a lease from the day of execution (*l*). If no date of commencement is named, the lease begins from the date of execution (*m*). In *Benoy Krishna Das* v. *Salsiccioni* (*n*) the Privy Council held that a lease for four years from the 1st June 1921 expired on the 1st June 1925. The tenant held over on a monthly tenancy, each month of which expired on the 1st on each succeeding month, and this monthly tenancy was validly terminated by a notice to quit of the 1st February 1928 which treated the tenancy as expiring at midnight of the 1st March 1928. This decision has been followed in the undernoted cases (*o*). An argument that the second paragraph of the section gave an additional day to the lessee so that the term expressed to commence from the 1st day of a month would commence on the 2nd day of that month and would expire on the anniversary day, that is, the second day of the last month of the term and, the monthly tenancy would commence from the 3rd day of that month and therefore the notice to quit should expire on the 2nd and not on the 1st day of a month was, it is submitted, rightly rejected in the second of the last cited cases.

Option to break.—A lease "for 3, 6 or 9 years" is a lease for 9 years terminable at the end of 3 or 6 years (*p*). A lease may be for a term of years with an option to "break" or determine the lease at the expiry of the earlier periods, *e.g.*, a lease for 21 years

(*i*) *Calcutta Landing and Shipping Co.* v. *Victor Oil Co.* (1944) A.C. 84, 48 C.W.N. 76; *Kidar Nath* v. *Ramendra Nath* (1946) 50 C.W.N. 306.

(*j*) *Utility Articles Mfg. Co.* v. *Raja Bahadur Motilal Mills* (1943) A.B. 306; *Usharani* v. *The Research Industries Ltd.* (1945) 50 C.W.N. 461.

(*k*) *Deb Das Lala* v. *Abdul Gani* (1938) 2 Cal. 134, 42 C.W.N. 444.

(*l*) *Llewellyn* v. *Williams* (1611) Cro. Jac. 258; *Underhill* v. *Horwood* (1804) 10 Ves. 209.

(*m*) *Dinanath Kundu* v. *Janaki Nath* (1928) 55 Cal. 435, 110 I.C. 368, ('28) A.C. 392; *Kailash Chandra* v. *Bejoy Kanta* (1919) 23 Cal. W.N. 190, 50 I.C. 177; *Raja* v. *Vizianagram* v. *Maharaja of Jaypur* (1944) A.M. 518.

(*n*) (1933) 59 I.A. 414, 60 Cal. 389, 37 Cal. W.N. 1, 56 Cal. L.J. 319, 63 Mad. L.J. 685, 35 Bom L.R. 6, 1933 All. L.J. 423, 141 I.C. 514, ('32) A.PC. 279.

(*o*) *Sushil Chandra* v. *Birendrajit Shaw* (1934) 38 C.W.N. 782; *Charu Chandra* v. *Bankim Chandra* (1938) 42 C.W.N. 1115; *Rahmat Ullah* v. *Md. Hussain* (1940) A.A. 444, (1940) A.L.J. 502, 191 I.C. 293.

(*p*) *Goodright d. Hall* v. *Richardson* (1789) 3 Term. Rep. 462.

Ss. 110, 111

terminable at the expiry of 7 or 14 years. If the option is given to each party, then either the lessor or the lessee may determine the lease (*q*). If the lease is "for the term of 21 years, determinable, nevertheless, at the expiration of 7 or 14 years, if the said *parties* shall so think fit," it is determinable only by the consent of *both* the parties (*r*), although it may have been the intention that *either* party should have the option of determining it.

But if the lease is silent as to who shall have the option, the section enacts that the lessee shall have the option. This follows the English case of *Dann* v. *Spurrier* (*s*), and rests upon the principle that when words of grant are ambiguous they are to be construed most strictly against the grantor (*t*). The exercise by the lessee of this power does not prejudice the lessor's remedy for previous breaches of covenant (*u*).

Condition of the option.—Any condition expressed in the lease as to the exercise of the option must be strictly complied with. If the lessor has the option in case he requires the premises for building purposes, he must show a bona fide intention and that he has entered into an agreement to build (*v*). If the lessee has the option and the terms of the option are that he shall have paid the rent and performed the covenants of the lease, this is a condition precedent (*w*).

Determination of lease.

111. A lease of immoveable property determines—

(a) by efflux of the time limited thereby [*pp. 709-712*]:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event [*p. 712*]:

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event [*p. 712*]:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right [*pp. 712-714*]:

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease, to the lessor by mutual agreement between them [*p. 714*]:

(f) by implied surrender [*pp. 714-716*]:

(g) by forfeiture; that is to say,—(1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter * * *; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; *or* (3)

(*q*) *Goodright d. Nicholls* v. *Mark* (1815) 4 M. & S. 30; *Lucas* v. *Rideout* (1868) L.R. 3 H.L. 153.

(*r*) *Fowel* v. *Tranter* (1864) 3 H. & C. 458.

(*s*) (1802) 3 Bos. and Pull, 399, 442.

(*t*) *Doe d. Webb* v. *Dixon* (1807) 9 East. 15.

(*u*) *Blore* v. *Giulini* (1903) 1 K.B. 356.

(*v*) *Russell* v. *Coggins* (1802) 8 Ves. 34; *Southend-on-Sea Estates Co.* v. *Inland Revenue Commissioners* (1915) A.C. 428.

(*w*) *Burch* v. *Farrows Bank* (1917) 1 Ch. 606; *Kirkland* v. *Wood* (1917) 1 K.B. 332; *Grey* v. *Friar* (1854) 4 H.L. Cas. 565.

S. 111 (a)

the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee *gives notice in writing to the lessee of* his intention to determine the lease [*pp. 716-724*]:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other [*pp. 724-725*].

Illustration to Clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

Amendment.—Clause (g) has been amended by Act 20 of 1929. See notes to that clause.

Determination of leases.—A tenancy at will or a tenancy at sufferance is determined by demand for possession or, by entry by the landlord without notice or, by the tenant quitting. Other tenancies are determined in one or other of the eight ways indicated by this section. To these may be added determination under a power or option to break. The principles of this section have been applied to leases in the Punjab (*x*). and to agricultural leases (*y*).

Special Legislation.—The effect of this section as of sections 106, 108, clause (q) has been practically superseded by special legislation in some places to give greater protection to tenants against eviction. See note *supra* " Emergency Legislation " under section 108, clause (q).

Clause (a)—Efflux of time.—Leases for a definite period, such as a lease for a year or for a term of years, expire on the last day of the term, and the lessor or person entitled to the reversion may enter without notice or other formality (*z*).

As a lease is a transfer of an estate of inheritance, it does not terminate with the death of the original lessee, but survives during the remainder of the term to his heirs and representatives (*a*).

The lessee cannot dispute the title of the lessor as a ground for refusing to give up possession at the expiry of the lease; for if he has been let into possession by the lessor, he cannot deny the title under which he entered without first surrendering possession (*b*). If the lessee has not surrendered possession, the estoppel continues even after the termination of the tenancy (*c*).

(*x*) *Chiragh Din* v. *Mohammad Usman* (1923) 70 I.C. 349, ('24) A.L. 281; *Karam Chand* v. *Amar Nath* (1933) 145 I.C. 992, ('33) A.L. 377.

(*y*) *Krishna Shetti* v. *Gilbert Pinto* (1919) 42 Mad. 654, 50 I.C. 899 F.B.; *Gangamma* v. *Bhommakka* (1910) 33 Mad. 253, 5 I.C. 437; *Vasudevan* v. *Valia* (1901) 24 Mad. 47 F.B.

(*z*) *Sunder Singh* v. *Ram Saran Das* (1932) 14 Lah. 137, 142 I.C. 754, ('33) A.L. 61; *Hakim Mohmd. Fazilzaman* v. *Anwar Hussain* (1932) All. L.J. 126, 139 I.C. 828, ('32) A.A. 314; *Kundan Lal* v. *Deepchand* (1933) 1933 All. L.J. 682, 146 I.C. 762, ('33) A.A. 756; *Suraj Bhan* v. *Hafiz Abdul* (1944) A.L. 1.

(*a*) *Tez Chund* v. *Sri Kanth Ghose* (1844) 3 M.I.A. 261; *Danoollah* v. *Amanatoolah* (1871) 16 W.R. 147.

(*b*) *Vasudev Daji* v. *Babaji Ranu* (1872) 8 Bom. H.C. 175 A.C.; *Muthuvaiyan* v. *Sinna Samavaiyan* (1905) 28 Mad. 526; *Trimbak Ramchandra* v. *Shekh Gulam Zilani* (1909) 34 Bom. 329, 5 I.C. 965; *Mujibar Rahaman* v. *Sheikh Isab Surati* (1928) 32 Cal. W.N. 867, ('28) A.C. 546.

(*c*) *Krishna Rao* v. *Mungara Sanyasi* (1932) 55 Mad. 601, 62 Mad. L.J. 813, 138 I.C. 34, ('32) A.M. 298; *Mujibar Rahman Isak Surati*, *supra*; *Bilas Kunwar Desraj Ranjit Singh* (1915) 42 I.A. 202, 37 All. 557, 30 I.C. 299; *Vertannes* v. *Robinson* (1927) 54 I.A. 276, 5 Rang. 427, 102 I.C. 639, ('27) A.P.C. 151.

Illustration.

S. 111 (a)

A purchased land at a revenue sale in the name of *B* his benamidar. *A* then let the land to *C*. At the expiry of the lease *C* refused to give up the land alleging that the real owner was *B*. Held that *C* having been let into possession, by *A* was estopped from disputing his title: *Muthuvaiyan* v. *Sinna Samavaiyan* (1905) 28 Mad. 526.

The estoppel extends to the assignee of the lessee (*d*) and to any person who has come in by collusion with the lessee (*e*). The Calcutta High Court has held that the estoppel applies only to the landlord who has let the tenant in (*f*). But the Bombay and Madras High Courts have held that even if a tenant has not been let into possession by the landlord there is an estoppel when a new tenancy arises on his attorning to that landlord (*g*). Section 116 of the Indian Evidence Act limits the estoppel to the landlord's title at the beginning of the term and the tenant may show that the landlord's title has determined since he took the lease (*h*).

Section 116 of the Evidence Act has since been explained by the Privy Council in *Kumar Raj Krishna Prosad Lal Singh Deo* v. *Baraboni Coal Concern Ltd.* (*i*). The Privy Council have held that section 116 does not deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant but deals with one cardinal and simple estoppel. It postulates that there is a tenancy still continuing and that it had its beginning at a given date from a given landlord and provides that neither a tenant nor anyone claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property and there is no exception even for the case where the lease itself discloses the defect of title. In the ordinary case of a lease intended as a present demise the section applies against the lessee, any assignee of the term and any sublessee or licensee. The Privy Council have further held that the principle of the section does not disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, and in that sense the principle only applies to the title of the landlord who " let the tenant in " as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. Under section 116 " the tenancy " does not begin afresh every time the interest of the tenant or the landlord devolves upon a new individual by succession or assignment. Further under that section a tenant is estopped from denying his landlord's title whether he was or was not already in possession of the property at the time when he took the lease. The Calcutta cases mentioned above have been explained as being outside section 116. In view of the observation of the Privy Council that neither a new tenant nor a new Kabulyat necessarily implies a new tenancy the Bombay and the Madras decisions noted above may need reconsideration.

The lessee may resist eviction, if a covenant for renewal gives him the option to take a lease for a further term (*j*).

Covenant for renewal.—The lease may contain a covenant for renewal, that is, a covenant to grant a renewal of the lease either at the end of the term or at some stated period within the term. Such a covenant confers an immediate right to a further term, and as the covenant runs with the land it is exercisable by the assignees of the lessee and binds the assignees of the lessor.

(*d*) *Parattahath* v. *Parattahath* (1906) 16 Mad. L.J. 351.

(*e*) *Pasupati* v. *Narayana* (1890) 13 Mad. 335; *Doe d. Bullen* v. *Mills* (1834) 2 Ad. & El. 17.

(*f*) *Lal Mahomed* v. *Kallanus* (1885) 11 Cal. 519; *Ketu Das* v. *Surendra Nath Sinha* (1903) 7 Cal. W.N. 596.

(*g*) *Shankar* v. *Jagannath* (1928) 30 Bom. L.R. 741, 111 I.C. 911, ('28) A.B. 265; *Nagindas Sankalchand* v. *Bapalal Purshottam* (1930) 54 Bom. 487, 125 I.C. 695, ('30) A.B. 395; *Krishnarao* v. *Ghaman* (1934) 36 Bom. L.R. 1074, 155 I.C. 249, ('35) A.B. 144; *Venkata Chetty* v. *Aiyanna Goundan* (1917) 40 Mad. 561, 36 I.C. 817.

(*h*) *Ammu* v. *Ramakrishna Sastri* (1879) 2 Mad. 226; *Hopcraft* v. *Keys* (1833) 9 Bing. 613.

(*i*) (1937) 64 I.A. 311.

(*j*) *Lewis* v. *Stephenson* (1898) 67 L.J. (Q.B.) 296.

The covenant generally requires the lessee to give notice of his intention to take a renewal before the expiry of the term, and if so the right of renewal may be lost by not applying within the specified time (*k*), though relief will be granted in special circumstances against failure to give notice in time (*l*). If no time is mentioned for giving notice it will suffice if notice is given in reasonable time (*m*). But it is not to be inferred that the lessee will lose his right of renewal by not giving notice or by not having made an application for renewal if he continues in possession with the assent of the lessor (*n*). Time is not regarded as of the essence of the contract for renewal, and if the lessee omits to exercise the option the lessor may call upon him to decide whether he will take the lease and any delay by the lessee after receiving such notice from the lessor will be fatal (*o*). In a Calcutta case (*p*) the landlord made a fresh settlement of a village after the term of the original lease had expired. But the settlement was held to be invalid because there was a covenant for renewal in the original lease and the landlord had omitted to give notice to the original lessees who were still in possession. If the lessee merely holds over and does not exercise his right of renewal, he becomes an annual or monthly tenant, as the case may be (*q*).

There may be conditions precedent to the exercise of the option, such as, performance of the conditions in the lease and as to repairs and these will be very strictly construed (*r*).

A covenant for renewal must be definite as to the term, otherwise it may be void for uncertainty (*s*). But in *Indian Cotton Co.* v. *Raghunath* (*t*) a lease for 5 years with a covenant for renewal so long as the lessee, a registered Company, should require the land was held to be a lease renewable at the option of the lessee so long as the Company lasted.

The chief difficulty about a covenant for renewal is to distinguish a covenant for one renewal from a covenant for perpetual renewal. This is a matter of construction of the covenant (*u*), and the leaning of the Courts always has been against perpetual renewal, and unless the intention is clearly shown the agreement is exhausted by one renewal (*v*). A covenant for a perpetual renewal of the lease must always be unequivocal (*w*). A covenant for a new lease "with all covenants, grants, and articles" contained in the old lease will not include the covenant for renewal (*x*); for an option of renewal is not the same thing as an option for renewal after renewal (*y*). But the addition of the words "including this present covenant" will make the covenant one for perpetual renewal (*z*). Where, however, the covenant gave the lessee an option "of continuing

(*k*) *Ram Lal* v. *Secretary of State* (1919) 29 Cal. L.J. 314, 51 I.C. 690; *Bayly* v. *Leominister Corporation* (1792) 1 Ves. 476; *Wight* v. *Hopetown (Earl)* (1864) 4 Macq. 729 H.L.; *Nicholson* v. *Smith* (1882) 22 Ch. D. 640.

(*l*) *Ram Lal* v. *Secretary of State*, *supra*; *Hunter* v. *Hopetown (Earl)* (1865) 13 L.T. 130 H.L.

(*m*) *Jaggi Lal* v. *Sir W. E. Cooper* (1905) 27 All. 696.

(*n*) *Buckland* v. *Papillon* (1866) 2 Ch. 67; Foa, Landlord and Tenant 6th Ed., pp. 369 & 429.

(*o*) *Hersey* v. *Gilbert* (1851) 18 Beav. 174.

(*p*) *Hemant Kumari Debi* v. *Safatulla Biswas* (1933) 37 Cal. W.N. 9, 144 I.C. 889, ('33) A.C. 477.

(*q*) *Manilal* v. *Nandlal* (1920) 22 Bom. L.R. 133, 55 I.C. 610; *Bhikaji Vishnu* v. *Ramchandra Krishna* (1944) A.B. 210.

(*r*) *Ram Lal* v. *Secretary of State*, *supra*; *Job* v. *Banister* (1856) 2 K. & J. 374; *Finch* v. *Underwood* (1876) 2 Ch. D. 310 C.A.; *Bastin* v. *Bidwell* (1881) 18 Ch. D. 238; *Greville* v. *Parker* (1910) A.C. 335 P.C.

(*s*) *Surendra Nath Sen* v. *Dinabhandhu Naik* (1908) 13 Cal. W.N. 595, 4 I.C. 535.

(*t*) (1931) 33 Bom. L.R. 111, 130 I.C. 598, ('31) A.B. 178.

(*u*) *Swinburne* v. *Milburn* (1884) 9 App. Cas. 844; *Secretary of State* v. *Forbes* (1912) 16 Cal. L.J. 217, 17 I.C. 180.

(*v*) *Secretary of State* v. *Forbes*, *supra*; *Swinburne* v. *Milburn*, *supra*; *Baynham* v. *Guys Hospital* (1796) 3 Ves. 295; *Srish Chandra* v. *Doa Mahammad* (1939) A.C. 77, 68 C.L.J. 128, 179 I.C. 813.

(*w*) *Sewakram* v. *Meerut Municipal Board* (1937) A.A. 328.

(*x*) *Iggulden* v. *May* (1804) 9 Ves. 325; *In re Purmanandas Jeewandas* (1883) 7 Bom. 109.

(*y*) *Lewis* v. *Stephenson* (1898) 67 L. J. (Q.B.) 296.

(*z*) *Hare* v. *Burgess* (1857) 4 K. & J. 45; *Wynn* v. *Conway Corporation* (1914) 2 Ch. 705 C.A.

S. 111 (b) (c) (d)

the tenancy for a further period of 6 months on the same terms and conditions including this clause" it was held that the lessee had the right to renew for one further period of 6 months and no more (*a*).

Clause (b)—Contingent term.—If a lease is not periodic or in perpetuity, it must be for a certain time; but it is sufficient if the time is certain with reference to a future event —see note "Leases for a certain time" under sec. 105. If the term depends upon the happening of a future event, the lease determines when that event happens. Thus a lease for life determines on the death of the lessee. A lease for the duration of the war (*b*) determines when peace is declared.

Clause (c)—Termination of lessor's interest or power.—If the lessor's interest is limited, the lease is determined with that interest. Thus a lease by a tenant for life is void at his death (*c*). Accordingly where a Maharaja made a grant of a village for the maintenance of his nephew for his lifetime and the nephew granted a permanent lease, the lease determined and became void on the death of the nephew (*d*). A lease granted by a Hindu widow having a widow's estate would determine at her death unless justified by necessity. A lease under a statutory or testamentary power would determine at the expiry of the time limited by that power for the term (*e*). A mortgagee in possession cannot grant a lease extending beyond the term of the mortgage, and a lease made by a mortgagee determines on redemption (*f*). If a puisne mortgagee redeems a prior mortgagee he may treat lessees of the latter who continue in possession as trespassers (*g*).

Clause (d)—Merger.—The doctrine of merger has been explained in the note under section 101. When a leasehold and a reversion coincide there is a merger of a lesser estate in the greater. The leasehold is the lesser estate, for it is carved out of the estate of the owner, which is the reversion. The lesser estate is merged, that is, sunk or drowned in the greater (*h*). The lease determines, for it sinks into the reversion (*i*). Thus if the lessor purchases the lessee's interest the lease is extinguished, as the same man cannot be at the same time both landlord and tenant.

The whole of the property.—The interests of the lessor and of the lessee must be in the whole of the property, otherwise there is no merger. Thus a lease is not extinguished because the lessee purchases a part of the reversion (*j*).

Illustration.

A is the owner of a property and leases it to *B* for Rs. 14-8 per mensem. *A* then sells ⅞ of the property to *C* and the remaining ⅛ to the lessee *B*. *C* claims that *B*'s lease is extinguished by merger and that the reasonable profits of the property are Rs. 350 per mensem and sues *B* for ⅞ of that sum. Held that as *B*'s purchase was not of the whole property the lease was not extinguished. *C* is therefore only entitled to ⅞ of Rs. 14-8 per mensem from *B*: *Faqir Bakhsh* v. *Murli Dhar* (1931) 6 Luck. 197, 58 I.A. 75, 131 I.C. 334, ('31) A. PC. 63.

(*a*) *Green* v. *Palmer* (1944) 1 Ch. 328.

(*b*) *Great Northern Rly.* v. *Arnold* (1916) 33 T.L.R. 114.

(*c*) *Doe d. Simpson* v. *Butcher* (1778) 1 Doug. (K.B.) 50; *Raghubir Singh* v. *Jethu Mahton* (1923) 2 Pat. 171, 70 I.C. 290, ('23) A.P. 130.

(*d*) *Beni Pershad Koeri* v. *Dudh Nath Roy* (1900) 27 Cal. 156, 26 I.A. 216.

(*e*) *Alexander* v. *Alexander* (1755) 2 Ves. Sen. 640.

(*f*) *Jhagru Mian* v. *Raghunath* (1929) 119 I.C. 551, ('29) A.P. 630.

(*g*) *Alagirisami Mudali* v. *Akkrulu Naidu* (1921) 41 Mad. L.J. 462, 69 I.C. 651, ('21) A.M. 393.

(*h*) 2 Bl. Comm. 177.

(*i*) *Burton* v. *Barclay* (1831) 7 Bing. 745; *Dynevor (Lord)* v. *Tennant* (1888) 13 App. Cas. 279; *Hriday Narain* v. *Kali Charan* (1928) 107 I.C. 819, ('28) A.P. 2.

(*j*) *Faqir Bakhsh* v. *Murli Dhar* (1931) 6 Luck. 197, 58 I.A. 75, 131 I.C. 334, ('31) A.PC. 631; *Monmotha Paul* v. *Mohendra Nath* (1922) 65 I.C. 469, ('22) A.C. 284; *Nathuni Prosad* v. *Anwar Karim* (1919) 55 I.C. 16; *Parmeshwar Singh* v. *Mst. Surbu* (1925) 88 I.C. 495, ('25) A.P. 530.

S. 111 (d)

No intervening estate.—The expression "the whole of the property" seems inadequate to express the further condition that the union must be of the entire interest of the lessor and of the lessee. With reference to sec. 101 the Legislature has discarded the equitable rule of intention and has adopted the simple rule that the existence of an incumbrance prevents merger. So also with reference to the interests of the lessor and lessee the union of the estates cannot occur, if there is any intervening estate (*k*). Thus in *Burton* v. *Barclay* (*l*) the lessee subleased for a term shorter by a few days, and then assigned his interest to his lessor. This did not operate as a merger of the sublease, for the term of a few days intervened. A mortgage in Indian form is not a transfer of the whole interest of the mortgagor and it is submitted that a mortgage by a lessor of his reversion to the lessee would not effect a merger. An Allahabad case (*m*), though not decided under this section, illustrates this principle. A zemindar mortgaged to an occupancy tenant and on redemption claimed physical possession on the ground that the tenant's right had been extinguished by merger. The Court, however, held that the only effect of the mortgage was to suspend the rent during the period of the mortgage. In a Calcutta case the Court was inclined to the view that there would be no merger where a lessee purchased the equity of redemption of his lessor (*n*).

Sublease.—When the lessor acquired the lessee's interest, the rule of English law was that the covenants in a sublease were extinguished (*o*). This anomaly was removed by sec. 9 of the Real Property Act, 1845, now replaced by sec. 139 of the Law of Property Act, 1925.

In the same right.—Another requisite for the operation of merger is that the two estates must be held in the same right, for, as said by Lord Kenyon, "Nothing is clearer than that a term which is taken in *alieno jure* is not merged in a reversion acquired *suo jure*" (*p*). There is no merger if the lessee makes the lessor his executor (*q*), or if the lessee is administrator of the lessor (*r*). Accordingly a device to prevent merger is to take a conveyance of one of the interests as trustee (*s*); or the purchase of the interests by different members of a joint family (*t*).

Leases before the Act.—As to leases before the Transfer of Property Act, it has been said that the doctrine of merger was not recognized by the law of India (*u*), and it is true that as to such leases sec. 2 (c) makes this section inapplicable (*v*). Both as to leases prior to the Act, and to leases to which the section does not apply, the question of merger is decided by the general law under which merger depends upon the intention of the parties (*w*). Accordingly there is a merger if the conduct of the parties shows that there was no intention to keep the interests apart (*x*). Following this rule the Calcutta

(*k*) *Someshwari Prasad* v. *Maheshwari* (1931) 10 Pat. 630, 135 I.C. 85, ('31) A.P. 426.

(*l*) (1831) 7 Bing. 745; *Amatoo* v. *Sheik Muksud* (1915) 19 Cal. W.N. 435, 28 I.C. 314; *Lal Mahomed Sarkar* v. *Jagir Sheikh* (1909) 13 Cal. W.N. 913, 2 I.C. 654.

(*m*) *Kallu* v. *Diwan* (1902) 24 All. 487; *Kashi* v. *Durga* (1911) 7 Nag. L.R. 154, 12 I.C. 734.

(*n*) *Suraj Chandra* v. *Behari Lal* (1939) A.C. 692, (1939) 2 C.L.J. 551, 70 C.L.J. 415, 43 C.W.N. 953.

(*o*) *Webb* v. *Russell* (1789) 3 Term Rep. 393.

(*p*) *Webb* v. *Russell*, *supra* at p. 401.

(*q*) 2 Bl. Comm. 177.

(*r*) *Chambers* v. *Kingham* (1878) 10 Ch. D. 743.

(*s*) *Belaney* v. *Belaney* (1867) 2 Ch. App. 138.

(*t*) *Dulhin Lachchanbati* v. *Bodh Nath* (1922) 26 Cal. W.N. 565, 48 I.A. 485, 66 I.C. 551, ('22) A.PC. 94.

(*u*) *Womesh Chunder* v. *Raj Narain* (1868) 10 W.R. 15; *Jibanti Nath* v. *Gokool Chunder* (1891) 19 Cal. 760, 764; *Amatoo* v. *Sheikh Muksud*, *supra*; *Lal Mahomed Sarkar* v. *Jagir Sheikh*, *supra*; *Prosunno* v. *Jugut Chunder* (1879) 3 Cal. L. R. 159; *Chandra Singh* v. *Surat Chandra* (1938) A.C. 128; *Lakshan Chandra* v. *Birendra Kumar* (1944) 48 C.W.N. 837.

(*v*) *Hirendra Nath* v. *Hari Mohan Ghosh* (1914) 18 Cal. W.N. 860, 22 I.C. 966; (referred to by the Privy Council in *Dulhin Lachhanbati* v. *Bodh Nath*, *infra* as being a valuable review of decisions on this branch of Indian law); *Raja Bejoy Singh Dudharia* v. *Tarini Charan Saha* (1935) 39 Cal. W.N. 694.

(*w*) *Dulhin Lachhanbati* v. *Bodh Nath* (1922) 48 I.A. 485, 26 Cal. W.N. 565, 66 I.C. 551, ('22) A.PC. 94 citing *Ingle* v. *Vaughan Jenkins* (1900) 2 Ch. 368; *Lakshan Chandra* v. *Birendra Kumar* (1944) 48 C.W.N. 837.

(*x*) *Ram Bissen Dutt* v. *Haripada Mukherji* (1919) 23 Cal. W.N. 830, 51 I.C. 889; *Promotha* v. *Kishore* (1916) 21 Cal. W.N. 304, 38 I.C. 547; *Amatoo* v. *Sheikh Muksud* (1915) 19 Cal. W.N. 435, 28 I.C. 314; *Prosonno* v. *Jugut Chunder* (1879) 3 Cal. L.R. 159; (1935) 39 Cal. W.N. 692, *supra*.

S. 111(e)(f) High Court held that there was a merger in a case in which a putni interest was purchased by a zemindar (*y*), though in an earlier case the same High Court had said that the rule of merger was not applicable to putnis (*z*). In two Calcutta cases (*a*) the rule of merger was wrongly applied following a dictum of the Privy Council in *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (*b*) which was a case of accession and of resumable tenures which fell into the parent estate.

Clause (e)—Surrender.—A surrender is an yielding up of the term of the lessee's interest to him who has the immediate reversion or the lessor's interest (*c*). It takes effect therefore like a contract by mutual consent, on the lessor's acceptance of the act of the lessee (*d*). The lessee cannot therefore surrender, unless the term is vested in him (*e*); and the surrender must be to a person in whom the immediate reversion expectant on the term is vested (*f*). Thus a lessee cannot surrender to a receiver in whom the reversion is not vested (*g*), or to a lessor after he has sold (*h*) or mortgaged (*i*) the reversion. Nor can the lessee surrender if the lease is for a fixed term and contains a clause expressly forbidding surrender (*j*).

Surrenders are either express or implied. This clause deals with express surrenders and the next with implied surrenders.

Express surrender.—Express surrenders are in England required by the Statute of Frauds to be in writing. No such formality is necessary in India (*k*). A deed of surrender need not be registered, if there are facts de hors (*l*). No particular form of words is essential to make a good surrender (*m*), and a surrender may be oral if accompanied with delivery of possession (*n*). In England the words generally used are "surrender, grant and yield up," but they are not necessary if the intention to surrender is sufficiently expressed. Some local Acts provide for a written surrender in the case of agricultural tenancies (*o*).

An express surrender takes effect at once and there can be no surrender in future. But an agreement to surrender becomes effective as an implied surrender when the estate is yielded up; and such an agreement can be enforced by specific performance. But delivery of possession is necessary, and so an insufficient notice to quit accepted by the landlord does not operate as a surrender if the lessee remains in possession after the notice (*p*).

Clause (f)—Implied surrender.—Implied surrender or surrender by operation of law occurs (1) by the creation of a new relationship, or (2) by relinquishment of possession.

(*y*) *Promotho Nath Mitter* v. *Kali Prasanna* (1901) 28 Cal. 744.

(*z*) *Jibanti Nath* v. *Gokool Chunder* (1891) 19 Cal. 760.

(*a*) *Surja Narain* v. *Nanda Lal* (1906) 33 Cal. 1212; *Ulfat Hossain* v. *Gayany Das* (1909) 36 Cal. 802, 3 I.C. 994, both dissented from in 18 Cal. W. N. 860, *supra*.

(*b*) (1879) 5 Cal. 198, 6 I.A. 145.

(*c*) Co. Litt. 337b.

(*d*) *Heera Lall Pal* v. *Neel Monee Pal* (1873) 20 W.R. 383; *Judoonath Ghose* v. *Schoene Kilburn & Co.* (1883) 9 Cal. 671; *Balaji Sitaram* v. *Bhikaji Coyare* (1884) 8 Bom. 164, 167; *Krishna* v. *Lakshminaranappa* (1892) 15 Mad. 67; *Gardner* v. *Ingram* (1889) 61 L.T. 729 (the words "take notice that I intend to surrender" do not effect a surrender).

(*e*) *Walter* v. *Yalden* (1902) 2 K.B. 304; *Venkataramanier* v. *Ananda Chetty* (1871) 5 Mad. H. C. 120.

(*f*) *Edwards* v. *Wickwar* (1866) L.R. 1 Eq. 403.

(*g*) *Cornish* v. *Searell* (1828) 8 B. & C. 471, 476.

(*h*) *Ramchandra* v. *Shaik Hussain* (1901) 3 Bom. L.R. 679.

(*i*) *Havu* v. *Ganapati* (1930) 32 Bom. L.R. 679, 125 I.C. 689, ('30) A.B. 329; *Robbins* v. *Whyte* (1906) 1 K.B. 125.

(*j*) *Jotindra Mohun* v. *Emam Ali* (1909) 9 Cal. L.J. 632, 2 I.C. 633.

(*k*) *Imambandi* v. *Kamleswari Pershad* (1887) 14 Cal. 109, 119, 13 I.A. 160.

(*l*) *Singeshwar Jha* v. *Ajab Lal* (1940) 190 I.C. 746, (1941) A.P. 142.

(*m*) *Bhutia Dhondu* v. *Ambo* (1889) 13 Bom. 294.

(*n*) *Narasimma* v. *Lakshmana* (1890) 13 Mad. 124, 127; *Warif Khan* v. *Daulat Khan* (1902) 25 All. 77.

(*o*) See Rent Recovery Act (Madras) 8 of 1889.

(*p*) *Johnstone* v. *Hudlestone* (1825) 4 B. & C. 922.

New relationship.—If the lessee accepts a new lease that in itself is a surrender of the old lease, for the new lease could not be granted unless the old was surrendered (*q*). Such surrender can also be implied from the consent of the parties or from such facts as the relinquishment of possession by the lessee and taking over possession by the lessor (*r*). This has been put on the ground of estoppel, and surrender by operation of law has been said to be "an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist" (*s*); and as the surrender is founded upon estoppel, the intention of the parties is immaterial. It matters not that the old lease is by deed and the new one by parole (*t*), and a new lease of a part will operate as a surrender of that part of the old lease (*u*). But the new lease must be immediately operative and the surrender is void if the new lease proves to be void (*v*).

Illustration.

A, the karnavan of a Malabar tarvad, grants a lease for years to *B*. *A* then grants a perpetual lease to *B* which if valid would have implied a surrender of the lease for years. But the perpetual lease was in excess of *A*'s powers, and it was set aside by *A*'s successor. But *A*'s successor could not evict *B* as a trespasser, for the surrender being invalid, *B* was entitled to hold until the expiry of the lease for years: *Ramunni* v. *Kerala Varma Valia Raja* (1892) 15 Mad. 166.

There is an implied surrender if the lessor grants a new lease to his lessee to take effect during the continuance of the existing lease as in the illustration to the section. The execution of a fresh kabulayet will imply the surrender even of a permanent lease (*w*). There is an implied surrender when the lessor lets to a new lessee at the request of the first lessee (*x*). But this rule was held not to apply if the two leases were not incompatible as when the first was a mining lease and the second a lease for coffee planting (*y*).

On the other hand an agreement regarding a change in the rent which does not import a new demise will not operate as a surrender (*z*), as for instance a kabulayet which is merely a recognition of a right already existing in the lessee (*a*).

There is an implied surrender when the lessee accepts an office inconsistent with the lease, *e.g.*, by remaining in possession as a servant, for the possession of the servant is that of the master (*b*).

Relinquishment of possession.—Relinquishment of possession operates as an implied surrender, if there is (1) an yielding up by the lessee, and (2) an acceptance of possession by the lessor. There must be a taking of possession, not necessarily a physical taking, but something amounting to a virtual taking of possession (*c*). Whether this has occurred is a question of fact. Thus if the lessor says he will give up his claim for

(*q*) *Crowley* v. *Vitty* (1852) 7 Exch. 319; *Upendra Singh* v. *Meghnalli Singh* (1939) 18 Pat. 370, 163 I.C. 56, (1939) A.P. 598.

(*r*) *Amar Krishna* v. *Nazir Hasan* (1939) 14 Luck. 723, 183 I.C. 821, (1939) A.O. 257.

(*s*) *Lyon* v. *Reed* (1844) 13 M. & W. 285, 306; *Fenner* v. *Blake* (1900) 1 Q.B. 426.

(*t*) *Dodd* v. *Acklom* (1843) 6 Man. & G. 672.

(*u*) *Carnarvon (Earl)* v. *Villebois* (1844) 13 M. & W. 313, 342.

(*v*) *Roe* [illegible] C.A.; *Ramunni* v. *Kerala Varma Valia Raja* (1892) 15 Mad. 166; *Jamini Mohan* v. *Debendra* (1923) 71 I.C. 976, ('24) A.C. 355.

(*w*) *Tika Ram* v. *Daoji Maharaj* (1934) 1934 All. L.J. 674, 152 I.C. 189, ('34) A.A. 787; *Bhikaji Vishnu* v. *Ramchandra Krishna* (1944) A.B. 210; *Suraj Bhan* v. *Hafiz Abdul* (1944) A.L. 1; *Mohammad Yusaf* v. *Hafiz Abdul* (1944) A.L. 9.

(*x*) *Nickells* v. *Atherstone* (1847) 10 Q.B. 944; *Wallis* v. *Hands* (1893) 2 Ch. 75.

(*y*) *Manavadan* v. *Parry & Co.* (1925) 48 Mad. 815, 90 I.C. 729, ('25) A.M. 1277.

(*z*) *Crowley* v. *Vitty, supra*; *Doe d. Monck* v. *Geekie* (1844) 5 Q.B. 841; *Jamini Moha* v. *Debendra, supra*.

(*a*) *Ramchunder Dutt* v. *Jugheschunder Dutt* (1873) 12 Beng. L.R. 229, 235 P.C.; *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1904) 32 Cal. 41, 31 I.A. 144; *Nilratan Mandal* v. *Ismail Khan Mahomed* (1904) 32 Cal. 51, 31 I.A. 149; *Nabakumari* v. *Behari Lal Sen* (1907) 34 Cal. 902, 34 I.A. 160.

(*b*) *Peter* v. *Kendall* (1827) 6 B. & C. 703, 710.

(*c*) *Oastler* v. *Henderson* (1877) 2 Q.B.D. 575, 578 C.A.

S. 111 (f)(g) rent if the lessee gives up possession in the middle of the quarter, and the lessee then gives the keys to the lessor who accepts them, the lease is terminated by surrender (*d*). So also when after a dispute as to rent, the lessee returns the keys to the lessor who accepts them (*e*); or when the lessee says that she will quit immediately and the lessor replies that she may go when she likes and the lessee quits and the lessor re-enters (*f*) But leaving the keys with the lessor is not sufficient, unless the lessor accepts them as a symbol of possession. Thus there was no surrender when the lessee left the keys with the clerk of the Official Assignee on the lessor's bankruptcy and the Official Assignee continued to demand rent (*g*); or if the lessee leaves the keys at the office of the lessor who is unable to return them as he cannot find the lessee (*h*). But if after the keys are left, the lessor at first refuses to accept but afterwards puts up on the premises a board to let, gives the keys to an agent and paints out the name of the tenant from the front of the house his conduct shows that he has exercised his option to accept the surrender (*i*). But the fact that the lessor attempts to relet the house does not necessarily imply acceptance of possession. In a case where the lessee went to America and left the keys with an agent who not finding a subtenant gave them to the lessor, who attempted to relet, the lessor had acted for the benefit of both parties and there was no acceptance (*j*). Nor will acceptance be implied merely from the fact that the lessor entered for repairs after the lessee had quitted (*k*); unless the lessor remains in possession for a considerable time and embarks on works of reconstruction (*l*). It matters not that the lessor accepts under a mistaken impression that the lessee is entitled to quit (*m*). If the lessor re-enters in exercise of a right of forfeiture, the lessee's assent to such re-entry does not constitute a surrender (*n*).

Not an assignment.—A surrender of a term puts an end to the lessee's rights and lets in the lessor. It does not operate as an assignment, and so a judgment against the lessee is not *res judicata* against the lessor after the surrender (*o*).

Clause (g)—Amendments.—The following amendments have been made in this sub-section by the amending Act 20 of 1929 :—

After the word "re-enter" the words "or the lease shall become void" have been omitted. These words were misleading, because even if the condition professed to determine the lease the lessor could not re-enter in the absence of an express provision to that effect. See note "Condition" *infra*.

The words "or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event" have been inserted to provide for forfeiture in the event of the lessee's insolvency. See note "Insolvency" *infra*.

The words "any of these cases" have been substituted for the words "either case." This amendment is purely consequential. The amendments made are not retrospective (*p*).

Forfeiture.—This clause refers to the determination of a lease by the lessor for breach of a condition by or for disclaimer by the lessee or for the insolvency of the lessee. The happening of any of the three specified events does not *ipso facto* put an end to

(*d*) *Whitehead* v. *Clifford* (1814) 5 Taunt. 518; *Furnivall* v. *Grove* (1860) 8 C.B. (N.S.) 496.
(*e*) *Dodd* v. *Acklom* (1843) 6 Man. & G. 672; *Imambundi Begum* v. *Kamleswari Pershad* (1887) 14 Cal. 109, 119, 13 I.A. 160.
(*f*) *Grimman* v. *Legge* (1828) 8 B. & C. 324.
(*g*) *Cannan* v. *Hartley* (1850) 9 C.B. 634; *Re Panther Lead Co.* (1896) 1 Ch. 978 (lessor's company liquidator accepts keys without prejudice to his rights under the lease).
(*h*) *Smith* v. *Blackmore* (1885) 1 T.L.R. 267.
(*i*) *Phene* v. *Popplewell* (1862) 12 C.B. (N.S.) 334.
(*j*) *Oastler* v. *Henderson* (1877) 2 Q.B.D. 575.
(*k*) *Bessell* v. *Landsberg* (1845) 7 Q.B. 638; *Smith* v. *Blackmore*, *supra*.
(*l*) *Smith* v. *Roberts* (1892) 9 T.L.R. 77 C.A.
(*m*) *Gray* v. *Owen* (1910) 1 K.B. 622.
(*n*) *Cook & Co.* v. *C. L. Phillips* (1931) 34 Cal. W.N. 785, 130 I.C. 222, ('31) A.C. 133.
(*o*) *Rajah of Ramnad* v. *Ramanathaswami* (1921) 44 Mad. 514, 63 I.C. 205, ('21) A.M. 306.
(*p*) *Krishna Prasad* v. *Adyanath* (1944) A.P. 77.

the lease, but only exposes the lessee to the risk of forfeiting his lease and gives a right to the lessor, if he so elects, to determine the lease. According to this clause, as worded, two things, namely, the happening of any of the specified events and the giving of the notice by the lessor amount to a forfeiture. There is no provision in the Act which enables a lessee to determine a lease for breach by the lessor (q).

> The words "gives notice in writing to the lessee of" have been substituted for the words "does some act shewing." The reason for this amendment is explained in the note "Notice" *infra*.

Condition.—The word condition is not used in this section in the same sense as in English law, and overlaps what is called a covenant in English law. A condition puts a bridle or restraint on the estate granted. Thus in a lease which stipulated and conditioned that the lessee would not assign except to his wife and children (r), these words indicated that the lease could be determined for breach of the conditions. But a covenant only imports an agreement. Thus in a lease where the lessee "hereby agrees that he will not underlet the premises without the consent in writing of the landlord" (s), these words are a covenant, the breach of which gives the lessor only the right to recover damages or obtain an injunction. But whether the provision was a condition or a covenant the lease enures in spite of the breach unless the lessor determines it. This he does by enforcing a right of re-entry. The words which have been omitted from the section, *i.e.*, "or the lease shall become void" referred to a condition in the strict sense in which it is understood in English law. Nevertheless it was held that "void" must be construed as voidable (t), and that the breach of a condition did not involve forfeiture unless the lease expressly so provided (u). In a Calcutta case (v) there was an express condition against alienation, but its breach was held not to work a forfeiture in the absence of a provision giving a right of re-entry. Conditions making the lease void on their breach are also construed in English (w) as well as Indian (x) cases as making the lease voidable at the option of the lessor.

But the condition or covenant must be an express condition. This has been said to mean so expressed that the Court can be certain that it was part of the stipulation between the parties (y). If the covenant to pay rent is express and a proviso for re-entry is annexed, non-payment of rent will support a forefeiture (z). But in the absence of such a proviso forfeiture will not be incurred by breach of an express covenant either to pay rent or not to assign or sublet (a).

(q) *Govindasamy* v. *Palaniappa* (1925) 48 Mad. L.J. 397, 87 I.C. 10, ('25) A.M. 833; *Bijay* v. *Howrah Amta Light Railway* (1923) 38 Cal. L.J. 177, 181, 72 I.C. 98, ('23) A.C. 542.

(r) *Doe d. Henniker* v. *Watt* (1828) 8 B. & C. 308.

(s) *Shaw* v. *Coffin* (1863) 14 C.B. (N.S.) 372.

(t) *Hiranandhan Ojha* v. *Ramdhar Singh* (1922) 1 Pat. 363, 69 I.C. 886, ('22) A.P. 528, following *Davenport* v. *The Queen* (1878) 3 App. Cas. 115.

(u) *Allah Ditta* v. *Mst. Farz Bibi* (1914) P.R. 33, 23 I.C. 395.

(v) *Nil Madhab* v. *Narattam Sikdar* (1890) 17 Cal. 826.

(w) *Davenport* v. *The Queen*, *supra*; *Reid* v. *Parsons* (1817) 2 Chit. 247 (the term shall cease); *Doe d. Bryan* v. *Banks* (1821) 4 B. & Ald. 401 (shall be void for all intents and pur[illegible], *Doe d. Nash* v. *Birch* (1830) 1 M. & [illegible]. 402 (shall be null and void); *Quesnel Forks Gold Mining Co.* v. *Ward* (1920) A.C. 222

(x) *Hiranandhan Ojha* v. *Ramdhan Singh* (1922) 1 Pat. 363, 69 I.C. 886, ('22) A.P. 528.

(y) *Mussa Kutti* v. *Rangachariar* (1910) 8 Mad. L.T. 238, 8 I.C. 309.

(z) [illegible] 176, 182; *Mussa Kutti* v. *Rangachariar*, *supra*; *Narayan* v. *Handu* (1905) 15 Mad. L.J. 210; *Cutenho* v. *Souza* (1864) 1 Mad. H.C. 15.

(a) *Tamaya* v. *Timapa* (1883) 7 Bom. 262, 265; *Nil Madhab Sikdar* v. *Narattam Sikdar*, *supra*; *Narayan Dasappa* v. *Ali Saiba* (1894) 18 Bom. 603; *Madar Saheb* v. *Sannabawa* (1897) 21 Bom. 195; *Parameshri* v. *Vittappa* (1903) 26 Mad. 157; *Netrapal Singh* v. *Kalyan Das* (1906) 28 All. 400; *Miran Bakhsh* v. *Aziz Bakhsh* (1908) P.R. 53; *Basarat Ali Khan* v. *Manirulla* (1909) 36 Cal. 745, 2 I.C. 116; *Sital Prasad* v. *Nawab Dildar* (1916) 1 Pat. L.J. 1, 33 I.C. 408; *Mahananda Roy* v. *Saramani* (1911) 14 Cal. L.J. 585, 10 I.C. 374; *Udipi Seshagiri* v. *Seshamma* (1920) 43 Mad. 503, 61 I.C. 858 F.B.

Illustration.

S. 111 (g) *A* leased land to *B* on the following condition :—" You will enjoy the profits from generation to generation by erecting houses upon the land and dwelling thereupon. If you fail to dwell upon the land you shall have no interest in or connection with the land." *B* failed to dwell upon the land. Held that as there was no proviso for re-entry, *A* could not forfeit the lease or evict *B* : *Nabakumar Datta* v. *Trailokya Nath Bose* (1914) 24 I.C. 354.

Proviso for re-entry.—The proviso for re-entry gives the lessor the option whether he will exercise his right to determine the lease. But even if the condition makes the lease void on its breach, it is voidable, and not void (*b*), and only the lessor can avoid it, for the lessee cannot avail himself of his own wrongful act (*c*).

On a proviso for re-entry for non-payment of rent the English common law required a formal demand on the very last day. This rule was applied by the Calcutta High Court in a case before the Act (*d*). No such formality is required by this Act and in England the terms of the proviso may dispense with the necessity for such a demand (*e*).

The application of the proviso to a particular covenant is a matter of strict construction ; and for this reason a proviso for re-entry on the ground of the lessee's insolvency was held not to apply when the company for which the lessee was the benamidar went into liquidation (*f*). A covenant against subletting the premises is not broken by the letting of lodgings (*g*), nor by the subletting of a part of the premises (*h*). A covenant against assignment is not broken by the sale of a part (*i*), nor by a mortgage (*j*), for a mortgage is an assignment only of an interest in the property, nor by a sublease even though the sublease be for the whole of the unexpired residue (*k*). A proviso for re-entry on breach " of all or any of the covenants hereinafter contained " was held not to apply to covenants contained in a lease before the proviso even though there were no covenants after the proviso (*l*). Again, when an underlease contained a clause restrictive of subletting and also incorporated the covenant of the head lease which contained a proviso for re-entry but no restriction on subletting, it was held that the proviso was not applicable to the clause restricting subletting contained in the sublease (*m*).

The proviso for re-entry may be applicable to negative as well as to positive covenants, *i.e.*, both to omissions and to acts. The appropriate phrase for positive covenants is "non-performance" and for negative covenants "non-observance" (*n*). But after many conflicting decisions it has been held that failure to perform refers to negative as well as to positive covenants (*o*). A proviso for re-entry on breach of any covenant would include both positive as well as negative covenants (*p*). But the Court will reject a covenant that is insensible (*q*), or ambiguous (*r*).

(*b*) *Bowser* v. *Colby* (1841) 1 Hare 109 ; see cases cited in foot-notes (*t*) and (*w*), *supra*.
(*c*) *Doe d. Bryan* v. *Bancks* (1821) 4 B. & Ald. 401, 406.
(*d*) *Kristo Nath* v. *Brown* (1887) 14 Cal. 176.
(*e*) *Kavanagh* v. *Gudge* (1844) 7 Man. & G. 316.
(*f*) *Raman Menon* v. *Malabar Forest and Rubber Co. Ltd.* (1935) 58 Mad. 378, 68 Mad. L.J. 269, 154 I.C. 445, ('35) A.M. 163.
(*g*) *Doe d. Pitt* v. *Laming* (1814) 4 Camp. 73, 77.
(*h*) *Wilson* v. *Rosenthal* (1906) 22 T.L.R. 233.
(*i*) *Dassorathy* v. *Rama* (1883) 9 Cal. 526 ; *Bansi Das* v. *Jagdip Narain* (1897) 24 Cal. 152 ; *Kundanlal* v. *Kallu* (1914) 12 All. L.J. 650, 24 I.C. 79 ; *Venkataramana* v. *Krishna* (1925) 47 Mad. L.J. 307, 81 I.C. 1006, ('25) A.M. 57 ; *Grove* v. *Portal* (1902) 1 Ch. 727 ; *Church* v. *Brown* (1808) 15 Ves. 258 : *Swarnamoyee Debee* v. *Aoyajaddi* (1932) 60 Cal. 47, 36 Cal. W.N. 819, 139 I.C. 239, ('32) A.C. 787.
(*j*) *Ansur Subba* v. *Secretary of State* (1917) Mad. W.N. 794, 41 I.C. 770.
(*k*) *Hunsraj* v. *Bejoy Lal Seal* (1930) 57 Cal. 1176, 57 I.A. 110, 122 I.C. 20, ('30) A.PC. 59.
(*l*) *Doe d. Spencer* v. *Godwin* (1815) 4 M. & S. 265.
(*m*) *Crawley* v. *Price* (1875) L.R. 10 Q.B. 302.
(*n*) *Evans* v. *Davis* (1878) 10 Ch. D. 747.
(*o*) *Harman* v. *Ainslie* (1904) 1 K.B. 698.
(*p*) *Wadham* v. *Post Master General* (1871) L.R. 6 Q.B. 644, 648.
(*q*) *Doe d. Wyandham* v. *Carew* (1841) 2 Q.B. 317.
(*r*) *Chidambara Pillai* v. *Manikka Chetti* (1864) 1 Mad. H.C. 63, 64.

The lessor must show that there is a breach of the covenant to which the proviso is annexed (*s*). The covenant is construed according to the ordinary rules, and the Court must see what is the object of the covenant, and put a fair construction upon it according to the intention of the parties (*t*). For though the law abhors a forfeiture (*u*) yet, as Lord Tenterden said, "judges are bound to give all instruments their natural construction and attach to them their legal consequences whatever their own inclinations may be" (*v*). Thus where a lease contained a covenant for forfeiture in case of a transfer without the consent of the lessor, a mere unregistered contract by the lessee for sale subject to the sanction of the lessor and putting the intended vendee in possession as an agent and giving him the right to work the quarry and sell lime and stone was held as not amounting to subletting but was a transfer of an interest and as the contract was not registered the transfer was not effective and so there was no breach of the covenant (*w*). Mistake or forgetfulness will not excuse a breach (*x*).

The proviso for re-entry runs with the land and enures for the benefit of the lessor's assigns. This is under sec. 109 and in a case (*y*) before the Act, the Calcutta High Court applied the Statute of Henry 8, c. 34—See note "Leases" under sec. 40. But the lessor's assignee cannot enforce a forfeiture for a breach occurring before the assignment—See note "Rights of assignee" under sec. 109. If the breach is a continuing one, the assignee may enforce a forfeiture for the breach while his estate lasts, and a waiver by the lessor of past breaches will not prevent his doing so (*z*).

Disclaimer.—Disclaimer or denial of the landlord's title is a ground of forfeiture. The section adopts the definition of disclaimer by Tindal, C.J., in *Doe d. Williams and Jeffery* v. *Cooper* (*a*)—"A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself." This is only a particular application of the general principle of law that a man cannot approbate and reprobate, or, as it is more familiarly expressed he cannot blow hot and cold (*b*). It had therefore been acted upon before the Transfer of Property Act was enacted (*c*). It has, however, been recently held, following a decision of the Privy Council that in cases of leases to which this Act does not apply, the disclaimer of a landlord's title unless it is in a judicial proceeding or other public document which is covered by the term "record" in English law, is not sufficient to work a forfeiture (*d*). A permanent lease is covered by clause (g) of sec. 111 (*e*).

In *Doe d. Gray* v. *Stanion* (*f*) Baron Park said—"In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of the landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information, will not be enough." Refusal to pay rent is not in itself a disclaimer, but it may be evidence of a disclaimer (*g*). Accordingly there is no disclaimer

(*s*) *Doe d. Chandless* v. *Robson* (1826) 2 C. & P. 245.
(*t*) *Goodtitle d. Luxmore* v. *Saville* (1812) 16 East. 87; *Croft* v. *Lumley* (1858) 6 H.L. Cas. 672.
(*u*) *Doe d. Muston* v. *Gladwin* (1845) 6 Q.B. 953.
(*v*) *Doe d. Davis* v. *Elsam* (1828) Mood. & M. 189.
(*w*) *Secretary of State* v. *Kuchwar Lime & Stone Co.* (1938) A.PC. 20, 65 I.A. 45.
(*x*) *Eastern Telegraph Co.* v. *Dent* (1899) 1 Q.B. 835.
(*y*) *Kristo Nath* v. *Brown* (1887) 14 Cal. 176.
(*z*) *Doe d. Muston* v. *Gladwin* (1845) 6 Q.B. 953 (covenant to insure).
(*a*) (1840) 1 Man. & G. 135; *Anand Sarup* v. *Taiyab Hasan* (1943) A.A. 279, 208 I.C. 422; *Amarkrishna* v. *Nazir Husain* (1939) 14 Luck. 723, 183 I.C 821, (1939) A.O. 257.
(*b*) *Kally Dass Ahiri* v. *Monmohini Dassee* (1897) 24 Cal. 440, 448.
(*c*) *Kally Dass Ahiri* v. *Monmohini Dassee*, *supra*.
(*d*) *Gurdevi* v. *Sham Lal* (1946) A.L. 330 F.B. following *Maharaja of Jeypore* v. *Rukmini Pattamahadevi* 42 Mad. 589, 46 I.A. 409, (1919) A.PC. 1.
(*e*) *Md. Hafiz Ulla* v. *United Provinces* (1945) A.A. 285.
(*f*) (1836) 1 M. & W. 695, 703.
(*g*) *Doe d. Williams and Jeffrey* v. *Cooper* (1840) 1 Man. & G. 135; *Prag Narain* v. *Kadir Bakhsh* (1913) 35 All. 145, 18 I.C. 728.

S. 111 (g) if the lessee refuses to pay rent until he knows who is the right owner (*h*) or until he is satisfied as to the lessor's title to receive the whole rent (*i*). Nor will the denial of the title of an assignee of the original lessor work a forfeiture of the tenancy (*j*).

Illustration.

A is a tenant of *B*, but *C* claims to be the landlord. *B* sues *A* for rent and *A* in his written statement states—"I have never paid rent to *B*. *C* now claims rent. I am ready to pay whomsoever is the rightful owner." This is not a disclaimer which will entitle *B* to evict *A* in a subsequent suit: *Rukmini* v. *Rayaji* (1924) 48 Bom. 541, 83 I. C. 45, ('24) A.B. 454.

On the other hand a direct repudiation of his landlord is sufficient (*k*), especially if the tenant executes a kabulayet in favour of another landlord (*l*). The section indicates that although the tenant does not deny that he is a tenant, yet it is a disclaimer if he claims to be a tenant of another landlord (*m*). So a refusal to pay rent accompanied with the words "you are not my landlord" (*n*), or "I have no rent for you, I have been ordered to pay no one" (*o*), operates as a disclaimer, for this amounts to setting up a title in a third person.

The repudiation must be clear and unequivocal and made to the knowledge of the landlord (*p*). An incidental statement in a sale deed referring to other property will not operate as a forfeiture (*q*). The bare statement that there is no relation of landlord and tenant with the lessor may operate as a surrender, but it is not a disclaimer as it does not amount to setting up title either in a third person or in the tenant himself (*r*). In England if a tenant conveyed an estate not warranted by his own interest in the land the conveyance could operate by wrong as a tortious feoffment, that is, conveyed an estate that was good against every one but liable to be forfeited by the landlord. Thus a tenant conveying the reversion was held to have disclaimed. But this is not the law in India (*s*), nor in England since the repeal of tortious feoffments by the Real Property Act, 1845. There is therefore no disclaimer if the tenant mortgages the property, describing himself as the owner (*t*); or describes himself as the owner in proceedings under the Land Acquisition Act (*u*).

In a Calcutta case the tenant had said that he had no relation of landlord and tenant with the lessor and that he was the tenant of another to whom he paid rent, and the Court held that this was no disclaimer (*v*). This it is submitted is bad law.

(*h*) *Doe d. Williams* v. *Pasquali* (1794) Packe 196; *Jones* v. *Mills* (1861) 10 C.B. (N.S.) 788; *Rama Aiyangar* v. *Gurusami* (1918) 35 Mad. L.J. 129, 134, 46 I.C. 62; *Venkatachariar* v. *Rangasami* (1919) 36 Mad. L.J. 532, 51 I.C. 709; *Rukmini* v. *Rayaji* (1924) 48 Bom. 541, 83 I.C. 45, ('24) A.B. 454.

(*i*) *Srimati Mallika Dassi* v. *Makham Lal* (1905) 9 Cal. W.N. 928.

(*j*) *Abdulla* v. *Mahammad Muslim* (1926) 96 I.C. 1056, ('26) A.C. 1205; *Srimati Farman Bibi* v. *Sheikh Tasha Haddal* (1907) 12 Cal. W. N. 587.

(*k*) *Doe d. Gray* v. *Stanion, supra.*

(*l*) *Anandamoyee* v. *Lakhi Chandra Mitra* (1906) 33 Cal. 339.

(*m*) *Hatimullah* v. *Mahomed Arju* (1928) 32 Cal. W. N. 391, 113 I.C. 13, ('28) A.C. 312.

(*n*) *Doe d. Bennett* v. *Long* (1841) 9 C. & P. 773.

(*o*) *Doe d. Whitehead* v. *Pittman* (1833) 2 Nev. & M. (K.B.) 673.

(*p*) *Doe d. Gray* v. *Stanion* (1836) 1 M. & W. 695, 703; *Raman Nair* v. *Mariyomma* (1920) 43 Mad. 480, 56 I.C. 13; *Sreedharan Valia* v. *Kunhunni* (1921) 41 Mad. L.J. 525; *Venkatachariar* v. *Narasimha* (1918) 53 Mad. L.J. 647, 48 I.C. 301; *Rama Aiyangar* v. *Gurusami* (1918) 35 Mad. L.J. 129, 46 I.C. 62; *Prag Narain* v. *Kadir Bakhsh* (1913) 35 All. 145, 18 I.C. 728; *Narayan* v. *Mangesh* (1932) 34 Bom. L.R. 1287, 140 I.C. 567, ('32) A.B. 599.

(*q*) *Kemalooti* v. *Muhamed* (1918) 41 Mad. 629, 45 I.C. 743.

(*r*) *Protap Narain* v. *Biraj Dasi* (1914) 19 Cal. L.J. 77, 20 I.C. 823; *Annada* v. *Mohim* (1917) 26 Cal. L.J. 261, 42 I.C. 673; *Hatimullah* v. *Mahamad Arju* (1928) 32 Cal. W.N. 391, 113 I.C. 13, ('28) A.C. 312.

(*s*) *Maharaja of Jeypore* v. *Rukmini* (1919) 42 Mad. 589, 46 I.A. 109, 50 I.C. 631, ('19) A.PC. 1.

(*t*) *Muhammad Mahmad Khan* v. *Laja Mal* (1934) 15 Lah. 683, 151 I.C. 209, ('34) A.L. 289; *Prag Narain* v. *Kadir Bakhsh, supra.*

(*u*) *Zia-ud-din* v. *Fakhr-ud-din* (1923) 4 Lah. 160, 73 I.C. 791, ('23) A.L. 454.

(*v*) *Mathewson* v. *Jadu Mahto* (1908) 12 Cal. W.N. 525.

Disclaimer by a lessee who has assigned his term will not affect the interest of the assignee (*w*). **S. 111 (g)**

Verbal disclaimer.—In English law a disclaimer must be by matter of record and a merely oral disclaimer does not cause the forfeiture of a lease for a term of years. But in the case of a lease from year to year it operates not by forfeiture but as evidence of an election to put an end to the tenancy and supersede the necessity of a notice to quit (*x*). These rules of English law were applied by the Privy Council in *Maharaja of Jeypore* v. *Rukmini* (*y*) to a lease before the Act, as a matter of justice, equity and good conscience. This was a case of a permanent lease, and their Lordships decided that no forfeiture had been incurred as there was no disclaimer by matter of record before the suit. In *Rachotappa Iswarappa* v. *Konher Amarao* (*z*) the lease was a permanent lease granted before the Act and the Bombay High Court held that a disclaimer in a written application to a revenue authority was not a disclaimer in matter of record so as to cause a forfeiture. This was on the ground that a proceeding before a revenue authority is not a judicial proceeding. In other cases of leases before the Act a parol disclaimer has been treated as effecting an estoppel (*a*), or as giving the lessor a right of immediate eviction presumably by waiver of notice to quit (*b*). But although there is no case clear on the point it would seem that under this Act a verbal disclaimer is sufficient to support a forfeiture whether the lease be periodic or for a term of years. But in a case not governed by the Act the disclaimer must be by record (*c*).

Claim to permanent tenancy.—There is no disclaimer, if the lessee sets up a permanent tenancy, for although he repudiates the particular holding which the lessor attributes to him, he does not question the lessor's right to receive rent nor does he renounce his character as lessee (*d*). An older Bombay case held that the assertion of a permanent tenancy did operate as a disclaimer (*e*). This was following the English case of *Vivian Moat* (*f*). But the tenant's assertion in *Vivian* v. *Moat* was of a right to hold at a customary rent, which involved a denial of the relationship of landlord and tenant. The Bombay case is therefore incorrect and, though not formally overruled, it has not been followed in subsequent decisions and is no longer an authority. But in a subsequent Bombay case (*g*) Ranade, J., said—"It is a disclaimer for a yearly tenant, when he claims to be a *mirasi* or permanent tenant, and such a disclaimer need not necessarily be made to the landlord himself." On both points, it is submitted, this is an incorrect statement of the law.

The assertion of a permanent tenancy by a yearly or monthly lessee does not operate as a waiver of notice to quit, and the cases cited assume that the lessor cannot evict without such notice. This is because a notice to quit is only necessary when a tenancy is admitted on both sides, and it is only when the tenant denies any tenancy that there is no necessity to end that which he says has no existence (*h*).

(*w*) *Gopal Jayvant* v. *Shriniwas* (1918) 42 Bom. 734, 47 I.C. 635.

(*x*) *Doe d. Graves* v. *Wells* (1839) 10 Ad. & El. 427.

(*y*) *Supra*; *Imam Din* v. *Natha Singh* (1932) 134 I.C. 296, ('32) A.L. 43.

(*z*) (1934) 59 Bom. 194, 36 Bom. L.R. 1083, 155 I.C. 516, ('35) A.B. 41.

(*a*) *Sutyabhama* v. *Krishna Chunder* (1881) 6 Cal. 55.

(*b*) *Vishnu Chintaman* v. *Balaji* (1888) 12 Bom. 352; *Gopalrao Ganesh* v. *Kishor Kalidas* (1885) 9 Bom. 527.

(*c*) *Gurdevi* v. *Shams Lal* (1946) A.L. 330 F.B.

(*d*) *Kali Kishen Tagore* v. *Golam Ali* (1886) 13 Cal. 3 S.C.; *Kali Krishna* v. *Golam Ally* (1886) 13 Cal. 248; *Vithu* v. *Dhondi* (1891) 15 Bom. 407; *Dodhu* v. *Madhavrao* (1894) 18 Bom. 110; *Unhamma* v. *Vatkunta* (1894) 17 Mad. 218; *Chinna* v. *Harischendana* (1904) 27 Mad. 23; *Maharaja of Jeypore* v. *Rukmini* (1919) 42 Mad. 589, 46 I.A. 109, 50 I.C. 631; *Ochhavlal* v. *Gopal* (1908) 32 Bom. 78; *Gol Daji* v. *Dod Laxman* (1920) 22 Bom. L.R. 648, 58 I.C. 226; *Rama Ranchhod* v. *Sayad Abdul* (1921) 45 Bom. 303, 58 I.C. 226, ('21) A.B. 395; *Amarkrishna* v. *Nazir Hassan* (1939) 14 Luck. 723, 183 I.C. 821, (1939) A.O. 257.

Baba v. *Vishvanath* (1883) 8 Bom. 228.

(1881) 16 Ch. D. 780.

Mahipat v. *Lakshman* (1900) 24 Bom. 426, 434.

Doe d. Calvert v. *Frowd* (1828) 4 Bing. 557.

S. 111 (g) A claim by a permanent tenant to adverse possession amounts to a disclaimer of the landlord's title (*i*).

Before suit.—The disclaimer must be before suit filed to eject the lessee (*j*). This is on the principle that the cause of action must be based on something accruing before the suit, and the rule is followed by all the Courts in India, for it has been held that a disclaimer in the written statement or after suit filed will not support a forfeiture or dispense with the necessity for notice to quit in the case of a yearly tenancy (*k*). But a disclaimer in a previous suit operates as a disclaimer so as to support the subsequent suit for ejectment (*l*).

The amendment of the section by the requisition for notice to the lessee makes it clear that the disclaimer must be before notice, and the notice before the suit. In the case of forfeiture one written notice is required under the law and not one under sec. 111 (g) and another under sec. 114A (*m*).

Agricultural tenancies.—In the case of agricultural tenancies the right of forfeiture for disclaimer depends upon the provisions of the Act governing the tenancy. It is not excluded by the Bombay Land Revenue Code (*n*); nor by the Bengal Act 8 of 1869 (*o*). But it is excluded by the Bengal Tenancy Act 8 of 1885 (*p*). When the right of forfeiture has not been excluded by the Local Act it has been applied on the principle of English law (*q*), and even in the case of a permanent tenancy (*r*). If a perpetual lease is granted for a premium and then forfeited, the consideration is exhausted by the granting of the lease and the forfeiture does not convert the original premium into a debt (*s*).

A disclaimer by one co-tenant will not justify a suit to evict the other co-tenants, unless his act was the act of all (*t*).

If the disclaimer is given effect to by the Court and the landlord's suit for rent is dismissed, the tenant cannot plead the tenancy in a subsequent suit to evict him as a trespasser (*u*).

(*i*) *Mahomed Hafiz* v. *United Provinces* (1945) A.A. 285.

(*j*) *Doe d. Lewis Cawdor* (1834) 1 Cr. M. & R. 398; *Doe d. Bennett* v. *Long* (1841) 9 C. & P. 773; *Mela Ram* v. *Sandhi Khan* (1933) 13 Lah. 796, 141 I.C. 825, ('33) A.L. 221.

(*k*) *Maharaja of Jeypore* v. *Rukmini*, *supra*; *Prannath Shaha* v. *Madhu Khulu* (1886) 13 Cal. 96; *Nizamuddin* v. *Mamtazuddin* (1901) 28 Cal. 135; *Srimati Mallika Dassi* v. *Makham Lal* (1904) 9 Cal. W.N. 928; *Khater Mistri* v. *Sadruddi Khan* (1907) 34 Cal. 922; *Vithu* v. *Dhondi* (1891) 15 Bom. 407; *Subba* v. *Nagappa* (1889) 12 Mad. 353; *Madavan* v. *Athi Nanjigar* (1892) 15 Mad. 123; *Unhamma Devi* v. *Vaikunta Hegde*, *supra*; *Ambabai* v. *Bhau* (1896) 20 Bom. 759; *Pratap Narain* v. *Harihar Singh* (1909) 36 Cal. 927, 2 I.C. 856; *Haidri* v. *Nathu* (1895) 17 All. 45; *Perta* v. *Subramanian* (1908) 31 Mad. 261; *Chiragh Din* v. *Mahomed Usman* (1924) 70 I.C. 349, ('24) A.L. 281; *Mukat Singh* v. *Misra Paras Ram* (1924) 79 I.C. 106, ('24) A.A. 726.

(*l*) *Debiruddi* v. *Abdur Rahim* (1890) 17 Cal. 196; *Nilmadhab Bose* v. *Ananta Ram* (1898) 2 Cal. W.N. 755; *Fayj Dhali* v. *Aftabuddin Sirdar* (1902) 6 Cal. W.N. 575; *Ramgati* v. *Pran Hari* (1905) 3 Cal. L.J. 201; *Khater Mistri* v. *Sadruddi Khan*, *supra*; *Sheikh Miadhar* v. *Rajani* (1909) 14 Cal. W.N. 339, 5 I.C. 708; *Ramji Lal* v. *Shib Charan Das* (1930) 28 All. L.J. 908, 130 I.C. 638, ('30) A.A. 479.

(*m*) *Prabhat Chandra* v. *Bengal Central Bank* (1938) A.C. 589.

(*n*) *Venkaji Krishna* v. *Lakshman Devji* (1896) 20 Bom. 354 F.B.; *Vidyavardhak Sangh Co.* v. *Ayyappa* (1925) 49 Bom. 842, 90 I.C. 614, ('25) A.B. 524.

(*o*) *Nizamuddin* v. *Mamtazuddin*, *supra*; *Ananda Chandra* v. *Abrahim* (1899) 4 Cal. W.N. 42.

(*p*) *Debiruddi* v. *Abdur Rahim*, *supra*; *Dhora Kairi* v. *Ram Jewan* (1893) 20 Cal. 101.

(*q*) *Nizamuddin* v. *Mamtazuddin* (1901) 28 Cal. 135.

(*r*) *Kally Das Ahiri* v. *Monmohini Dassee* (1897) 24 Cal. 440.

(*s*) *Kammaran Nambiar* v. *Chindan Nambiar* (1895) 18 Mad. 32.

(*t*) *Ishan Chunder* v. *Shama Churn* (1884) 10 Cal. 41; *Imbichi Kandan* v. *Thamburath* (1909) 19 Mad. L.J. 565, 4 I.C. 875; *Birendra Kishore* v. *Bhubaneswari* (1912) 39 Cal. 903, 15 I.C. 620; *Jharu Mondal* v. *Mahatabuddin* (1928) 113 I.C. 561, ('28) A.C. 713.

(*u*) *Nil Madhab Bose* v. *Ananta Ram* (1898) 2 Cal. W.N. 755; *Ramgati* v. *Pran Hari* (1903) 3 Cal. L.J. 201; *Fayj Dhali* v. *Aftabuddin Sirdar* (1902) 6 Cal. W.N. 575; *Khater Mistri* v. *Sadruddi Khan* (1907) 34 Cal. 922; *Sheikh Miadhar* v. *Rajana* (1909) 14 Cal. W.N. 339, 5 I.C. 708; *Ekabbar Sheikh* v. *Hara Bewa* (1911) 15 Cal. W.N. 335, 8 I.C. 660.

Insolvency.—A condition determining a lease in the event of the insolvency of the lessee is recognised in section 12 when the condition is for the benefit of the lessor. A condition that is for the benefit of the lessor is a condition that reserves to the lessor a right of re-entry. See notes "Lease" under sec. 12 and under sec. 10. Accordingly if the condition against insolvency reserves a right of re-entry to the lessor, he has a right to determine the lease by forfeiture for that reason.

This ground of forfeiture was added by the Amending Act of 1929. It was not covered by the section before the amendment, as a condition against assignment means a condition against voluntary assignment, and is not broken by an involuntary assignment, or an assignment by operation of law, such as an execution sale (*v*), or an insolvency (*w*); though an express condition against involuntary assignment may be valid (*x*).

In English law a forfeiture may be expressed so as to include an involuntary assignment by execution sale (*y*) or bankruptcy (*z*). The condition applies, of course, only to the person in whom the term is vested (*a*).

The repealed clause "or the lease shall become void" would suggest that the breach of a condition avoiding a lease would involve a forfeiture although there was no proviso for re-entry. But this is not the law. See note "Condition," *supra*

If the lessor does not determine the lease by giving notice on the adjudication of the lessee and if the trustee in bankruptcy does not properly disclaim the lease the lessee, after his discharge, remains liable to pay the rent (*b*).

Lessor or his transferee.—A proviso for re-entry runs with the land, and may therefore be enforced by the lessor's transferee (*c*). The transferee cannot enforce a forfeiture for a breach occurring before the assignment, unless the breach is a continuing one (*d*). But in a Bombay case (*e*) an assignee was allowed to forfeit a lease for breach before the assignment. See note "Rights of the assignee" under sec. 109.

Notice in writing.—As breach of a condition only makes the lease voidable, the forfeiture is not complete unless and until the lessor gives notice that he has exercised his option to determine the lease. Section 146 (1) of the Law of Property Act, 1925, also provides in the case of English leases that a right of re-entry is not enforceable unless and until the lessor serves a notice on the lessee; and this notice is required by sec. 196 (1) of the same Act to be in writing.

If the lessors were tenants in common, the notice would have to be by or on behalf of all (*f*).

Before the Amending Act of 1929 it was only necessary for the lessor to do "some act showing his intention to determine the lease." With reference to this phrase it was held that the lessor did an act showing his intention to determine the lease when he took possession with his darwans (*g*), or when he sent the lessee a lawyer's notice (*h*), or orally informed the lessee that the lease was forfeited (*i*), or when he filed a suit in

(*v*) *Doe d. Mitchinson* v. *Carter* (1798) 8 T.R. 57; *Tamaya* v. *Timapa* (1883) 7 Bom. 262; *Subbaraya* v. *Krishna* (1883) 6 Mad. 159, 164; *Re West Hopetown Tea Co.* (1890) 12 All. 192; *Golak Nath* v. *Mathura Nath* (1893) 20 Cal. 273.

(*w*) *Doe d. Goodbehere* v. *Bevan* (1815) 3 M. & S. 353, 369.

(*x*) *Dwarka Nath Roy* v. *Mathura Nath* (1916) 21 Cal. W.N. 117, 34 I.C. 833; *Vyankatraya* v. *Shivrambhat* (1883) 7 Bom. 256.

(*y*) *Davis* v. *Eyton* (1830) 7 Bing. 154.

(*z*) *Roe d. Hunter* v. *Galliers* (1787) 2 T.R. 133; *Re Walker, Ex parte Gould* (1884) 13 Q.B. D. 454.

(*a*) *Smith* v. *Gronow* (1891) 2 Q.B. 394.

(*b*) *Metropolis Estates Company* v. *Wilde* (1940) 2 K.B. 536.

(*c*) *Kristo Nath* v. *Brown* (1887) 14 Cal. 176.

(*d*) *Doe d. Muston* v. *Gladwin* (1845) 6 Q.B. 953 (covenant to insure).

(*e*) *Vishveshwar* v. *Mahableshwar* (1919) 43 Bom. 28, 47 I.C. 198.

(*f*) Cf. *Gopal Ram* v. *Dhakeswar Pershad* (1908) 35 Cal. 807, but see *Syed Ahmad* v. *Magnesite Syndicate* (1916) 39 Mad. 1049, 32 I.C. 512.

(*g*) *Cook & Co.* v. *C. L. Phillips* (1930) 34 Cal. W.N. 785, 130 I.C. 222, ('31) A.C. 183.

(*h*) *Sivarama Aiyar* v. *Muthu Alagappa* (1915) Mad. W.N. 845, 31 I.C. 211.

(*i*) *Satyanarayana* v. *Venkataramamurthy* (1935) 157 I.C. 804, ('35) A.M. 45[illegible].

S. 111 (g), (h)

ejectment, which he withdrew with liberty to file a fresh suit on the same cause of action (j). But there was a conflict of decisions as to whether the act showing an intention to determine the lease was a condition precedent to the right of suit for ejectment. The Calcutta, Madras and Allahabad High Courts held that it was (k), and the Bombay High Court held that it was not (l). A subsequent Calcutta case, however, expresses a preference for the Bombay view (m), but a still later Calcutta case preferred to follow the earlier decisions of Calcutta (n). The Patna High Court has followed the Bombay view (o). It is now, however, clear that the lessor cannot file a suit in ejectment until after he has given notice for until then the lease subsists (p). The giving of a notice in writing is, since the amendment, an essential condition of forfeiture taking effect in law (q). But in the case of forfeiture of a lease granted before 1929, a disclaimer followed by some act by the lessor indicating his intention to determine the lease is all that is necessary and no written notice is required (r). The Patna High Court has expressed the view that the opening words of sec. 111 (g) no doubt seem to imply that the lease comes to an end as soon as notice to quit is given, but the concluding words imply that something more, *e.g.*, an actual entry or the institution of a suit in ejectment is required to be done by the lessor to end it (s). There does not seem to be any cogent reason to support this view. Lease is determined by forfeiture which is complete when notice is given. See note under sec. 112: " Waiver of forfeiture.

The rule of English law (before the enactment of the Law of Property Act, 1925, sec. 146) would appear to be that a suit in ejectment is equivalent to a re-entry (t); and this has been followed in some agricultural tenancies to which the Act does not apply (u), and in the case of tenancies created before the Act (v).

Clause (h)—Notice to quit.—Periodic tenancies are terminated by notice to quit under sec. 106, see notes under sec. 106. Until a periodic tenancy is so determined the lessor cannot treat the lessee as a trespasser (w). No notice is necessary to determine a tenancy for a fixed term (x). But where under the terms of a lease for 21 years from December 25, 1934, either party could determine the tenancy at the end of 7 years on giving 6 months' notice and the landlord gave to the tenants' solicitors a notice as from June 21, 1941, which purported to terminate the lease on December 21, 1941, it has been held that the notice, although the mistake as to the date was obviously due to a slip, was invalid and the acceptance of service by the solicitors did not carry the defect (y). A tenancy at will is determinable at the will of either party, by the tenant giving up possession,

(j) *Ramnath* v. *Siba Sundari* (1917) 25 Cal. L.J. 332, 40 I.C. 348; *Mazhoor Pudu Kudi* v. *Pudiyapurayil* (1911) 8 Mad. L.T. 99, 6 I.C. 264.

(k) *Anandamoyee* v. *Lakhi Chandra Mitra* (1906) 33 Cal. 339; *Nawrang Singh* v. *Janardan Kishor* (1918) 45 Cal. 469, 41 I.C. 952; *Motilal Pal* v. *Chandra Kumar* (1920) 24 Cal. W.N. 1064, 60 I.C. 312; *Venkatramana* v. *Gundaraya* (1908) 31 Mad. 403; *Prag Narain* v. *Kadir Bakhsh* (1913) 35 All. 145, 18 I.C. 728; *Shib Charan* v. *Kharka* (1925) 47 All. 348, 86 I.C. 174, ('25) A.A. 346.

(l) *Isabali Tayabali* v. *Mahadu Ekoba* (1918) 42 Bom. 195, 43 I.C. 851, followed in *Prakashchandra* v. *Rajendranath* (1931) 58 Cal. 1359, 135 I.C. 296, ('32) A.C. 221.

(m) *Prakashchandra* v. *Rajendranath, supra.*

(n) *L. A. Crest* v. *Gungaraj Gulraj* (1937) 1 Cal. 203, (1937) A.C. 129, 64 C.L.J. 280.

(o) *Sri Ram Chandra* v. *Thakur Ajodhya* (1935) 15 Pat. 8, overruled in *Maheswari* v. *Manrajo* (1945) 28 Pat. 185, on the point of limitation.

(p) *Srinivasa Ayyar* v. *Muthusami Pillai* (1901) 24 Mad. 246, 251.

(q) *Saheb Din* v. *Gauri Shankar* (1939) 15 Luck. 92, 185 I.C. 25, (1940) A.O. 92.

(r) *Krishna Prasad* v. *Adyanath* (1944) A.P. 77.

(s) *Chotu Mia* v. *Mt. Sundri* (1945) A.P. 260.

(t) *Moore* v. *Ullcoats Minin Co.* (1908) 1 Ch. 575; *Serjeant* v. *Nash* (1903) 2 K.B. 304; *Evans* v. *Davis* (1878) 10 Ch. D. 747; *Baylis* v. *Le-Gros* (1858) 4 C.B. (N.S.) 537 (reletting a sufficient entry).

(u) *Padmanabhaya* v. *Ranga* (1911) 34 Mad. 161, 6 I.C. 447; *Korapalu* v. *Narayana* (1915) 38 Mad. 445, 20 I.C. 930; *Thirthaswamiar* v. *Rangappayya* (1913) 25 Mad. L.J. 486, 21 I.C. 405; *Dwarka Nath* v. *Mathura Nath* (1916) 21 Cal. W.N. 117, 34 I.C. 833.

(v) *Venkatachariar* v. *Rangasami* (1919) 36 Mad. L.J. 532, 51 I.C. 709; *Thirthaswamiar* v. *Rangappayya, supra.*

(w) *Aminullah* v. *Emperor* (1928) 26 All. L.J. 328, 107 I.C. 694, ('28) A.A. 95.

(x) *Bishen Sarup* v. *Abdul Samad* (1931) 29 All. L.J. 666, 136 I.C. 273, ('31) A.A. 649.

(y) *Hankey* v. *Clavering* (1942) 2 K.B. 326.

or by a demand for possession by the landlord (z), or by the death of either party (a). See note "Tenancy at will" under sec. 105. **Ss. 111 (h), 112**

A tenancy on sufferance does not create the relationship of landlord and tenant and no notice is necessary before evicting a tenant on sufferance (b).

112. A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Waiver of forfeiture.—On breach of an express condition to which a proviso for re-entry is annexed, or in any of the other events stated in sec. 111 (g), the lease is voidable at the option of the lessor. If the lessor has knowledge of the breach he may adopt one of three courses :—(1) elect to avoid the lease, or (2) elect not to avoid the lease, or (3) make no election. These three alternatives are put by Baron Bramwell in *Croft* v. *Lumley* (c). In case (1) he must as required by sec. 111 (g) give notice in writing to the lessee of his intention to determine the lease, and it is only then that there is a forfeiture and the lease is terminated. Thus under sec. 111 (g) two things, namely the happening of any of the three specified events and the giving of the notice by the lessor together amount to a forfeiture. Under that section there can be no forfeiture unless and until the lessor gives the notice. Therefore there can be no forfeiture as contemplated by that section without the lessor being aware that the event which gives him the right to put an end to the lease has happened, for, without such knowledge, he cannot give the notice and without such notice there is no forfeiture as defined in that section. In this view of the matter the language of sec. 112 does not appear to be very happy. If "A forfeiture under sec. 111, clause (g)" means the happening of any of the three specified events followed by a notice from the lessor, the first proviso to sec. 112 becomes meaningless for there cannot be a forfeiture under sec. 111 (g) without the knowledge of the lessor. This proviso, therefore, makes it clear that the word "forfeiture" as used in sec. 112 does not mean the same thing as "forfeiture" as defined under sec. 111 (g). Therefore the opening words "A forfeiture under sec. 111, clause (g)" and the marginal note "Waiver of forfeiture" are not quite appropriate. Sec. 112 deals with the second of the three alternative cases mentioned above, namely the lessor electing not to avoid the lease in spite of the breach, or disclaimer by or insolvency of the lessee. It would be more accurate, therefore, to say that in case (2) there is a waiver of the breach, or the disclaimer or the insolvency as the case may be, than that there is waiver of a forfeiture. Indeed in the last mentioned case Baron Bramwell said that the expression "waiver of forfeiture" is not strictly accurate. The waiver in case (2) is either express

(z) *Deo Nandan Pershad* v. *Meghu Mahton* (1907) 34 Cal. 57; *Ram Kishun* v. *Bibi Sohila* (1933) 145 I.C. 567, ('33) A.P. 561.
Deo d. Price v. *Price* (1832) 9 Bing. 356.
(a) *Chemminian* v. *Udayavarma* (1900) 10 Mad. L.J. 201; *James* v. *Dean* (1805) 11 Ves. 383, 391.
Gokul Chand v. *Shib Charan* (1912) 9 All. L. J. 574, 13 I.C. 59.
(1858) 6 H.L.C. 672, 705.

S. 112

or implied from one or other of the acts referred to in this section. In case (3) the lessor takes no action and this is the case of lying by. But the election is not between different rights, but whether to retain the right created or to give it up (*d*).

Acceptance of rent.—Acceptance of rent due on a date after the forfeiture is incurred is a waiver of forfeiture (*e*). This is because acceptance of the rent is an affirmance that the lease was subsisting at the time when the rent became due (*f*). For the same reason receipt of rent due before the breach does not operate as a waiver (*g*). But the giving of a notice to quit at a future day amounts to a waiver because the giving of the notice recognises the continuance of the tenancy upto that day (*h*). A contrary view has, however, been recently taken in *Loewenthal* v. *Vanhoute* (*i*). It is there explained that when a forfeiture of a lease is incurred the lease is voidable and not void and in those circumstances the giving of a notice to quit may recognise the subsistence of the lease and may amount to a waiver of forfeiture, but when the tenancy is determined by a notice to quit the position is entirely different. When a valid notice to quit is given the lease is determined and a new tenancy can be created by an agreement express or implied and no such agreement can be inferred from the fact of service of a second notice. In *Price* v. *Worwood* (*j*) Martin, B., said—"The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt." But such waiver operates in respect of a particular breach (*k*).

Illustration.

A leased a house to *B* with an express condition that if default were made in the punctual payment for three successive months the lease would be forfeited and *A* would have a right to re-enter. Rents payable in April, May, June and July were not paid. On the 19th of July *B* paid the rent of April and May. The rent payable in August was not paid. *A* was entitled to forfeit the lease for the three successive defaults of June, July and August: *Raj Mohan* v. *Mati Lal* (1915) 22 Cal. L. J. 546, 33 I.C. 331.

But if the rent is accepted for any period subsequent to the breach it makes no difference that it is accepted "under protest" or without prejudice to the forfeiture, *e.g.*, as compensation for use and occupation (*l*); or that it is credited to a suspense account (*m*); or that there is a proviso in the lease requiring waiver to be in writing (*n*). The protest is inoperative as the lessor has no right to take the money except on the terms on which it is paid. Nor does it matter that the rent is accepted from an underlessee or other person in possession (*o*).

(*d*) *Thirthaswamiar* v. *Rungappayya* (1913) 25 Mad. L.J. 486, 21 I.C. 405.

(*e*) *Pennant's* case (1596) 3 Co. Rep. 64a, 64b, Note (B); *Goodright d. Walter* v. *Davids* (1778) 2 Cowp. 803; *Arnsby* v. *Woodward* (1827) 6 B. & C. 519; *Doe d. Griffith* v. *Pritchard* (1833) 5 B. & Ad. 765; *Doe d. Gatehouse* v. *Rees* (1838) 4 Bing. (N.C.) 384; *Davenport* v. *The Queen* (1877) 3 App. Cas. 115; *Dulli Chand* v. *Meher Chand* (1867) 8 W.R. 138; *Vishvanath* v. *Yakub* (1883) P.J. 104; *Sarafali* v. *Subraya* (1896) 20 Bom. 439, 446; *Farman Bibi* v. *Tasha Haddal* (1908) 12 Cal. W.N. 587; *Basanta Kumar* v. *Secretary of State* (1921) 59 I.C. 273; *Chattar Singh* v. *Nand Kishore* (1914) 12 All. L.J. 1139, 26 I.C. 107; *Chotu Mia* v. *Mt. Sundri* (1945) A.P. 260 F.B.; *Mohan Lal* v. *Governor-General* (1945) A.N. 255.

(*f*) *Arnsby* v. *Woodward*, *supra*; *Raj Mohan* v. *Mati Lal* (1915) 22 Cal. L.J. 546, 33 I.C. 331.

(*g*) *Green's* case (1582) Cro. Eliz. 3; *Price* v. *Worwood* (1859) 4 H. & N. 512; *Purna Chandra* v. *Ali Mahammad* (1928) 37 Cal. L.J. 548, 70 I.C. 999, ('24) A.C. 520; *Habib Ahmed* v. *Mt. Keoli Koer* (1946) A.A. 328.

(*h*) *Shiv Prasad* v. *Mandira Kumari* (1940) 186 I.C. 686, (1940) A.P. 478.

(*i*) (1947) 1 A.E.R. 116.

(*j*) (1859) 4 H. & N. 512.

(*k*) *Muhammad Hasan* v. *Baidya Nath* (1939) 184 I.C. 605, (1940) A.P. 140.

(*l*) *Croft* v. *Lumley*, (1858) 6 H. L. C. 672; *Davenport* v. *The Queen* (1877) 3 App. Cas. 115; *Strong* v. *Stringer* (1889) 61 L. T. 470; *Amarkrishna* v. *Nazir Hasan* (1939) 14 Luck. 723, 183 I.C. 821, (1939) A.O. 257.

(*m*) *Kali Krishna* v. *Fazle Ali* (1883) 9 Cal. 643.

(*n*) *R.* v. *Paulson* (1921) 1 A.C. 271.

(*o*) *Doe d. Griffith* v. *Pritchard* (1833) 5 B. & Ad. 765.

Distress.—Under the English Common Law the landlord has as an incident to his reversion, the right to seize whatever moveables he finds on the premises without legal process as a pledge to compel payment of arrears of rent. This right is not recognized in India except in Presidency Towns where it may be exercised through the Small Cause Court; and is also recognized subject to statutory restrictions in some agricultural tenancies. In English law there is no right to levy distress, unless the relationship of landlord and tenant still subsists when the distress is levied. Accordingly in English law the levy of distress operates as a waiver, even if it is levied for rent for a period before the breach (*p*); and in *Price* v. *Worwood* (*q*) Chief Baron Pollock said that an actual distress is so clear an affirmance of the tenancy existing at the time that it does away with all previous forfeitures. This section does not make this distinction and the words "distress for such rent" limit the operation of the waiver to rent becoming due since the forfeiture was incurred. This may be because the Presidency Small Cause Courts Act does not expressly require that the relationship of landlord and tenant should exist at the time of the application for a distress warrant. See. s. 53 of that Act. S. 112

Any other act.—The election not to avoid the lease may be manifested in other ways besides acceptance of rent or levy of distress. Instances of such acts showing an intention to treat the lease as subsisting are a demand for rent accruing due since the breach (*r*), a suit for such rent (*s*), or acceptance of a sum paid into Court as damages for breach of covenant to repair alleged to have been committed during the term (*t*). As to the effect of a second notice see the cases under foot-notes (*h*) and (*i*) *supra*. The pleadings in a suit for ejectment may even operate as a waiver of forfeiture, *e.g.*, where the lessor describes the breaches as occurring during the existence of the term (*u*), or makes an alternative prayer inconsistent with the determination of the lease (*v*).

In an English case (*w*) the lessor after the forfeiture described the lessee as a "termor", and this was treated as a waiver although the statement was made in a receipt for rent due before the forfeiture. But in a Calcutta case already cited (*x*) a similar description was held to refer to the period antecedent to the forfeiture and therefore not to operate as a waiver.

First proviso—Knowledge of the breach.—The principle underlying the first proviso is that there can be no election without knowledge. It must therefore be shown that the lessor had notice or knowledge of the breach which incurs a forfeiture at the time of the supposed waiver (*y*). Knowledge of an agent is not sufficient unless the agent has authority to grant a new lease (*z*).

Second proviso—Election irrevocable.—The second proviso results from the principle that an election once made is irrevocable. The lessor when he has knowledge of the breach may take time to make his election; but once he has made the election either

(*p*) *Ward* v. *Day* (1864) 4 B. & S. 359; *Kirkland* v. *Briancourt* (1890) 6 T. L. R. 441; *Raj Mohan* v. *Mati Lal* (1912) 22 Cal. L.J. 546, 33 I.C. 331.

(*q*) (1859) 4 H. & N. 512.

(*r*) *Doe d. Nash* v. *Birch* (1836) 1 M. & W. 402; *Kristo Nath* v. *Brown* (1887) 14 Cal. 176, 184.

(*s*) *Dendy* v. *Nicholl* (1858) 4 C. B. (N.S.) 376; *Jogeshuri* v. *Mahomed Ebrahim* (1886) 14 Cal. 33; *Sitanath* v. *Basudeo* (1900) 2 Cal. L. J. 540; *Kalanand* v. *Gunput* (1911) 16 Cal. W.N. 104, 11 I.C. 974; *Abdul Rashid* v. *Safar Ali* (1918) 42 I.C. 614; *Midnapore Zamindari Co.* v. *Joyram Santal* (1916) 1 Pat. L.J. 185, 34 I.C. 918.

(*t*) *Pellat* v. *Boosey* (1862) 31 L.J. (C.P.) 281.

(*u*) *Pellatt* v. *Boosey*, *supra*.

(*v*) *Evans* v. *Davis* (1878) 10 Ch. D. 747; *Saraf Ali* v. *Subraya* (1896) 20 Bom. 439, 448; *Rukmini* v. *Rayaji* (1924) 48 Bom. 451, 83 I.C. 45, ('24) A.B. 454; *Abdul Rashid* v. *Safar Ali*, *supra*.

(*w*) *Green's* case (1582) Cro. Eliz. 3.

(*x*) *Raj Mohan* v. *Mati Lal*, *supra*.

(*y*) *Arnsby* v. *Woodward* (1827) 6 B. & C. 519; *Matthews* v. *Smallwood* (1910) 1 Ch. 777; *Atkin* v. *Rose* (1923) 1 Ch. 522; *Fullers Theatres* v. *Rofe* (1923) A.C. 435; *Mritunjoy* v. *Gopal* (1869) 10 W.R. 466; *Nagardas* v. *Ganu* (1891) P. J. 107; *Swarnamayee Debee* v. *Aoyajaddi* (1932) 60 Cal. 47, 36 Cal. W. N. 819, 139 I.C. 230, ('32) A.C. 787.

Doe d. Nash v. *Birch* (1836) 1 M. & W. 402.

Ss. 112, 113

by express words or unequivocal act, the election is irrevocable (*a*). Therefore if the lessor has given notice and filed a suit on the ground of forfeiture, he has determined the lease and no subsequent act of his will amount to waiver. A distress levied after such a suit would be merely a trespass, and not an affirmance of the tenancy (*b*). Acceptance of rent after such a suit is not a waiver (*c*). A prayer for rent or mesne profits in a suit for ejectment on the ground of forfeiture will not necessarily operate as a waiver (*d*).

But the suit must be an unequivocal demand for possession, and if there are alternative prayers to enforce the covenants in the lease (*e*), the plaint itself would not be unequivocal.

Subsequent breaches.—Waiver of past breaches does not preclude the lessor from enforcing a forfeiture when the same or another condition is subsequently broken (*f*). When the breach is of a continuing nature, the same rule applies, and the continuance of the breach after the waiver will justify a forfeiture (*g*). But if the breach involves the creation of a subordinate interest, *e.g.*, in the case of a covenant not to sublet, the waiver operates during the continuance of that interest (*h*), but not afterwards (*i*).

Express waiver.—Express waiver is a license to commit a particular breach, and such license according to the rule in *Dumpor*'s case (*j*) amounted to a total waiver of the covenant. This unreasonable doctrine though never overruled (*k*) was abrogated in England by secs. 1 and 2 of the Law of Property Amendment Act, 1859, now replaced by sec. 143 of the Law of Property Act, 1925. It has never been followed in India (*l*). Express waiver operates in the same way as implied waiver.

Lying by.—This is the third case put by Baron Bramwell in *Croft* v. *Lumley* (*m*) where the lessor having knowledge of the breach makes no election. Such lying by and witnessing the breach is no waiver, for some positive act must be done (*n*), either to give notice under sec. 111 (g) or to waive under this section. It matters not that the lessee spends money on the premises while the lessor is lying by (*o*). But long continued acquiescence in repeated breaches is evidence from which a waiver may be inferred (*p*).

Waiver of notice to quit.

113. A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

(*a*) *Jones* v. *Carter* (1846) 15 M. & W. 718; *Grimwood* v. *Moss* (1872) L. R. 7 C.P. 360; *Sergeant* v. *Nash Field & Co.* (1903) 2 K. B. 304; *Chengiah* v. *Rajah of Kalahasti* (1912) 24 Mad. L. J. 268, 15 I.C. 445.

(*b*) *Grimwood* v. *Moss*, *supra*.

(*c*) *Doe d. Morecraft* v. *Meux* (1824) 1 C. & P. 346; *Timmarsa* v. *Badiya* (1867) 2 Bom. H. C. 66.

(*d*) *Padmanabhaya* v. *Ranga* (1910) 34 Mad. 161, 6 I. C. 447; *Koragalva* v. *Jakri Beary* (1927) 52 Mad. L.J. 8, 99 I.C. 700, ('27) A.M. 261; *Tollman* v. *Portbury* (1872) L.R. 7 Q.B. 344; *Penton* v. *Barnett* (1898) 1 Q. B. 276; *Mazhoor Pudukudi* v. *Perandatta* (1911) 8 Mad. L. T. 99, 6 I. C. 264; *Upendranath* v. *Dhubeswar* (1931) 132 I.C. 875, (31) A.P. 240.

(*e*) *Evans* v. *Davis* (1878) 10 Ch. D. 747; *Moore* v. *Ullcoats Mining Co.* (1908) 1 Ch. 575.

(*f*) *Dulli Chand* v. *Meher Chand* (1867) 8 W.R. 138; *Raj Mohan* v. *Mati Lal* (1915) 22 Cal. L. J. 546, 33 I.C. 331.

(*g*) *Doe d. Baker* v. *Jones* (1850) 5 Exch. 498 and *Penton* v. *Barnett* (1898) 1 Q. B. 276 (both cases of covenants to repair); *Doe d. Muston* v. *Gladwin* (1845) 6 Q. B. 953 and *Price* v. *Worwood* (1859) 4 H. & N. 512 (both cases of covenants to keep insured); *Doe d. Ambler* v. *Woodbridge* (1829) 9 B. & C. 376 (not to use in a particular way).

(*h*) *Walrond* v. *Hawkins* (1875) L. R. 10 C.P. 342; *Griffin* v. *Tomkins* (1880) 42 L.T. 359.

(*i*) *Doe d. Boscawen* v. *Bliss* (1813) 4 Taunt. 735.

(*j*) (1603) 4 Co. Rep. 119a.

(*k*) See the remarks of Lord Mansfield in *Doe d. Boscawen* v. *Bliss*, *supra*.

(*l*) *Reasut Hossein* v. *Chorwar Singh* (1881) 7 Cal. 470.

(*m*) (1858) 6 H. L. C. 672.

Doe d. Sheppard v. *Allen* (1810) 3 Taun. 78.

Perry v. *Davis* (1858) 3 C. B. (N.S.) 769.

Kelsey v. *Dodd* (1881) 52 L.J. Ch. 34.

S. 113

Illustrations.

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

Waiver of notice to quit.—Waiver of notice to quit does not, like waiver of forfeiture, depend upon the election of one party, but upon the consent of both. Maule, J., in *Blyth* v. *Dennett* (q) said—

"There is this difference between a determination of a tenancy by a notice to quit and a forfeiture; in the former case, the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both: but, in the case of a forfeiture, the lease is voidable only at the election of the lessor: in the one case the estate continues, though voidable; in the other, the tenancy is at an end."

This distinction is manifested in the section by the words "with the express or implied consent of the person to whom the notice is given." Both the illustrations are of notices given by the lessor; and the consent of the lessee is implied in illustration (a) by his tender of rent, and in illustration (b) from his remaining in possession. As to the effect of giving a second notice to quit see the undernoted cases (r). In the last mentioned English case the effect of a second notice as a waiver of forfeiture has been distinguished from that of a second notice to quit after a tenancy has been determined by a first notice to quit.

Secs. 113 and 116 have not made the Indian law different from the English law on the question whether the acceptance of payments by the landlord after the notice to quit amounts to waiver of the notice (r).

Waiver of notice to quit operates in English law as an agreement to create a new tenancy to take effect at the expiry of the old tenancy (s). This section seems to regard waiver as an agreement to restore the old tenancy. But this is really a distinction without a difference. Under English law a surety is not liable after waiver of notice to quit because there is new tenancy (t). But under this section the result would be the same, for the surety's liability which had been determined by the notice to quit could not be extended without his consent.

There is a fundamental difference between a waiver of a forfeiture which is a matter which can be done at the election of the landlord alone and the waiver of notice to quit which proceeds on the basis of a new agreement between the landlord and the tenant. (See the observations in *Loewanthal* v. *Vanhonte, supra*). It is not in every case that the payment and acceptance of rent by the landlord after the notice to quit of necessity waives the notice. The question under sec, 113 is whether the act of the landlord (whether it is a receipt of the amount sent as rent or is the receipt of the amount sent without any statement at all) is one from which one can impute to the landlord the intention of creating a renewal of the tenancy or treating the tenancy as still subsisting is a question of fact (u).

In some cases it has been held that payment and acceptance of rent after the expiry of a notice to quit operates as a waiver of the notice and the lease subsists (v).

(q) (1853) 13 C. B. 178, 180.

(r) *Shiva Prasad* v. *Mandia Kumari* (1940) A.P. 478, 184 I.C. 686; *Loewanthal* v. *Vanhonte* (1947) 1 A.E.R. 116.

(s) *Tayleur* v. *Wildin* (1868) L. R. 3 Exch. 303.

(t) *Tayleur* v. *Wildin, supra.*

(u) *Navnit Lal* v. *Baburao* (1945) A.B. 132.

(v) *Bengal Nagpur Rly.* v. *Bal Mukunda* (1923) 80 I.C. 200, ('23) A.C. 663; *Keith Prowse & Co.* v. *National Telephone Co.* (1894) 2 Ch. 147 (only one day's rent).

Ss. 113, 114

But acceptance of rent for the period before the expiry of the notice does not operate as waiver (*w*). Nor is the acceptance of rent by mistake a waiver of the notice (*x*) Nor is there waiver if the payment is for compensation for use and occupation (*y*). The giving of a second notice to quit operates as a waiver, as it shows that the lessee may rightfully remain in possession after the expiry of the first notice (*z*). But the terms of the second notice may show that this was not the intention of the lessor, *e.g.*, if the notice is merely a demand for possession (*a*).

The fact of the lessee holding over without an agreement for a new tenancy does not operate as a waiver (*b*); nor the fact that the lessor as a matter of indulgence allows the lessee to continue in occupation after the expiry of the notice (*c*).

There is no proviso to the section corresponding to the second proviso to sec. 112, and the payment and acceptance, after suit filed, of rent subsequent to expiry of notice would operate as a waiver (*d*). But the inclusion in the suit of a claim to such rent would not have that effect (*e*), for a demand does not show consent.

Relief against forfeiture for non-payment of rent.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.—In England equity from very early times regarded a forfeiture clause for non-payment of rent as security for the rent, and granted relief whenever compensation could be given; and even the Courts of Common Law restrained actions for ejectment for non-payment of rent on the lessee bringing the rent into Court. Relief was given upon the principle that, as the right of entry was intended merely as security for the rent, the lessor thereby recovered full compensation and was put in the same situation as if rent had been paid to him when it was originally due (*f*). This equity was recognised by various statutes (*g*). Sec. 14 of the Conveyancing and Law of Property Act, 1881, now replaced by sec. 146 of the Law of Property Act, 1925, gives relief against forfeiture generally but does not apply to relief in respect of non-payment of rent. This section refers to non-payment of rent only while other cases of forfeiture are dealt with in the new sec. 114A.

(*w*) *Price* v. *Worwool* (1859) 4 H. & N. 512; *Mansar Ali* v. *Abdul Karim* (1908) 10 Cal. L. J. 187, 1 I.C. 753.
(*x*) *Maconochie* v. *Brand* (1946) 2 A.E.R. 779.
(*y*) *Doe d. Cheny* v. *Batten* (1775) 1 Cowp. 243.
(*z*) *Doe d. Brierly* v. *Palmer* (1812) 16 East. 53, 56.
(*a*) *Doe d. Godsell* v. *Inglish* (1810) 3 Taunt. 54; *Doe d. Digby* v. *Steel* (1811) 3 Camp. 115.
(*b*) *Gray* v. *Bompas* (1862) 11 C. B. (N. S.) 520.
(*c*) *Whiteacre d. Boult* v. *Symonds* (1808) 10 East. 13.
(*d*) *Manicklal* v. *Kadambini* (1926) 43 Cal. L. J. 272, 94 I.C. 156, ('26) A. C. 763.
(*e*) *Shah Wali* v. *Hussaini Begam* (1917) 2 Pat. L. J. 595, 42 I. C. 655.
(*f*) *Dhurrumtola Properties Ltd.* v. *Dhunbai* (1931) 58 Cal. 311, 132 I.C. 87, ('31) A.C. 457; *Peachy* v. *Duke of Somerset* (1724) 1 Str. 447, 2 Wh. & Tud. 979.
(*g*) The Landlord and Tenant Act, 1730 (4 Geo. 2 c. 28); the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76); the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126); (s. 46 (4) as to vesting orders only) and Supreme Court of Judicature (Consolidation) Act, 1925, s. 46; the Law of Property Act, 1925 (15 Geo. 5 c. 20).

S. 114

Relief against forfeiture for non-payment of rent was given in India before the Act (*h*). It is given in leases to which the Act is not applicable (*i*); and it is recognised in various Acts referring to agricultural holdings (*j*).

There is no distinction between a clause of nullity and a condition of forfeiture. A lease under the old sec. 111 (g) provided that on failure to pay three instalments of rent the lease should be null and void. This was treated as a case of forfeiture for non-payment of rent and relief was given under this section (*k*).

The principle of the section has been applied in the Punjab (*l*); and also to agricultural leases (*m*).

At the hearing.—Under the English statutes the lessee may apply for relief not only at the hearing, but within six months of the execution of the decree in ejectment (*n*); but under this section the lessee must apply at the hearing of the suit. As an appeal is a continuation of the suit the lessee may pay or tender even in second appeal (*o*). The section does not refer to tender of rent before suit filed; but such tender would be ground for relief, and if the lessor nevertheless files a suit in ejectment he does so at his own risk as to costs (*p*). Deposit of standard rent with the Rent Controller under the Calcutta Rent Act (Bengal Act 3 of 1920) has been held to entitle a tenant to relief against forfeiture (*q*). Having regard to the practice on the original side of the Bombay and Calcutta High Courts it will be difficult, if not impossible, for the tenant to comply strictly with the provision of this section, for the costs cannot possibly be paid or tendered at the hearing or even within 15 days, as they have to be ascertained on taxation which takes considerable time. It is submitted the Court will construe the section liberally and direct that security be given for payment of the costs within fifteen days after the costs are taxed and allocatur issued.

Conditions of relief.—The lessee is put on terms to make full compensation to the lessor, *i.e.*, he must pay all rent in arrear with interest and full costs of the lessor's suit (*r*); or if he does not pay he must give security for payment within fifteen days. The Madras High Court has held that he must pay arrears of rent even though they are time-barred (*s*). Rent in arrear means rent in arrear up to the date when relief from forfeiture is allowed (*t*).

The relief is discretionary, and in some cases it has been refused on the ground that the lessee made no tender in the lower Court and set up a false plea of discharge (*u*). But in a case before the Act the Privy Council gave relief in spite of a false defence (*v*). The proper rule seems to be that if at the time the relief is asked for, the position has been

(*h*) *Timmarsa* v. *Badiya* (1865) 2 Bom. H.C. 66; *Kottal Uppi* v. *Edavalath* (1871) 6 Mad. H. C. 258; *Alum Chunder* v. *Moran* (1864) W.R. Gap. No. (Act 10 Rulings) 31; *Ablakh Rai* v. *Salim Ahmad* (1879) 2 All. 437.

(*i*) *Subbaraya* v. *Krishna* (1883) 6 Mad. 159, 164; *Narayana* v. *Narayana* (1883) 6 Mad. 327; *Jamsedji* v. *Lakshmiram* (1889) 13 Bom. 323; *Vaguran* v. *Rangayyangar* (1892) 15 Mad. 125.

(*j*) *Duli Chand* v. *Meher Chand* (1874) 12 Beng. L.R. 439 P.C. (Act 10 of 1859); *Mothoora Mohun* v. *Ram Lall* (1879) 4 Cal. L.R. 469 (Beng. Act of 1869); *Mahomed Ameer* v. *Peryag Singh* (1881) 7 Cal. 566.

(*k*) *Hiranandan Ojha* v. *Ramdhar Singh* (1922) 1 Pat. 363, 69 I.C. 886, ('22) A.P. 528.

(*l*) *Kallan* v. *Jawahar Singh* (1924) 5 Lah. L.J. 99, 71 I.C. 837, ('24) A.L. 49.

(*m*) *Ramkrishna* v. *Fernandez* (1927) 98 I.C. 851, ('27) A.M. 239; *Shri Krishanlal* v. *Ramnath* (1944) A.N. 229.

(*n*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 126), s. 210.

(*o*) *Ramakrishna* v. *Baburaya* (1912) 23 Mad. L.J. 715, 24 I.C. 139; *Thirthaswamiar* v. *Rangappayya* (1913) 25 Mad. L.J. 486, 21 I.C. 405; *Shri Kishanlal* v. *Ramnath* (1944) A.N. 229.

(*p*) *Krishnasami* v. *Natal Emigration Board* (1894) 17 Mad. 216.

(*q*) *Ahindra Nath* v. *Twiss* (1922) 49 Cal. 150, 70 I.C. 75, ('22) A.C. 394.

(*r*) *Kundanlal* v. *Kallu* (1914) 12 All. L.J. 650, 24 I.C. 79.

(*s*) *Vasudeva* v. *Krishna* (1921) 44 Mad. 629, 62 I.C. 593, ('21) A.M. 418; *Vaman Pai* v. *Venkata Naika* (1936) A.M. 116, (1936) M.W.N. 83, 160 I.C. 530.

(*t*) *Dhurrumtolla Properties Ltd.* v. *Dhunbai* (1931) 58 Cal. 311, 132 I.C. 87, ('31) A.C. 457; *Howard* v. *Fanshawe* (1895) 2 Ch. 581.

(*u*) *Narayan* v. *Handu* (1905) 15 Mad. L.J. 210; *Mahalakshmi* v. *Lakshmi* (1911) 21 Mad. L.J. 960, 12 I.C. 456. But see *Ramakrishna* v. *Baburaya* (1912) 23 Mad. L.J. 715, 24 I.C. 139.

(*v*) *Duli Chand* v. *Meher Chand*, *supra*.

Ss. 114, 114A

altered so that relief cannot be given without causing injury to third parties, relief will be refused (w). But if the position is not altered so that no injustice will be done, there is no real discretion and the Court should make the order (x).

Consent decree.—If the terms of the lease are embodied in a consent decree the Court executing the decree has power under this section to grant relief from forfeiture (y). But such relief cannot be granted in connection with decrees other than consent decrees (z).

Period of grace.—When the lease allows a period of grace after due date for the payment of rent, the Madras High Court at one time held that the provision for forfeiture was not penal and that the lessee was not entitled to relief (a). The Bombay High Court refuses to treat this as an inflexible rule (b). It is obvious that such a rule might be a means of defeating the equity of relief and the Madras High Court has repudiated it (c).

Extension of time by Court.—In England it has recently been held that where an order for relief against forfeiture of a lease is granted to a tenant on terms to be performed within a specified time, the Court has jurisdiction to extend that time if circumstances are brought to its notice which would make it just and equitable that extension should be granted (d). It is not quite clear whether, in view of the express terms of the section requiring payment at the hearing or within fifteen days the Courts in India can, in a case governed by the Act, extend the time.

Sub-lessee.—The assignee has the same right to relief under this section as the lessee. In England the right to relief is given to the "tenant" and his assigns (e). It therefore extends to a mortgagee or underlessee (f). The Allahabad High Court has given a sub-lessee the benefit of this section (g).

Relief against forfeiture in certain other cases.

114A. *Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—*

(a) *specifying the particular breach complained of; and*

(b) *if the breach is capable of remedy, requiring the lessee to remedy the breach;*

(w) *Stanhope* v. *Haworth* (1886) 3 T.L.R. 34.

(x) *Newbolt* v. *Bingham* (1895) 72 L.T. 852; *Debendra Lal* v. *Cohen* (1927) 54 Cal. 485, 10? I.C. 47?, ('27) A.C. 908.

(y) *Nagappa* v. *Venkat Rao* (1904) 24 Mad. 265; *Krishnabai* v. *Hari Govind* (1907) 31 Bom. 15, overruling *Shirekuli* v. *Mahablya* (1886) 10 Bom. 435; *Balambhat* v. *Vinayak* (1911) 35 Bom. 239, 10 I.C. 746.

(z) *Girdharadoss & Co.* v. *Appadurai* (1928) 51 Mad. 157, 107 I.C. 792, ('28) A.M. 193.

(a) *Naraina* v. *Vasudeva* (1905) 28 Mad. 389; *Adhiragi Chetty* v. *Billa Tyampu* (1910) 20 Mad. L.J. 944, 6 I.C. 438; *Mahalakshmi* v. *Lakshmi* (1911) 21 Mad. L.J. 960, 12 I.C. 456; *Narayan* v. *Handu* (1905) 15 Mad. L.J. 210.

(b) *Krishnaji* v. *Sitaram* (1921) 45 Bom. 300, 59 I.C. 769, ('21) A.B. 403.

(c) *Appayya Shetty* v. *Mahammad Beari* (1916) 39 Mad. 834, 30 I.C. 596; *Ramabrahmam* v. *Rami Reddi* (1928) 108 I.C. 273, ('28) A.M. 250.

(d) *Chandless-Chandless* v. *Nicholson* (1942) 2 K.B. 321.

(e) Common Law Procedure Act, 1852, s. 212, see also as to vesting s. 146 (4) of the Law of Property Act, 1925.

(f) *Hare* v. *Elms* (1893) 1 Q.B. 604; *Moore* v. *Smee & Cornish* (1907) 2 K.B. 8; *Vaman Pai* v. *Venkata Naika*, see *supra*.

(g) *Ahmad Husain* v. *Riaz Ahmad* (1914) 12 All. L.J. 1085, 25 I.C. 186.

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy. **S. 114A.**

Nothing in this section shall apply to an express condition against the assigning, underletting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

Relief against forfeiture.—This section was inserted by the Amending Act 20 of 1929. It provides for relief against forfeiture in certain other cases besides non payment of rent, *e.g.*, for breach of covenant to repair or for breach of covenant to insure. Before the enactment of the section, relief was not granted in the case of a breach of a covenant to repair (*h*).

The section does not apply to a breach of the covenant to pay rent, for that is the subject of sec. 114.

The section does not apply to forfeiture for disclaimer. There is no power to relieve against forfeiture for disclaimer (*i*). But in the case last cited it was said that the Court would have such power if the disclaimer were occasioned by fraud, accident or mistake. This was *obiter*, and there is another *obiter dictum* in a Bombay case (*j*) to the effect that in very special cases a Court might relieve against forfeiture for disclaimer even when the disclaimer was not occasioned by fraud, accident or mistake of the landlord.

The section does not apply to forfeiture for breaches of covenants which have the effect of creating a subordinate interest such as assigning, underletting, parting with possession, or disposing of the property leased. A similar exception was made in sec. 14 (6) (i) of the Conveyancing and Law of Property Act, 1881, but has been removed by sec. 146 (8) of the Law of Property Act, 1925, as from the 1st January 1926. Before that date no relief was given in English law against forfeiture for such breaches either by statute (*k*) or in equity (*l*). In the case of an agricultural tenancy relief against forfeiture for breach of a covenant against assignment was refused by the Madras High Court (*m*); but was granted by the Bombay High Court where the lessee gave a mortgage in breach of a covenant against alienation (*n*).

The section is modelled on sec. 146 of the Law of Property Act, 1925, which re-enacts with some variations, sec. 14 of the Conveyancing and Law of Property Act, 1881.

The effect of the section is that the lessee by remedying the breach prevents the enforcement of the forfeiture, and he is not liable for the lessor's costs (*o*) as he is under sec. 114. If the Court were satisfied that the lessee had complied with the terms of the section the lessor's suit for eviction would be dismissed with costs.

In the case of forfeiture one written notice is required under the law and not one under sec. 111 (g) and another under sec. 114A (*p*).

(*h*) *Debendra Lal* v. *Cohen* (1927) 54 Cal. 485, 106 I.C. 47, ('27) A.C. 908.

(*i*) *Kemalooti* v. *Muhamed* (1918) 41 Mad. 629, 45 I.C. 743.

(*j*) *Rachotappa* v. *Konher Deshpande* (1934) 59 Bom. 194, 36 Bom. L.R. 1083, 155 I.C. 516, ('35) A.B. 41.

(*k*) *Barrow* v. *Isaacs & Son* (1891) 1 Q.B. 417 C.A.; *Eastern Telegraph Co.* v. *Dent* (1899) 1 Q.B. 835.

(*l*) *Hill* v. *Barclay* (1811) 18 Ves. 56, 63.

(*m*) *Krishna Shetti* v. *Gilbert Pinto* (1919) 42 Mad. 654, 50 I.C. 899.

(*n*) *Mallappa* v. *Janardan* (1926) 50 Bom. 450, 94 I.C. 1054, ('26) A.B. 304.

(*o*) *Nind* v. *Nineteenth Century Building Society* (1894) 2 Q.B. 226 C.A.; but see now Law of Property Act, 1925, sec. 146 (3).

(*p*) *Prabhat Chandra* v. *Bengal Central Bank* (1938) A.C. 589.

S. 115

Effect of surrender and forfeiture on underleases.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an underlease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such underleases, except where such forfeiture has been procured by the lessor in fraud of the underlessees, or relief against the forfeiture is granted under section 114.

Effect of surrender on underleases.—Surrender, being a voluntary act the principle applies that the lessee cannot derogate from his own grant. He cannot by surrender to the lessor destroy the rights that he has created in the sublessee. (*q*). The surrender, therefore, operates as a grant subject to the rights of the sublessee. In other words the lessee can only give title to his lessor by a surrender to the same extent as he could give to another person by an assignment (*r*). For the same reason an execution creditor of the lessee cannot attach the sublessee's interest, for all that he can proceed against is the interest of his judgment-debtor (*s*). The position is the same when on the bankruptcy of the lessee his trustee in bankruptcy disclaims the lease and such disclaimer does not affect the sublessee's rights (*t*). When the lessee surrenders to the lessor, the sublessee, therefore, becomes a lessee of the lessor on the terms of the sub-lease. But if the surrender is made for the purpose of obtaining a new lease, the sublessee continues to hold under the lessee (*u*).

There is in England a similar provision in sec. 6 of the Landlord and Tenant Act, 1730, now re-enacted in sec. 150 of the Law of Property Act, 1925.

The same rule has been enforced in India before the Act (*v*), and in the case of agricultural tenancies (*w*). Relinquishment by a patnidar of his interest does not affect subordinate interests (*x*). On the same principle if an occupancy tenant mortgages his tenancy and then surrenders it to the zemindar, the surrender will not prejudice the rights of the mortgagee (*y*).

Effect of forfeiture on underlease.—If the lease is terminated by forfeiture *in invitum* the lessee, the principle that the lessee cannot derogate from his grant does not apply. In *Great Western Railway Co.* v. *Smith* (*z*) Mellish, L.J., said—" It is a rule of

(*q*) *Suleman Haji* v. *Darab Shaw* (1939) Bom. 144, 41 Bom. L.R. 125, 180 I.C. 945, (1939) A.B. 98.

(*r*) *Walter* v. *Yalden* (1902) 2 K.B. 304, 310.

(*s*) *Vishnu Atmaram* v. *Anant Vishnu* (1890) 14 Bom. 384.

(*t*) *In re Finley* (1888) 21 Q.B.D. 475; Thompson and Cottrell's Contract (1943) 1 Ch. 97.

(*u*) *Doe d. Palk* v. *Marchetti* (1831) 1 B. & Ad. 715, 721; *Suleman Haji* v. *Darab Shaw*, see *supra*.

(*v*) *Heeramonee* v. *Gungánarain* (1868) 10 W.R. 384; *Nehaloonissa* v. *Dhunnoo Lall* (1870) 13 W.R. 281.

(*w*) *Badri Prasad* v. *Sheodhian* (1896) 18 All. 354; *Mohsenuddin* v. *Bhagaban Chandra* (1921) 48 Cal. 605, 25 Cal. W.N. 29, 61 I.C. 443, ('21) A.C. 444 F.B.

(*x*) *Judoonath* v. *Schoene Kilburn & Co.* (1884) 9 Cal. 671.

(*y*) *Rannu Rai* v. *Rafi-ud-din* (1905) 27 All. 82; *Brij Kumar* v. *Sheo Kumar* (1915) 37 All. 444, 29 I.C. 215 F.B.; *Chhiddu* v. *Sheo Mangal Singh* (1917) 39 All. 186, 39 I.C. 585; *Kenchadi Lal* v. *Jabarsha* (1936) A.N. 171.

(*z*) (1876) 2 Ch. D. 235, 253.

law that if there is a lessee, and he has created an underlease, or any other legal interest, if the lease is forfeited, then the underlessee, or the person who claims under the lessee loses his estate as well as the lessee himself; but if the lessee surrenders he cannot by his own voluntary act in surrendering, prejudice the estate of the underlessee, or the person who claims under him." In a case of forfeiture the sublease falls with the lease from which it is derived. Thus forfeiture of a lease destroys also the rights of the sublessee (a) and in a suit for the eviction of the lessee there is no need to implead or even to inform the sublessee (b); and the decree in ejectment of the lessee can be executed against the sublessee although he was not a party (c). This is true of all derivative interests such as leases and mortgages created by the lessee (d); but if by the terms of the lease the lessee is authorized to mortgage his interest, the lease should not be extinguished without giving the mortgagee an opportunity to prevent the extinction (e).

If the forfeiture is a collusive proceeding between the lessor and the lessee, this fraudulent practice will not affect the sub-lessee. Moreover if the forfeiture is relieved against the sublessee also gets the benefit of the continuance of the lease. The Allahabad High Court has held that the sublessee can himself claim relief agaist forfeiture (f). As to England see note "Sublessee" under sec. 114.

116. If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Effect of holding over.

Illustrations.

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C*'s lease is renewed from month to month.

(b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A*'s assent. *B*'s lease is renewed from year to year.

Holding over.—The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind (g). If the lessee remains in possession after the determination of the term, the common law rule is that he is a tenant on sufferance (h). The expression "holding over" is used in the sense of retaining possession. A distinction should be drawn between a tenant continuing in possession after the determination of the lease, without the consent of the landlord and a tenant doing so with the landlords' consent. The former is called a tenant by sufferance in the language of the English law

(a) *Great Western Rly. Co.* v. *Smith* (1876) 2 Ch. D. 235, 253; *Timmappa* v. *Ramo Venkanna* (1897) 21 Bom. 311; *Ramkissendas* v. *Binjraj* (1923) 50 Cal. 419, 77 I.C. 910, ('23) A.C. 691. See also *Madhusudan Mahton* v. *Midnapore Zemindari Co.* (1918) 45 Cal. 940, 46 I.C. 129

(b) *Ramkissendas* v. *Binjraj*, *supra*; *Egerton* v. *Jones* (1939) 2 K.B. 702.

(c) *Sheikh Yusuf* v. *Jyotish Chandra* (1932) 59 Cal. 739, 35 Cal. W.N. 1132, 137 I.C. 129, ('32) A.C. 241, dissenting from *Ezra* v. *Gubbay* (1920) 47 Cal. 907, 60 I.C. 969.

(d) *Khiali Ram* v. *Nathu Lal* (1893) 15 All. 219, 230.

(e) *Bahadur* v. *Raja Moti Chand* (1925) 47 All. 589, 88 I.C. 224, ('25) A.A. 580.

(f) *Ahmad Husain* v. *Riaz Ahmad* (1914) 12 All. L.J. 1085, 25 I.C. 186.

(g) *Gopal Chandra* v. *Khater Karikar* (1930) 33 Cal. W.N. 1207, 125 I.C. 654, ('30) A.C. 262.

(h) *Kundan Lal* v. *Deepchand* (1933) 1933 All. L.J. 682, 146 I.C. 762, ('33) A.A. 756.

S. 116

and the latter class of tenants is called a tenant holding over or a tenant at will (*i*). It is submitted, in view of the concluding words of the section, that a lessee holding over with the consent of the lessor is in a better position than a mere tenant at will. The tenancy on sufferance was converted into a tenancy at will by the assent of the landlord, but the relationship of landlord and tenant was not established until the rent was paid and accepted. But the common law admitted an exception in the case of a lease for a year, and a tenant for a year holding over with the consent of the landlord became a tenant from year to year (*j*).

This tacit renovation of the tenancy is enacted in this section and it only requires the consent of the landlord to continue the tenancy (*k*); and the relationship of landlord and tenant may be created before payment of rent. The doctrine of holding over, however, does not apply to a person who has never been in occupation as a tentant (*l*).

Illustration.

A leased a godown to *B* for a term expiring on the 20th October 1923. *B* wrote that he would vacate the godown on the 30th October 1923. *A* replied that in that case he would require a proper notice to quit. *B* gave no notice but vacated the godown on the 26th October 1923 and claimed to be liable for 6 days' rent as compensation for use and occupation. But *A*'s demand for a notice was an assent to *B*'s continuing in possession and *B* was after the 20th October a monthly tenant. *B* was therefore liable for two months' rent, one month from the 20th October plus one month in default of notice, one month being the period of notice required by usage: *Meghji* v. *Dayalji* (1924) 48 Bom. 341, 80 I.C. 507, ('24) A.B. 322.

The rule enacted in this section was followed before the Act (*m*). In the undernoted case (*n*), a tenant under a yearly lease was held at the expiry of the term to have become by payment of rent a tenant from month to month as the lease was not for an agricultural or manufacturing purpose. A tenant holding over as a tenant from month to month is entitled to notice to quit of fifteen days expiring with the end of each month of the tenancy and the day on which each month expires is calculated according to the rule in sec. 110 of this Act (*o*).

Oral lease.—An oral lease for more than one year if accompanied by delivery of possession is valid for one year and the lessee continuing in possession thereafter with the assent of the lessor becomes a tenant by holding over (*p*).

Assents to his continuing in possession.—The assent of the lessor may be inferred from the acceptance of rent (*q*); or a demand for rent (*r*); or a suit for rent (*s*); or an agreement as to an item in an account for rent (*t*); or the grant of an invalid lease (*u*). But

(*i*) *Punjab National Bank* v. *Chaudhary* (1943) 210 I.C. 626, (1943) A.O. 392.

(*j*) *Right d. Flower* v. *Darby* (1786) 1 Term Rep. 159; *Dougal* v. *McCarthy* (1893) 1 Q.B. 736 C.A.

(*k*) *Solaiman* v. *Jatindranath* (1930) 57 Cal. 538, 33 Cal. W.N. 1199, 123 I.C. 268, ('29) A.C. 553.

(*l*) *Syed Nawab Ali* v. *Mohammad Ramzan* (1944) A.N. 141.

(*m*) *Sheikh Enayutoolah* v. *Elaheebuksh* (1864) W.R. Gap. No. (Act 10 of 1859 rulings) 42; *Nocoordass* v. *Jewraj* (1874) 12 Beng. L.R. 263; *Ram Khelawun* v. *Soondra* (1867) 7 W. R. 152; *Sayaji* v. *Umaji* (1867) 3 Bom. H.C. 27 A.C.; *Chaturi Singh* v. *Makund Lall* (1881) 7 Cal. 710.

(*n*) *Secretary of State* v. *Madhu Sudan Mukerji* (1932) 36 Cal. W.N. 918, 141 I.C. 833, ('32) A.C. 260.

(*o*) *Benoy Krishna Das* v. *Salsiccioni* (1933) 59 I.A. 414, 60 Cal. 389, 37 Cal. W.N. 1, 56 Cal. L.J. 319, 63 Mad. L.J. 685, 1933 All. L.J. 423, 35 Bom. L.R. 6, 141 I.C. 514, ('32) A.PC. 279; *Susil Chunder Neogy* v. *Birendrajit Shaw* (1934) 38 Cal. W.N. 782, 153 I.C. 673, ('34) A.C. 837.

(*p*) *Alauddin Ahmed* v. *Aziz Ahmad* (1934) 148 I.C. 684, ('34) A.P. 369 affirming 144 I.C. 785, ('33) A.P. 482; *Mohammad Mosa* v. *Joganand Singh* (1913) 20 I.C. 715.

(*q*) *Bishop* v. *Howard* (1832) 2 B. & C. 100; *Finch* v. *Miller* (1848) 5 C.B. 428; *Hyatt* v. *Griffiths* (1851) 17 Q.B. 505; *Dougal* [illegible] A. C. 524; *Har Nath* v. *Mohar Singh* (1931) 32 Punj. L. R. 469, ('31) A.L. 675.

(*r*) *Dougal* v. *McCarthy*, *supra*.

(*s*) *Balaji* v. *Ramchandra* (1903) 27 Bom. 262.

(*t*) *Cox* v. *Bent* (1828) 5 Bing. 185.

(*u*) *Mitarjit* v. *Sheikh Leakut* (1914) 18 Cal. W. N. 858, 23 I.C. 318.

these circumstances only create a presumption which may be rebutted. Thus the lessor may show that he accepted the rent in ignorance of the fact that the tenancy had terminated (*v*). No implication of a holding over arises therefore in the case of a repudiating tenant (*w*); and if the tenant holds over against the wish of the landlord he is liable for damages as a trespasser (*x*). See note " Damages " under sec. 108 (q) and note " Double value " *infra.*

The assent of the lessor cannot be inferred merely from his delay in taking steps to evict the lessee (*y*). But in a case where the tenant retained possession for eleven years after the expiration of the lease, the Court inferred that there was a tenancy by holding over (*z*). The mere fact of service of notice to quit on a tenant who continues in occupation is not an assent or recognition of the tenancy (*a*).

If there are several lessors who are tenants in common, payment to some of their share of the rent will not constitute a tenancy as regards the others, who will therefore be entitled to evict without notice to quit (*b*); and on the other hand if there are several essees and some only hold over without the consent of the others, those not holding over cannot be made liable for rent (*c*).

Again as there is no privity of contract between the lessor and the heirs of the lessee the heirs if they continue in possession after the expiry of the lease cannot become tenants by holding over. The new tenancy must be created by the consent of both sides otherwise the heirs are trespassers (*d*). For the same reason sec. 116 cannot apply to a lease for life (*e*). When the heirs of a lessee for life paid rent to a mortgagee of the lessor in order to support their claim that the leasehold was hereditary and the lessor subsequently refused to accept rent except in the name of the lessee, the Privy Council held that there was no implied assent to the continuance of the tenancy (*f*).

Agreement to the contrary.—An agreement to the contrary is an agreement which settles the terms of the holding over (*g*). If there is such an express agreement, it will determine the duration and terms of the renewed lease. In the Privy Council case last cited (*h*) the expression " agreement to the contrary " was used in a different sense. The heirs of a lessee for life continued in possession and paid rent which the lessor accepted giving receipts in the name of the original lessee. But when the heir demanded receipts in their own names the lessor refused to accept the rent. The Privy Council said that this was an agreement to the contrary which prevented the application of the section, meaning that the refusal to give a receipt in the name of the heir rebutted the presumption of assent to the holding over. Their Lordships' judgment referred to the principle of the section, for the lease being a lease for the life of the lessee there could be no question of holding over.

(*v*) *Doe d. Lord* v. *Crago* (1848) 6 C.B. 90, 98.

(*w*) *Gokul Chand* v. *Shib Charan* (1911) 9 All. L.J. 574, 13 I.C. 59; *Sujjad Ahamed* v. *Ganga Charan* (1905) 9 Cal. W.N. 460.

(*x*) *Mackintosh* v. *Gopee Mohun* (1868) 4 W. R. 24; *Ram Sunder* v. *Bataso Kuer* (1935) 155 I.C. 367, ('35) A.P. 271.

(*y*) *Ratan Lal* v. *Farshi Bibi* (1907) 34 Cal. 396 *Govindasawmi* v. *Ramaswami* (1916) 30 Mad. L.J. 492, 34 I.C. 6.

(*z*) *Munshi Safar Ali* v. *Abdul Majid* (1927) 31 Cal. W. N. 282, 100 I. C. 614, ('27) A.C. 279; *Chaturbhuja* v. *Gopal Dolai* (1915) 18 I.C. 448.

(*a*) *Doe d. Godsell* v. *Inglis* (1810) 3 Taunt. 54; *Paramananda Singh* v. *Syjou Singh* (1916) 24 Cal. L.J. 30, 37 I.C. 201.

(*b*) *Monmohan* v. *Hatem Makbul* (1919) 29 Cal. L.J. 473, 49 I.C. 245.

(*c*) *Brojo Lal Roy* v. *Belchambers* (1904) 9 Cal. W.N. 340.

(*d*) *Adimulam* v. *Pir Ravuthan* (1885) 8 Mad. 424, 427; *Vadapalli* v. *Dronamraju* (1908) 31 Mad. 163.

(*e*) *Ram Rachhyya Singh* v. *Kumar Kamakhya Narayan Singh* (1925) 4 Pat. 139, 84 I.C. 586, ('25) A.P. 216.

(*f*) *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (1928) 7 Pat. 649, 55 I.A. 212, 109 I.C. 663, ('28) A.PC. 146.

(*g*) *Govinda Chandra* v. *Dwarka Nath* (1915) 19 Cal. W.N. 489, 26 I.C. 962; *Troilokya Nath* v. *Sarat Chandra* (1905) 32 Cal. 123, 127; *Dasarathi Kumar* v. *Sarat Chandra* (1934) 37 Cal. W. N. 971, 149 I.C. 722, ('34) A.C. 135; *Mati Lal* v. *Darjeeling Municipality* (1913) 17 Cal. L.J. 167, 18 I.C. 844.

(*h*) *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (1928) 7 Pat. 649, 55 I.A. 212, 109 I.C. 663, ('28) A.PC. 146.

S. 116

Whether there is an implied assent or not is a question of fact (*i*). If there is an assent by implication, the lease is renewed from month to month or year to year according to sec. 106 (*j*). An agricultural tenant who holds over is a tenant from year to year (*k*); and so is a tenant who holds over for manufacturing purposes (*l*). The lessee of premises for purposes other than agriculture or manufacture holds over as a monthly tenant (*m*).

Terms of holding over.—If there is no agreement fixing the terms of the new lease the implied tenancy is in English law subject to such of the terms of the old lease as are applicable to a yearly or monthly tenancy (*n*). In *Digby* v. *Atkinson* (*o*) Lord Ellenborough said: "Where the tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation." This has been explained in *Hyatt* v. *Griffiths* (*p*) to mean not merely the terms which are necessarily incident to a yearly or monthly tenancy, but the terms, which may be incident to such a tenure. This rule has been followed in Indian cases, for the word "renewed" shows that there is no new contract of tenancy (*q*). The lessee holding over with the assent of the lessor acquires an interest which he can assign and which the lessor can determine by notice to quit (*r*).

The following are some terms which in England have been held to apply in the case of a tenancy by holding over:—a covenant to pay rent in advance (*s*), or to repair (*t*), or a proviso for re-entry for non-payment of rent (*u*) or a covenant as to the user of the premises (*v*).

Legal representative.—This term refers to a person who occupies the same position as the lessor; it would include an assignee of the lessor but not an underlessee (*w*).

Underlessee.—The rule as to holding over applies equally to a sublessee. If a sublessee holds over, he is a tenant on sufferance until the tenancy is renewed by the assent of the lessee. The case last cited is an instance of a sublessee holding over.

Mortgage by tenant holding over.—A mortgagee is entitled for the purposes of his security to a renewed lease under sec. 71. It has therefore been held that a tenant holding over with the assent of his landlord can effect a valid mortgage of the leasehold by deposit of the lease deed although the term of the original letting has expired (*x*).

(*i*) *Finlay* v. *Bristol and Exeter Railway Co.* (1852) 7 Exch. 409.

(*j*) *Durgi Nikarini* v. *Gobordhan Bose* (1915) 19 Cal. W.N. 525, 24 I.C. 183, citing *Digby* v. *Atkinson* (1815) 4 Camp. 275; *Troilokya Nath* v. *Sarat Chandra* (1905) 32 Cal. 123; *Mati Lal* v. *Darjeeling Municipality, supra*; *Ram Prosad* v. *Debi Prosad* (1919) 49 I.C. 974, 61 I.C. 503.

(*k*) *Administrator General* v. *Asraf Ali* (1901) 28 Cal. 227; *Manilal* v. *Nandlal* (1920) 22 Bom. L.R. 133, 55 I.C. 610; *Mahammad Ayejuddin* v. *Prodyat Kumar* (1921) 48 Cal. 359, 377, 61 I.C. 503, ('21) A.C. 741; *Stonewegg* v. *Rameshwar* (1923) 71 I.C. 1022, ('23) A.P. 340; *Ram Lochan Baid* v. *Kumar Kamakhya* (1923) 71 I.C. 570, ('23) A.P. 201.

(*l*) *Jacks & Co.* v. *Joosab* (1921) 48 Bom. 38, 82 I.C. 791, ('24) A.B. 115.

(*m*) *Troilokya Nath* v. *Sarat Chandra, supra*; *Bijay* v. *Howrah Amta Light Rly.* (1923) 38 Cal. L.J., 177, 72 I.C. 98, ('23) A.C. 524; *Meghji* v. *Dayalji* (1924) 48 Bom. 341, 80 I.C. 507, ('24) A.B. 322; *Muharram Ali* v. *Bansi Lal* (1919) P.R. 34, 51 I.C. 121; *Ram Prasad* v. *Debi Prosad* (1919) 49 I.C. 974; *Manmatha Nath* v. *Peary Mohan* (1919) 23 Cal. W.N. 596, 52 I.C. 180.

(*n*) *Badal* v. *Ram Bharosa* (1938) 178 I.C. 986, (1938) A.A. 649; *Ranga Swami* v. *Jainabu* (1942) A.M. 507.

(*o*) (1815) 4 Camp. 275, 278.

(*p*) (1851) 17 Q.B. 505; *Wedd* v. *Porter* (1916) 2 K.B. 91.

(*q*) *Baijnath Prosad* v. *Raghunath Rai* (1911) 16 Cal. W.N. 496, 14 I.C. 817; *Moore* v. *Makhan* (1919) 53 I.C. 180; *Khuda Baksh* v. *Abid Husain* (1909) 12 O.C. 279, 3 I.C. 873.

(*r*) *Bengal National Bank* v. *Janaki Nath Roy* (1927) 54 Cal. 813, 827, 104 I.C. 484, ('27) A.C. 725.

(*s*) *Lee* v. *Smith* (1854) 9 Exch. 662; *Finch* v. *Miller* (1848) 5 C.B. 428.

(*t*) *Digby* v. *Atkinson, supra*; *Wyatt* v. *Cole* (1877) 36 L.T. 613; cf. *Chaturbhuj* v. *Bennett* (1905) 29 Bom. 323, 344.

(*u*) *Thomas* v. *Packer* (1857) 1 H. & N. 669.

(*v*) *Sanders* v. *Karnell* (1858) 1 F. & F. 356.

(*w*) *Durji Nikarini* v. *Gobardhan Bose* (1915) 19 Cal. W.N. 525, 24 I.C. 183.

(*x*) *Villa* v. *Petley* (1934) 148 I.C. 721, ('34) A.R. 51.

Ss. 116, 117

Double value.—Under an English statute (y) a tenant contumaciously holding over, *i.e.*, remaining in possession knowing that he has no right to keep possession (z), was liable to pay compensation at double the yearly value of the premises. This rule has no application in India, but it has been taken as a guide, in the Punjab, in the assessment of damages to be awarded to a lessor when the lessee contumaciously holds over (a).

Exception of leases for agricultural purposes

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the Provincial Government * * * may, by notification published in the official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

Amendments.—After the words "Local Government" the words "with the previous sanction of the Governor-General in Council" were omitted by the devolution Act 38 of 1920. The words "in the case of all or any of such leases" were inserted by the amending Act 6 of 1904.

Agricultural leases.—These leases are exempted from the operation of this chapter because the rights of the parties are regulated by usages which have to a great extent been embodied in local Acts. Thus in tenancies governed by the Bengal Landlord and Tenant Procedure Act, Beng. Act 8 of 1869, reasonable notice to quit, not necessarily determining the tenancy at the end of the year, is sufficient (b). The Legislature has abstained from making the sections of this chapter apply *proprio vigore* for fear of interfering with settled usages (c). But in the absence of any local Act, or custom, or of any special reason to the contrary, the principles of English law as reproduced by this Act are applied to agricultural leases (d). Thus the principles of sec. 108 (j) as to assignment (e), of sec. 111 (g) as to forfeiture (f), of sec. 114 as to relief against forfeiture (g), and of sec. 116 as to holding over (h) and of sec. 108 (c) as to the covenant for quiet enjoyment (i) have been held to apply. But an agricultural tenant erecting buildings on the land does not necessarily incur a forfeiture (j).

Oral leases valid.—Section 107 does not apply to agricultural leases. An agricultural lease may therefore be made orally (k). If made in writing an agricultural lease

(y) Landlord and Tenant Act, 1730 (4 Geo. 2 c. 28) s. 1.

(z) *Wright* v. *Smith* (1805) 5 Esp. 203.

(a) *Sunder Singh* v. *Ram Saran Das* (1933) 14 Lah. 187, 142 I.C. 754, ('33) A.L. 61; *Narain Das* v. *Dharam Das* (1932) 13 Lah. 216, 138 I.C. 290, ('32) A.L. 275.

(b) *Nabinchandra Chakrabarti* v. *Rameschandra* (1933) 60 Cal. 771, 37 Cal. W.N. 727, 146 I.C. 858, ('33) A.C. 745; *Pratap Narain Deo* v. *Maig Lal Singh* (1909) 36 Cal. 927, 2 I.C. 656.

(c) *Krishna Shetti* v. *Gilbert Pinto* (1919) 42 Mad. 654, 660, 50 I.C. 899.

(d) *Krishna Shetti* v. *Gilbert Pinto*, *supra*; *Gangamma* v. *Bhommakka* (1910) 33 Mad. 253, 5 I.C. 437; *Vasudevan* v. *Valia* (1901) 24 Mad. 47 F.B.; *Kesarbai* v. *Rajabhan* (1944) A. N. 94; *Nanjappa* v. *Rangaswami* (1940) 1 M.L.J. 200, (1940) A. M. 410.

(e) *Monica Kitheria Saldanha* v. *Subraya* (1907) 30 Mad. 410.

(f) *Parameshri* v. *Vittappa* (1903) 26 Mad. 157; *Brojabashi* v. *Saratchandra* (1919) 53 I.C. 545; *Nizamuddin* v. *Mamtazuddin* (1901) 28 Cal. 135; *Kally Das Ahiri* v. *Monmohini Dassee* (1897) 24 Cal. 440; *Kamalooti Muhamed* (1918) 41 Mad. 629, 45 I.C. 743.

(g) *Appayya Shetty* v. *Mahammad Beari* (1916) 39 Mad. 334, 30 I.C. 596.

(h) *Administrator-General* v. *Asraf Ali* (1901) 28 Cal. 227.

(i) *Srinivas Aiyangar* v. *Rangaswami* (1915) 25 I.C. 812.

(j) *Periyan Chetty* v. *Govind Rao* (1932) 62 Mad. L.J. 496, 137 I.C. 487, ('32) A.M. 328; *Nayna Missir* v. *Rupikin* (1883) 9 Cal. 609.

(k) *Giribala Dasi* v. *Dwarka Nath Mistri* (1932) 55 Cal. L.J. 312, 142 I.C. 61, ('32) A.C. 715.

S. 117 would require registration under sec. 17 (1) (d) of the Registration Act if from year to year or for any term exceeding a year or reserving a yearly rent (*l*).

Agricultural purposes.—The report of the Special Committee of the 11th March 1881 seems to exclude gardens from agricultural purposes, and under the Agra Tenancy Act (U.P. Act 2 of 1901) the planting of a grove of trees was not an agricultural purpose (*m*). The Madras High Court at one time seemed to limit the phrase to cereals and excluded a coffee garden (*n*); but subsequently admitted that this was wrong and extended the meaning to tillage of the soil in its widest sense, including not only field cultivation but also garden cultivation for the purpose of procuring vegetables and fruit as food for man or beast and other products fit for human consumption by way of luxury if not as an article of diet, *i.e.*, a betel garden (*o*); and finally included arboriculture such as a casuarina plantation (*p*). The Calcutta High Court has said that agriculture is a term of wider import than cultivation and includes horticulture in agricultural purposes (*q*), but a lease merely for the purpose of gathering fruit from trees on the land is not for horticultural purposes (*r*). Rearing of tea plants is an agricultural purpose. Where the bulk of the land leased was used for the cultivation of tea plants and only a small portion of it is occupied by a factory for manufacturing tea, this lease is agricultural (*s*) but the fact that a portion of a holding let for residential purposes is planted with fruit trees does not make it agricultural and the Transfer of Property Act applies (*t*). The Privy Council have held that the creation of a tenancy for the purpose of the tenant realizing the rent from cultivators is not a tenancy exempted from the provisions of this chapter (*u*). So also a lease mainly executed with the object of making arrangement for collecting rents and not with the object of cultivating is not a lease for agricultural purposes (*v*). It is not the actual use of the land, but the original purpose of the tenancy which determines the question of applicability or otherwise of the Act (*w*). Similarly a patni lease is not one for an agricultural purpose merely because the lessee sublets to cultivators, for he could use the land for other purposes also (*x*). A permanent lease of a whole village was held not to be a lease for agricultural purposes and so exempt from the provisions of sec. 108 because there were waste lands in the village, for the primary object of the lessor was to secure his property right and not to utilize the land for agriculture (*y*). But a lease of a village for the purpose of bringing its lands under cultivation is, of course, a lease for agricultural purposes (*z*), and so is a reclamation lease for jungle clearance to make the land arable (*a*). A lease of land to an agriculturist not for a homestead but for a shop is governed by the Transfer of Property Act, and he is not protected from eviction by sec. 182 of the Bengal Tenancy Act (*b*). A sublease of homestead land for residential purposes, granted after the Transfer of Property Act but before the Bengal Tenancy Act is governed by the Transfer of Property Act and the sublessee cannot be evicted without notice to

(*l*) *Sivasubramania* v. *Theerpathi* (1933) 64 Mad. L.J. 676, 144 I.C. 27, ('33) A.M. 451.

(*m*) *Jalesar Sahu* v. *Raj Mangal* (1921) 43 All. 606, 63 I.C. 437, ('21) A.A. 168.

(*n*) *Kunhayen Haji* v. *Mayan* (1894) 17 Mad. 98.

(*o*) *Murugesa Chetti* v. *Chinnathambi* (1901) 24 Mad. 421.

(*p*) *Panadai Pathan* v. *Ramasami* (1922) 45 Mad. 710, 70 I.C. 657, ('22) A.M. 351, dissenting from *Raja of Venkatagiri* v. *Ayyapareddi* (1915) 38 Mad. 738, 21 I.C. 582.

(*q*) *Hedayet* v. *Kamalanand* (1913) 17 Cal. L.J. 411, 20 I.C. 332.

(*r*) *Hedayet* v. *Kamalanand*, *supra*.

(*s*) *Prabat Chandra* v. *Bengal Central Bank* (1938) 2 Cal. 434, 42 C.W.N. 761, (1938) A.C. 589.

(*t*) *Srimati Sasibala* v. *Srimati Amala* (1921) 25 Cal. W.N. 378, 66 I.C. 61, ('21) A.C. 379; *Gopal* v. *Bhutnath* (1926) 42 Cal. L.J. 520, 92 I.C. 411, ('26) A.C. 312; *Bithal Das* v. *Iqbalmunissa* (1940) 190 I.C. 444, (1940) A.O. 425.

(*u*) *Satya Niranjan* v. *Sarajubala Debi* (1930) 33 Cal. W.N. 865, 127 I.C. 749, ('30) A.P.C. 13.

(*v*) *Shiam Sunder* v. *Chottey Lal* (1936) 12 Luck. 814, 164 I.C. 830, (1937) A.O. 151.

(*w*) *Raj Kumari* v. *Samsuddin* (1942) 200 I.C. 814, (1942) A.C. 330.

(*x*) *Promotho Nath Mitter* v. *Kali Prasanna* (1901) 28 Cal. 744, 747.

(*y*) *Ballabh Das* v. *Murat Narain Singh* (1926) 48 All. 385, 95 I.C. 1048, ('26) A.A. 45.

(*z*) *Banmali* v. *Nihal Singh* (1919) 48 I.C. 854.

(*a*) *Jagadish Chandra* v. *Lal Mohan* (1908) 7 I.C. 864.

(*b*) *Purusottam* v. *Panchanan* (1925) 42 Cal. L.J. 197, 90 I.C. 805, ('26) A.C. 373.

quit (*c*). On the other hand if the land is agricultural land, a liberal interpretation should be given to this section so that the lessee should not be deprived of the privileges conferred on agriculturists by the Bengal Act (*d*). The cultivation of indigo is an agricultural purpose (*e*), and the Privy Council have held that the building of an indigo factory on a portion of an indigo plantation may be in conformity with the agricultural purpose (*f*). A lease of a tank used for the preservation and rearing of fish is not a lease for an agricultural purpose (*g*) even though some land on the banks is included (*h*). But a lease of a tank with a considerable area of pasture land is for an agricultural purpose (*i*), because a lease of land for grazing is for an agricultural purpose as the grazing is ancillary to cultivation (*j*).

(*c*) *Banwari Lal* v. *Gopal Chandra* (1933) 37 Cal. W.N. 471, 58 Cal. L.J. 226, 146 I.C. 540, ('33) A.C. 643.

(*d*) *Broucke* v. *Sri Panch Rani Chhatar Kumari Devi* (1925) 4 Pat. 404, 86 I.C. 597, ('25) A.P. 421.

(*e*) *Surendra Narain Singh* v. *Hari Mohan* (1904) 31 Cal. 174.

(*f*) *Hari Mohun Misser* v. *Surendra Narayan* (1907) 34 Cal. 718, 34 I.A. 133 reversing 31 Cal. 174, *supra*.

(*g*) *Siboo Jelya* v. *Gopal Chunder* (1738) 19 W.R. 200.

(*h*) *Nidi Krishna* v. *Ram Doss* (1873) 20 W.R. 341; *Mahananda* v. *Mangala* (1904) 31 Cal. 937.

(*i*) *Surendra Kumar Sen* v. *Chandratara Nath* (1930) 34 Cal. W.N. 1063, 130 I.C. 219, ('31) A.C. 135.

(*j*) *Hedayet* v. *Kamalanand* (1933) 17 Cal. L.J. 411, 20 I.C. 332.

CHAPTER VI.

OF EXCHANGES.

S. 118

"Exchange" defined.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Definition.—The definition of exchange is not limited to immoveable property. Exchange is therefore not only exchange of land but also barter of goods. If one of the items transferred is money, the transaction is not an exchange but a sale (*k*); for price is money only (*l*). But money in one form may be exchanged for money in another form (*m*). So also an exchange of one stamp for another is not a sale (*n*).

The ownership of the one party must be exclusive of the ownership of the other, so that a partition is not an exchange (*o*). But if *A* mortgages X and Y to *B* and then *A* transfers the equity of redemption in X to *B* in consideration of *B* transferring his mortgagee's right in Y to *A*, the transaction is an exchange (*p*). Again if *A* and *B* are joint owners of X, and *B* sole owner of Y, and *A* transfers his share in X to *B* in consideration of *B* transferring Y to *A* the transaction has been held to be an exchange (*q*). This would seem to be a partition of the shares in X followed by an exchange of the divided share for Y.

A transfer by a husband to a wife in discharge of her claim to maintenance is not an exchange as the wife transfers no ownership in anything (*r*). Similarly if the lessee surrenders a lease and the landlord grants him a lease of another property, the transaction is not an exchange (*s*).

A document whereby one decree is set off against another and the balance made up by a transfer of land is not an exchange for there is no mutual transfer of two things (*t*).

The usual type of family settlement by which each party takes a share by virtue of an antecedent title which is admitted, does not involve an alienation and does not fall within the definition of an exchange (*u*).

(*k*) Sec. 54, Transfer of Property Act.

(*l*) *Queen Empress* v. *Appavu* (1886) 9 Mad. 141; *Volkart Brothers* v. *Vettivelu* (1888) 11 Mad. 459, 467; *Samaratmal Uttamchand* v. *Govind* (1901) 25 Bom. 696, 698; *Kedar Nath* v. *Emperor* (1903) 30 Cal. 921; *Madhavrao* v. *Kashibai* (1910) 34 Bom. 287, 290, 5 I.C. 599; *Madam Pillai* v. *Badrakali* (1922) 45 Mad. 612, 617, 68 I.C. 687, ('22) A.M. 311 F.B. differing from a dictum in *Ariyaputhira* v. *Muthukomaraswami* (1914) 37 Mad. 423, 15 I.C. 343.

(*m*) *Empress* v. *Joggessur Mochi* (1878) 3 Cal. 379.

(*n*) *Kedar Nath* v. *Emperor* (1903) 30 Cal. 921.

(*o*) *Gyanessa* v. *Mobarakunnessa* (1898) 25 Cal. 210; *Satya Kumar Banerjee* v. *Satya Kripal* (1909) 10 Cal. L.J. 503, 3 I.C. 247.

(*p*) *Ariyaputhira* v. *Muthukomaraswami*, *supra*; *Lachman Prasad* v. *Mir Fida Husain* (1915) 18 O.C. 109, 30 I.C. 232.

(*q*) *Raj Narain* v. *Khobdari* (1900) 5 Cal. W.N. 724.

(*r*) *Madan Pillai* v. *Badrakali*, *supra*.

(*s*) *Waliul Hassan* v. *Maharaj Kumar Gopal* (1901) 6 Cal. W.N. 905.

(*t*) *Dina Nath* v. *Matimala* (1906) 11 Ca[l]. W.N. 342.

(*u*) *Ram Gopal* v. *Tulsi* (1929) 51 All. [illegible], 116 I.C. 861, ('28) A.A. 641 F.B.; [illegible] *[illegible]unni Lal* v. *Gobind Krishna* (1911) 33 [illegible] 356, 38 I.A. 87, 10 I.C. 477.

But provided there is a reciprocal transfer of two things it matters not that money is paid for bringing about an equality of exchange for the section requires that neither thing shall be money only (*v*).

Illustration.

A transferred to *B* a house worth Rs. 1,500 and *B* transferred to *A* a field worth Rs. 1,000 and Rs. 500 cash. The transaction is an exchange and therefore not subject to pre-emption as a sale: *Ismail Shah* v. *Saleh Mohammad* (1925) 86 I.C. 266, ('25) A.L. 326.

Mode of transfer.—The mode of transfer is the same as in the case of sales. Therefore in the case of immoveable property the rules in sec. 54 as to registration or delivery of possession apply. Thus an exchange of tangible immoveable property of the value of Rs. 100 and upward if not made by registered instrument is invalid (*w*). In the case of immoveable property exchange is usually made by mutual conveyances (*x*), but it is not necessary that there should be two separate deeds (*y*). If the properties exchanged are moveable it is believed that this section and sec. 120 apply the rules in Chapter VII of the Contract Act, now replaced by the Sale of Goods Act, 1930, following the maxim *permutatio est vicina emptioni* (*z*).

Part performance.—If the parties have taken possession without a registered conveyance either party would be entitled to defend his possession under the doctrine of part performance if sec. 53A applied. Before the enactment of sec. 53A the equity in *Maddison* v. *Alderson* was applied in some cases (*a*) and in others (*b*) the equity in *Walsh* v. *Lonsdale*. See note under sec. 53A.

Right of party deprived of thing received in exchange.

119. *If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.*

Amendment.—This section is new and was substituted for the original section by the Amending Act 20 of 1929. The old section was as follows:—

"In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title

(*v*) *Fateh Singh* v. *Pirthi Singh* (1930) 28 All. L.J. 1312, 124 I.C. 557, ('30) A.A. 426; *Ismail Shah* v. *Saleh Muhammad* (1925) 86 I.C. 266, ('25) A.L. 326; *Nathu Mal* v. *Har Dial* (1900) P.R. 97; *Babu* v. *Maruti* (1907) 3 Nag. L.R. 138; *Randhir Singh* v. *Randhir Singh* (1937) A.L.J. 743, 171 I.C. 577, (1937) A.A. 665; *Ram Badan Lal* v. *Kunwar Singh* (1938) A.L.J. 52, 175 I.C. 618, (1938) A.A. 229.

(*w*) *Chidambara Chettiar* v. *Vaidilinga* (1915) 38 Mad. 519, 30 I.C. 408; *Shams Shah* v. *Hussain Shah* (1909) 4 I.C. 1004.

(*x*) *Nathu Mal* v. *Har Dial*, *supra*.

(*y*) *Gopi Ram* v. *Durjan* (1929) 113 I.C. 753, ('29) A.A. 63.

(*z*) I.E. Exchange is analogous to sale.

(*a*) *Salamat-uz-zamin* v. *Masha Allah Khan* (1918) 40 All. 187, 43 I.C. 645; *Hunter* v. *Damodar Das* (1924) 46 All. 759, 81 I.C. 508, ('24) A.A. 772; *Kunti* v. *Gajraj Tiwari* (1924) 46 All. 847, 83 I.C. 297, ('24) A.A. 826; *Sandu* v. *Bhikchand* (1923) 47 Bom. 621, 75 I.C. 118, ('23) A.B. 473; *Dada* v. *Bahiru* (1927) 29 Bom. L.R. 1419, 105 I.C. 754, ('27) A.B. 627.

(*b*) *Hari Pada* v. *Nirod Krishna* (1921) 33 Cal. L.J. 437, 64 I.C. 687, ('21) A.C. 383; *Meher Ali Khan* v. *Aratunnessa* (1921) 25 Cal. W.N. 905, 67 I.C. 107.

S. 119

of the other party, is entitled at his option to compensation or to the return of the thing transferred by him."

The section has been widened; it provides not only for the rights of the party deprived but of his transferee. The rights are also made subject to a contrary intention apparent from the terms of the exchange. The party deprived cannot get back the thing transferred by him unless it is still in the possession of the other party. The old section made no provision for the contingency and gave no remedy against a purchaser who was not a party to the exchange (*c*). Under the new section the right to a return of the thing transferred is limited to cases where the thing is still in the possession of the other party or his legal representative or his donee.

Undertaking as to title.—This section implies in the case of an exchange an implied undertaking as to title similar to that in sec. 14 of the Indian Sale of Goods Act, 1930, as to moveables or in the case of a sale of land in sec. 55 (2) of the Act.

There was a similar warranty and right of re-entry on eviction in an exchange of real property under the Common Law of England (*d*), but this was altered by the Real Property Act, 1845 (*e*) by which an exchange of land did not imply any condition. As to barter of goods the Common Law rules as to sales were applied (*f*).

Remedy.—The remedy is similar to that for breach of an undertaking as to title under sec. 14 of the Indian Sale of Goods Act or that for breach of an implied covenant for title under sec. 55 (2). The party aggrieved may either rescind or claim compensation. If he rescinds, he must no doubt surrender any advantage he receives. If he is evicted from a portion of the land he is entitled to recover the whole of the land that he gave, but he cannot retain the portion from which he has not been evicted (*g*). But it does not appear that he can both rescind and claim damages other than *restitutio ad integrum* by re-entry (*h*). The right may be exercised by a person claiming under the party aggrieved. But the right of re-entry cannot be exercised, if the land is in the possession of a transferee for consideration.

It has been held that the covenant for title implied by this section was also implied in exchanges before the Transfer of Property Act (*i*). The principle of the section has been applied in the Punjab (*j*).

Contrary intention.—The exchange may however be subject to express covenants as to title, and these would exclude the covenant implied by this section (*k*). Thus in *Subramania Ayyar* v. *Saminatha* (*l*) the covenant in the deeds of exchange was: "If any claim or dispute arises I hereby bind myself to settle it. If I do not so get (the dispute) settled I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli of land for lands which go out of your possession." This was held to exclude the plaintiff's right under this section to recover the land he had transferred to the defendant. But a clause that "neither party has after to-day any claim against the other contrary to the exchange; whatever proprietary rights each party had in his own land will be owned by the other party"—is not a contract to the contrary but merely a recital of the effect of the exchange (*m*).

(*c*) *Ganga Singh* v. *Ragho Ram* (1934) A.L. 934.
(*d*) 2 Bl. Com. 300, 323.
(*e*) 8 and 9 Vict. c. 106, sec. 4, now replaced by sec. 59 of the Law of Property Act, 1925.
(*f*) *Emanual* v. *Dane* (1812) 3 Camp. 299 (warranty); *La Neuville* v. *Nourse* (1813) 3 Camp. 351 (caveat emptor).
(*g*) *Veera Pillai* v. *Ponnambala Pillai* (1899) 9 Mad. L. J. 137.
(*h*) *Salabat* v. *Abdul Rahman* (1917) P. R. 51, 41 I.C. 248.
(*i*) *Balusu Veeraghavalu* v. *Boppana* (1916) 31 Mad. L. J. 380, 35 I.C. 92.
(*j*) *Salabat* v. *Abdul Rahman*, *supra*.
(*k*) *Browning* v. *Wright* (1799) 2 Bos. & P. 13; *Line* v. *Stephenson* (1838) 4 Bing. (N. C.) 678; *Dennett* v. *Atherton* (1872) L. R. 7 Q. B. 316; *Subramania Ayyar* v. *Saminatha* (1898) 21 Mad. 69.
(*l*) (1898) 21 Mad. 69, 70.
(*m*) *Salabat* v. *Abdul Rahman* (1917) P. R. 51, 41 I.C. 248.

Limitation.—The covenant implied by this section is a future covenant and limitation runs from the date when the deprivation of the whole or the part took place. Accordingly when the suit is for damages for breach, limitation is six years under art. 116 from the date of breach, if the document is registered (*n*); otherwise it is three years. If the suit is to recover the land transferred, it is one for specific performance when it is founded on an *express* covenant to return, and art. 113 has been held to apply (*o*). If the suit is to recover the land under the *implied* covenant, art. 143 has been held to apply (*p*).

Inapplicable.—There is of course no right to the return of land, if there has been no exchange. There cannot be a triangular exchange (*q*). Thus if *A* transfers to *B* and *B* to *C* and *C* to *A*, then *A* could not if evicted require *B* to return the land. So also if a lessee voluntarily surrenders his lease, and then receives another lease there is no exchange and if he is deprived of this leasehold, he cannot claim the return of the lease he has voluntarily surrendered (*r*).

Rights and liabilities of parties.

120. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

The parties to an exchange have each under this section the rights and liabilities of a seller of the thing given and a buyer of the thing taken. The rules in sec. 55 apply in the case of an exchange of land and it is believed the rules in Chapter VII of the Indian Contract Act now replaced by the Sale of Goods Act, 1930, apply in the case of a barter of goods.

But these rules only apply so far as they are applicable. An exchange does not involve payment of price and so there can be no charge for unpaid price and when the exchange is not completed there is no charge on the land given for the value of the land agreed to be taken (*s*) and even when money is paid for equality of exchange there is no charge for the money so paid (*t*). Again a right of pre-emption which arises out of a sale does not necessarily arise out of an exchange (*u*).

In the case of goods the rule in the Indian Contract Act, now replaced by the Indian Sale of Goods Act, 1930, that property passes on delivery of ascertained goods was applied in the case of an agreement to exchange cotton. A dealer delivered cotton to a press under an agreement, implied by custom, to receive in exchange an equivalent amount of cleaned and pressed cotton. It was held that property passed on delivery and that when the cotton was destroyed by fire the press had to bear the loss (*v*).

The English law similarly follows the analogy of sales. In the case of an exchange of land there is no remedy as to defect of title after completion, except on the ground of fraud or on covenant for title (*w*). And in barter of goods the rules as to warranty (*x*) and *caveat emptor* have been applied (*y*).

(*n*) *Srinivasa Raghava* v. *Rengasami* (1908) 31 Mad. 452.

(*o*) *Hari Tiwari* v. *Raghunath* (1889) 11 All. 27; *Veera Pillai* v. *Poonambala* (1899) 9 Mad. L. J. 137.

(*p*) *Rajagopalan* v. *Somasundara* (1907) 30 Mad. 316; *Sreenivasa Ayyangar* v. *Johnsa* (1919) 42 Mad. 690, 51 I.C. 939.

(*q*) *Eton College (Provost)* v. *Winchester (Bishop)* (1774) 3 Wils. 483.

(*r*) *Waliul Hussain Singh* v. *Maharaj Kumar Gopal* (1901) 6 Cal. W.N. 905.

(*s*) *Chidambara Chettiar* v. *Vaidilinga* (1915) 38 Mad. 519, 522, 30 I.C. 408.

(*t*) *Krishna Nair* v. *Kundu Nair* (1912) Mad. W. N. 535, 16 I.C. 109.

(*u*) *Samar Bahadur* v. *Jit Lal* (1924) 46 All. 359, 79 I.C. 495, ('24) A.A. 390.

(*v*) *Volkart Brothers* v. *Vettivelu* (1888) 11 Mad. 459.

(*w*) *Bartram* v. *Whichcote* (1833) 6 Sim. 86.

(*x*) *Emmanuel* v. *Dane* (1812) 3 Camp. 299.

(*y*) *La Neuville* v. *Nourse* (1813) 3 Camp. 351.

Ss. 120, 121

This section does not exclude the rule of estoppel enacted in sec. 43. When *A* had only half the property and he purported to give the whole of it to *B* in exchange, and subsequently purchased the other half, *B* was entitled to the other half also as soon as *A* perfected the title (*s*).

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

Exchange of Money.—Money here includes not only coins but also currency notes (*a*).

In an exchange of money there is no occasion for a warranty of title, as the title to money passes by mere delivery to one who receives it honestly. There is however an implied warranty as to the genuineness of the money. False coin or a forged currency note would involve total failure of consideration. This has been held with reference to a forged banknote (*b*); a worthless cheque (*c*); and stolen goods (*d*).

(*s*) *Bhairab Chandra* v. *Jiban* (1921) 33 Cal. L.J. 184, 60 I.C. 819, ('21) A.C. 748.

(*a*) *In re Mathur Lalbhai* (1901) 25 Bom. 702, 705.

(*b*) *Jones* v. *Ryde* (1814) 5 Taunt. 488.

(*c*) *Timmins* v. *Gibbins* (1852) 18 Q.B. 722.

(*d*) *Eichholz* v. *Bannister* (1864) 17 C. B. (N.S. 708.

CHAPTER VII

OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. **S. 122**

"Gift" defined.

Acceptance when to be made.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Gifts are :—

1. Gifts *inter vivos*.
2. Gifts *mortis causa*.
3. Gifts by will.

Gifts *mortis causa* are excluded by sec. 129. Gifts by will are outside the scope of this Act. The subject of this chapter is therefore gifts *inter vivos* only. The essential elements of a gift are :—

1. The absence of consideration.
2. The Donor.
3. The Donee.
4. The subject-matter.
5. The transfer.
6. The acceptance.

1. **Voluntarily and without consideration.**—The essence of a gift is that it is a gratuitous transfer. Blackstone says : "Gifts are always gratuitous, grants are upon some consideration or equivalent" (*e*). The word "voluntarily" in the section is used in its popular sense denoting the Exercise of unfettered will and not in its technical sense of 'without consideration.' (*f*). On behalf of the donor the essential ingredient is that he should voluntarily and without consideration transfer the property to the donee, and the giving away implies a complete divesting of the ownership in the property by the donor (*g*). An allotment by a Burmese father on re-marriage, of lands to the children of his first wife is not a gift but a partition (*h*). The word "consideration" is used in the same sense as in the Indian Contract Act and excludes natural love and affection. A transfer in consideration of an expectation of spiritual and moral benefit, or in consideration of natural love and affection is a gift, for such consideration is not that contemplated by the section (*i*). A gift of immoveable property effected by a deed of gift but brought about by undue influence of the donee, though the donor acted voluntarily in making it, is not void but is only voidable and a suit to set it aside, before possession can be claimed by the donor or anyone claiming under him, must be brought within the three years' period prescribed

(*e*) 2 Bl. Com. 440.

(*f*) *U Thita* v. *U Areissuna* (1938) A.R. 76, (1938) Rang. L.R. 678, 179 I.C. 903.

(*g*) *Deo Saran* v. *Deoki Bharthi* (1924) 3 Pat. 842, 80 I.C. 980, ('24) A.P. 657.

(*h*) *Ma Htay* v. *U Tha Hline* (1924) 2 Rang. 640, 88 I.C. 66, ('25) A.R. 184.

Debi Saran v. *Nandlal* (1929) 125 I.C. 127, ('29) A.P. 591.

S. 122 by article 91 of the Limitation Act (*j*). A gift in consideration of past, or with the object of future, cohabitation is immoral and invalid under sec. 6 (h) of the Act (*k*). A transfer for services rendered may be a gift, if the services are the motive, and not the consideration for the transfer (*l*). A settlement on a wife is a gift although the marriage proves to be invalid (*m*). An "agreement to give" lacks consideration and is void under sec. 25 of the Indian Contract Act, but that section admits of an exception if it is in writing registered and made on account of natural love and affection between parties standing in a near relation to each other. If a gift is not complete the Court will not compel the intending donor to complete it (*n*). Again if the effect of the gift is to defeat or delay the creditors of the donor it is under sec. 53 voidable at the option of any creditor so defeated or delayed. And if the donor is adjudged insolvent within two years of the gift it may be void as against the Official Assignee or Official Receiver under the Law of Insolvency—see sec. 55 of the Presidency-Towns Insolvency Act, and sec. 53 of the Provincial Insolvency Act.

2. **Donor.**—The donor is the person who gives. Any person who is *sui juris* can make a gift of his property. A minor being incompetent to contract (*o*) is incompetent to transfer (*p*), and a gift by the minor would therefore be void. Trustees cannot make a gift out of trust property unless authorised by the terms of the trust.

3. **Donee.**—The donee is the person who accepts the gift. A gift may be accepted by or on behalf of a person who is not competent to contract. A minor may therefore be a donee; but if the gift is onerous, the obligation cannot be enforced against him while he is a minor. But when he attains majority he must either accept the burden or return the gift.

The words "accepted by or on behalf of the donee" show that the donee may be a person unable to express acceptance. A gift can be made to a child *en ventre sa mere* and could be accepted on its behalf.

The donee must be alive at the date of the gift, and the representatives of a person deceased at the date of the gift cannot take for him (*q*).

The donee must be an ascertainable person and so the public cannot be a donee under this section (*r*); nor can a gift be made to an unregistered society (*s*).

A gift to two or more persons may be a gift to them as joint tenants or as tenants in common. The presumption of English law in favour of a joint tenancy does not apply to a Hindu gift, and in a Hindu gift the donees are presumed to take as tenants in common (*t*). See Mulla's Hindu Law, 7th Ed., p. 462. As to legacies see sec. 106 and sec. 107 of the Indian Succession Act, 1925.

4. **Subject-matter.**—The subject-matter of the gift must be certain existing moveable or immoveable property. It may be land, goods, or actionable claims. It must be transferable under sec. 6. But it cannot be future property (*u*). A gift of a right of assessment is valid (*v*); but a gift of a future revenue of a village is invalid (*w*). These

(*j*) *Ramchandra* v. *Laxman* (1944) 72 I.A. 21.
(*k*) *Subama* v. *Yamanappa* (1933) 35 Bom. L.R. 345, 149 I.C. 464, ('33) A.B. 209.
(*l*) *Hiralal* v. *Gavrishankar* (1928) 30 Bom. L.R. 451, 454, 109 I.C. 149, ('28) A.B. 250; *Madhavrao* v. *Kashibai* (1910) 34 Bom. 287, 5 I.C. 599.
(*m*) *Gopal Saran* v. *Sita Devi* (1932) 36 Cal. W.N. 392, 135 I.C. 753, ('32) A.PC. 34.
(*n*) *Ellison* v. *Ellison* (1802) 6 Ves. 656; *Ward* v. *Audland* (1845) 8 Beav. 201; *Kekewich* v. *Manning* (1851) 1 DeG. M. & G. 176 C.A.
(*o*) *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 Cal. 539, 30 I.A. 114.
(*p*) Section 7.
(*q*) *Re Tilt, Lampat* v. *Kennedy* (1896) 74 L.T. 163.
(*r*) *Pallayya* v. *Ramavadhanulu* (1903) 31 Mad. L.J. 364.
(*s*) *Mathura Kuer* v. *Dharam Samaj* (1916) 14 All. L.J. 1038, 38 I.C. 483.
(*t*) *Jogeswar* v. *Ram Chund* (1896) 23 I.A. 37, 23 Cal. 670.
(*u*) Section 124.
(*v*) *Madhavrao* v. *Kashibai* (1910) 34 Bom. 287, 5 I.C. 599.
(*w*) *Amtul Nisa* v. *Mir Nuruddin* (1898) 22 Bom. 489.

S. 122

cases were decided under Hindu and Mahomedan law respectively but they illustrate the principle. In a Calcutta case (*x*) it was said that the release of a debt is not a gift, as a gift must be of tangible property. It is submitted that the release of a debt is not a gift as it does not involve a transfer of property but is merely a renunciation of a right of action. It is quite clear that an actionable claim such as a policy of insurance may be the subject of a gift—see sec. 130. A testatrix, who at the date of her will and at the date of her death was possessed of National Savings Certificates, war stocks and cash, bequeathed " my money " to two named persons. It was held that in the absence of any context to the contrary in the will the word " money " must be given its primary meaning and that it would not carry the National Savings Certificates or the war stock (*y*). This has, however, not been approved by the House of Lords (*z*) when the word " money " was held to include all personality, *e.g.*, cash at bankers, investments, income-tax repayment, household goods, etc. It is submitted that in a deed of gift the meaning of the word " money " should not be restricted by any hard and fast rule but should be interpreted having regard to the context property construed in the light of all relevant facts.

5. **Transfer.**—See sec. 123.

6. **Acceptance.**—There was a divergence of view between the two schools of Hindu law as to the necessity of acceptance of the gift by the donee, Dayabhaga holding that it was not necessary but Mitakshara holding the contrary. This section has modified the indigenous Dayabhaga law (*a*). In English law express acceptance is not necessary, for although it recognizes that it " requires the assent of both minds to make a gift as it does to make a contract," yet it will readily infer that a man will accept what is for his benefit (*b*). Thus a transfer of a stock to the name of the donee vests the property in him subject to his right to repudiate the gift, even though he be unaware of the tansfer (*c*). And this is so even though the gift be onerous (*d*). On the other hand the donee may refuse the gift when he becomes aware of it (*e*), or he may accept the property not as a gift, but as a loan (*f*). This rule of English law which presumes acceptance of a gift was followed by a single Judge of the Patna High Court in a case (*g*) which was dissented from in a subsequent Allahabad decision (*h*).

But though the rules of English law stated above do not all apply in India, there is nothing in the section to show that the acceptance under this section should be express (*i*). The acceptance may be inferred (*j*), and it may be proved by the donee's possession of the property (*k*), or even by the donee's possession of the deed of gift (*l*). Provided the donee is in possession of the property, the donor's retention of the deed is not necessarily proof of the fact that there has been no acceptance (*m*). Where a deed of gift was delivered by the donor to the donee, the Privy Council held that that on delivery of the deed there was an acceptance of the transfer within the meaning of this section, and therefore the gift became effectual, subject to registration as required by

(*x*) *Mahim Chandra* v. *Ram Dayal* (1925) 42 Cal. J. L. 582, 91 I.C. 757, ('26) A.C. 170.

(*y*) *In re Hodgson Nowell* v. *Flaunsy* (1936) 1 Ch. 203.

(*z*) *Perrin* v. *Morgan* (1943) A.C. 399.

(*a*) *Kanai Lal Ghosal* v. *Kumar Purnendu Nath Tagor* 51 C.W.N. 227.

(*b*) *Hill* v. *Wilson* (1873) 8 Ch. App. 888, 896.

(*c*) *Standing* v. *Bowring* (1885) 31 Ch. D. 282.

(*d*) *Siggers* v. *Evans* (1855) 5 E. & B. 367; *Sarba Mohan Banerjee* v. *Manmohan Banerjee* (1933) 37 Cal. W. N. 149, 143 I.C. 757, ('33) A.C. 488.

(*e*) *Mallott* v. *Wilson* (1903) 2 Ch. 494.

(*f*) *Hill* v. *Wilson* (1873) 8 Ch. App. 888.

(*g*) *Muhammad Abdul* v. *Jhouti Mahton* (1917) 41 I.C. 389.

(*h*) *Anandi Devi* v. *Mohanlal* (1932) 30 All. L.J. 335, 137 I.C. 750 ('32) A. A. 444.

(*i*) Cf. *Pallayya* v. *Ramavadhanulu* (1903) 13 Mad. L.J. 364, is intended to lay down any proposition to the contrary, it is submitted, it is not good law.

(*j*) *Anandi Devi* v. *Mohan Lal*, *supra*.

(*k*) See note " Hindu Law ", *infra*.

(*l*) *Balmakund* v. *Bhagwan Das* (1894) 16 All. 185; *Man Bhari* v. *Naunidh* (1882) 4 All. 40.

(*m*) *Ammithammal* v. *Ponnusami* (1907) 17 Mad. L.J. 386.

S. 122 sec. 123 (*n*); and it is immaterial that the deed was not stamped. Failure to stamp the deed will render the document inadmissible in evidence, but will not affect its validity and the deed becomes effectual from the very moment of its execution subject to its being stamped and registerd as required by law (*o*).

Acceptance may be by a donee who is not competent to contract (*p*), for a minor may accept benefit although he cannot incur an obligation. And a minor's guardian may accept a gift for him. So also in the case of a deity, this acceptance may be by its agent (*q*). Acceptance must be in the lifetime of the donor and of course if the donee dies before acceptance there is no gift (*r*). If the gift has been accepted but the donor dies before the deed is registered, the transfer may be completed by registration after the donor's death (*s*).

Trusts.—A gift may be made by the equitable machinery of a trust; and the interposition of the trustees enables a gift to be made to a person not yet in existence and therefore incapable of being the donee of a direct gift.

A trust is not complete until the trust property is vested in trustees for the benefit of the *cestui que trust*. The settlor may do this by a declaration of trust if he is himself the sole trustee, using language which taken in connection with his acts shows a clear intention on his part to divest himself of all beneficial interest in it and to exercise dominion and control over it exclusively in the character of a trustee (*t*). Otherwise he must transfer the trust property to trustees by registered conveyance or delivery of possession as the case may be (*u*).

If the settlor has not perfected the trust either by constituting himself a trustee or by transferring the trust property to trustees the Court will not enforce the trust (*v*); nor will the Court perfect an incomplete gift by holding that the property was transferred in equity or that an imperfect gift amounted to a declaration of trust (*w*).

Hindu law.—The section applies to Hindus and it contains nothing that is inconsistent with Hindu law (*x*) except as to acceptance of the gift not being essential according to Dayabhaga. The rule of pure Hindu law that a gift in favour of an unborn person is wholly void so that it cannot be made even through the medium of a trust, was modified by the Hindu Disposition of Property Act 15 of 1916, by the Madras Act 1 of 1914, and by Act 8 of 1921. These Acts have been amended by secs. 11, 12 and 13 of Act 21 of 1929; and the effect of the amendment is that, subject to the limitations in Chapter II of this Act and in secs. 113, 114, 115 and 116 of the Indian Succession Act,

(*n*) *Kalyanasundaram* v. *Karuppa* (1927) 50 Mad. 193, 54 I.A. 89, 100 I.C. 105, ('27) A.PC. 42 followed in *Venkatsubba Shrinivas* v. *Subha Rama* (1928) 52 Bom. 313, 108 I. C. 367, ('28) A.PC. 86. See also *Nabadweepchandra Das* v. *Loke Nath Roy* (1933) 59 Cal. 1176, 36 Cal. W.N. 738, 142 I.C. 452, ('33) A.C. 212.

(*o*) *Purna Chandra* v. *Kalipada Ray* (1942) 201 I. C. 551, (1942) A.C. 386.

(*p*) *Ganeshdas Bhiwraj* v. *Suryabhan* (1917) 13 Nag. L.R. 18, 39 I.C. 46.

(*q*) *Ram Bharose* v. *Rameshwar Prasad Singh* (1937) 13 Luck. 697, 171 I.C. 481, (1938) A.O. 26.

(*r*) *Re Tilt, Lampet* v. *Kennedy* (1896) 74 L.T. 163.

(*s*) *Hardei* v. *Ram Lal* (1889) 11 All. 319 F.B.; *Nand Kishore Lal* v. *Suraj Prasad* (1898) 20 All. 392; *Khashaba* v. *Chandrabhagabai* (1908) 32 Bom. 441; *Meiyyalu* v. *Anjalay* (1902) 25 Mad. 672; *Venkati Rama* v. *Pillati Rama* (1917) 40 Mad. 204, 38 I.C. 707 F.B.; *Kalyanasundaram* v. *Karuppa* (1927), *supra*.

(*t*) *Richards* v. *Delbridge* (1874) L.R. 18 Eq. 11; *Heartley* v. *Nicholson* (1875) L.E. 19 Eq. 233; *Re Richards, Sherstone* v. *Brock* (1887) 36 Ch. D. 541; *Ashabai* v. *Haji Tyeb* (1885) 9 Bom. 115, 122.

(*u*) Trusts Act, s. 6; *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449, 472.

(*v*) *Ellison* v. *Ellison* (1802) 6 Ves. 656: *Dening* v. *Ware* (1856) 22 Beav. 184; *Weale* v. *Ollive* (1853) 17 Beav. 252; *Moore* v. *Moore* (1874) L.R. 18 Eq. 474; *Harding* v. *Harding* (1886) 17 Q.B.D. 442.

(*w*) *Antrobus* v. *Smith* (1806) 12 Ves. 39; *Milroy* v. *Lord* (1862) 4 De.G. F. & J. 264; *Mancherahaw* v. *Ardeshir* (1908) 10 Bom. L.R. 1209; *Natha Gulab* v. *Shaller* (1923) 25 Bom. L.R. 599, 87 I.C. 312, ('24) A.B. 88; cf. *Amarendra* v. *Monimunjary* (1921) 48 Cal. 986, 66 I.C. 586, ('21) A.C. 148.

(*x*) *Deo Saran* v. *Deoki Bharthi* (1924) 3 Pat. 842, 80 I.C. 980, ('24) A.P. 657.

1925, no transfer *inter vivos* or by will, of property of a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date such disposition took effect.

There is no presumption of a joint tenancy in the case of a gift to several donees in Hindu law. The donees in Hindu law take as tenants in common. In *Jogeswar Narain* v. *Ram Chund Dutt* (y) the Privy Council said that the principle of joint tenancy was unknown to Hindu law except in the case of a coparcenary. See note "Joint tenancy or Tenancy in common" under sec. 45.

Acceptance has been held proved in cases decided under Hindu law by the assent of a donee already in possession (z) or by the donee's possession of the deed of gift (a). Although an idol is a juristic person capable of holding property, yet it has been held in some cases that an idol is not a living person, and that a dedication of land to an idol is not a gift within the meaning of secs. 122 and 5 and need not be effected by registered instrument (b). But these decisions have been criticised as whittling down the provisions of sec. 123 in a manner not contemplated when the Act was made (c); for a gift is still a gift though made through the medium of a trust (d), and in some cases a registered instrument has been held to be necessary (e). It has also been said that an idol is a symbol of a deity, and that it would be contrary to the Hindu religion for an idol to make an acceptance of worldly goods (f). A gift to an idol not yet instituted is invalid (g), unless the transfer is to Pujaris on trust to establish an idol (h). The Indian Trusts Act does not apply to religious or charitable endowments (i). A Hindu may establish a religious or charitable institution without a writing and without the intervention of a trust (j). A gift to dharam is void for uncertainty as the object is too vague and uncertain for its administration to be under the control of the Court (k).

Transfer how effected.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

(y) (1896) 23 Cal. 670, 23 I.A. 37.
(z) *Bai Kushal* v. *Lakhma Mana* (1883) 7 Bom. 452.
(a) *Balmakund* v. *Bhagwan Das* (1894) 16 All. 185.
(b) *Pallaya* v. *Ramavadhanulu* (1903) 13 Mad. L.J. 364; *Narasimha* v. *Venkatalingum* (1927) 50 Mad. 687, 103 I.C. 302, ('27) A. M. 636 F.B.; *Ramalinga Chetty* v. *Sivachidambara Chetty* (1919) 42 Mad. 440, 49 I.C. 742; *Rambrahma* v. *Kedar*, (1922) 36 Cal. L.J. 478, 72 I.C. 1026, ('23) A.C. 60; *Harihar Prasad* v. *Siri Guruugranth* (1930) 129 I.C. 791, ('30) A.P. 610.
(c) *Birendra Keshri Prasad Narain Sahee* v. *Bahuria Saraswati Kuer* (1934) 13 Pat. 356, 155 I. C. 750, ('34) A.P. 612.
(d) *Sadik Hashim* v. *Hashim Ali* (1916) 43 I.A. 212, 38 All. 627, 36 I.C. 104.
(e) *Mannu Lal* v. *Sri Thakur*, *supra*; *Shaukat Begam* v. *Sri Thakurji*, *supra*.
(f) *Bhupati Nath* v. *Ram Lal* (1910) 37 Cal. 128, 3 I.C. 642 F.B.; *Ramalinga Chetty* v. *Sivachidambaram Chetty* (1919) 42 Mad. 440, 49 I.C. 742.
(g) *Nogendra Nandini* v. *Benoy Krishna* (1903) 30 Cal. 521; *Phundan Lal* v. *Arya Prithi* (1911) 33 All. 793, 11 I.C. 320.
(h) *Mohar Singh* v. *Het Singh* (1910) 32 All. 337, 5 I.C. 584; *Bhupati Nath* v. *Ramlal*, *supra*; *Chatarbhuj* v. *Chatarjit* (1911) 33 All. 253, 8 I.C. 832.
(i) *Pallayya* v. *Ramanadhanulu* (1903) 13 Mad. L.J. 364.
(j) *Ganji Reddi* v. *Tammi Reddi* (1927) 50 Mad. 421, 425, 54 I.A. 136, 101 I.C. 79, ('27) A.PC. 80; *Ramalinga Chetty* v. *Sivachidambara* (1919) 42 Mad. 440, 149 I.C. 742.
(k) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71.

S. 123

Such delivery may be made in the same way as goods sold may be delivered.

Mode of transfer—Immoveables.—A gift of immoveable property can only be made by a registered instrument. A deed cannot be dispensed with even for a property of small value, as in the case of a sale. And as a further precaution attestation by two witnesses is required. This provision excludes every other mode of transfer and even if the intended donee is put in possession, a gift of immoveable property is invalid without a registered instrument (*l*). But twelve years' possession under an oral gift will perfect title by prescription (*m*). A gift by way of dowry or *sankalap* to a bridegroom is invalid if not made by a registered instrument (*n*). Recitals in an unregistered petition to the Collector will not take the place of a registered deed of a gift (*o*). So also mere entries in a mutation register will not be sufficient (*p*).

Illustration.

A registered owner of two villages presented a petition to the Collector praying for the transfer of the villages to the name of *B* and stating that he had given the villages to *B* as stridhanam. The Collector registered the villages in *B*'s name. Subsequently *A*'s heir sued to recover the villages. The suit was dismissed as *B* had acquired a title by adverse possession, but with reference to the petition to the Collector, the Judicial Committee said—" It was not contended before the Board that the above transactions effected a valid gift of the property to *B*; for such a gift must, under sec. 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to sec. 91 of the Indian Evidence Act, can the recitals in the petitions be used as evidence of a gift having been made": *Varatha Pillai* v. *Jeevarathammal* (1919) 43 Mad. 244, 249, 46 I.A. 285, 290, 53 I.C. 901.

Signed by or on behalf of the donor.—The deed must be signed by the donor, and a deed signed by the intended donee will not effect a transfer (*q*). It is curious that while this section uses the words "signed by or on behalf of the donor" yet in the case of mortgages—sec. 59—the words are "signed by the mortgagor." There is however no significance in this distinction and the words "on behalf of" are mere surplusage (*r*); for where a party is illiterate another person may with his consent sign his name for him (*s*).

Attested.—The definition of the word "attested" in sec. 3 as amended by Act 27 of 1926 and Act 10 of 1927 makes it clear that attestation in acknowledgment of execution is sufficient. The definition requires that the attesting witnesses should have signed in the presence of the executant. See note under the same heading under sec. 3 and under sec. 59.

Registration.—The word "registered" in this section does not mean registered in the lifetime of the donor. If the other conditions to the validity of the gift are complied with, neither the death of the donor nor his express revocation is a ground for refusing registration (*t*).

(*l*) *Kuverji* v. *Municipality of Lonavla* (1921) 45 Bom. 164, 58 I.C. 403, ('21) A.B. 198.

(*m*) *Venkatarayudu* v. *Subbamma* (1903) 13 Mad. L.J. 302.

(*n*) *Hira Mani* v. *Anmol Singh* (1928) 26 All. L.J. 944, 117 I.C. 351, ('28) A.A. 699.

(*o*) *Varatha Pillai* v. *Jeevarathammal* (1919) 43 Mad. 244, 46 I.A. 285, 53 I.C. 901.

(*p*) *Assudibai* v. *Haribai* (1943) Kar. 227, (1943) A.S. 177.

(*q*) *Girjaprasad* v. *Purshottam* (1926) 28 Bom. L.R. 429, 94 I.C. 609, ('26) A.B. 261.

(*r*) *Deo Narain* v. *Kukur Bind* (1902) 24 All. 319 F.B.

(*s*) *Deo Narain* v. *Kukar Bind*, supra; *Sasi Bhusan* v. *Chandra Peshi* (1906) 33 Cal. 861.

(*t*) *Kalyanasundaram* v. *Karuppa* (1927) 50 Mad. 193, 54 I.A. 89, 100 I.C. 105, ('25) A.PC. 42; *Venkati Rama* v. *Pillai Rama* (1917) 40 Mad. 204, 38 I.C. 707 F.B.; *Parbati* v. *Bauj Nath* (1913) 35 All. 3, 16 I.C. 406.

S. 123

If a deed of gift of immoveable property is not registered the gift cannot be enforced and cannot be supported under the doctrine of part performance. That doctrine does not apply to gifts (*u*). See note "Contracts to transfer for consideration" under sec. 53A.

In a Madras case (*v*) the members of a coparcenary effected a partition, and allotted a share to a person who was not a coparcener; but the Court held that as the deed of partition was not registered it could not operate as a gift to confer title on a stranger. In another case where a father allotted a share of property to his sons by a registered deed of gift, the gift was valid although the sons executed a power of attorney authorizing the father to manage the property and to take the profits during his lifetime (*w*).

Registration will not perfect an imperfect gift if any of the essential ingredients of a gift are lacking (*x*); and on the other hand title cannot pass without there being a registered deed of gift (*y*).

Whether donor may revoke gift after delivery of deed and before registration.—This question was considered by the Courts in India in several cases (*z*), and it was ultimately set at rest by the Privy Council which decided that after delivery of the deed of gift and before registration the donor cannot revoke the gift (*a*). In *Kalyanasundaram* v. *Karuppa* (*b*) Lord Salvesen said: "Their Lordships are unable to see how the provision of sec. 123 of the Transfer of Property Act can be reconciled with sec. 47 of the Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose."

Mode of transfer—Moveables.—With regard to moveables the section allows two alternative modes of transfer:—

1. Registered deed signed by or on behalf of the donor, or,
2. Delivery of possession.

Delivery of possession is the usual mode of transfer in a gift of goods (*c*). As in English Law (*d*), an oral gift without delivery of possession would be a promise without consideration. It would transfer no property to the donee and would in fact be no gift at all. So when the Directors of a Railway Company resolved to give a bonus to an employee and the sum had not been paid over by the District Paymaster the money could not be attached by a creditor of the employee as the gift was not complete (*e*). When the donee is already

(*u*) *Maung Hla* v. *Maung Po Htai* (1929) 123 I.C. 142, ('29) A. R. 316; *Hiralal* v. *Gavrishankar* (1928) 30 Bom L.R. 451 109 I.C. 149, ('28) A. B. 250.

(*v*) *Made Gouda* v. *Chenne Gouda* (1925) 49 Mad. L. J. 150, 90 I.C. 331, ('25) A. M. 1174, dissenting from *Girhi Rani* v. *Chandra Lal* (1912) 17 Cal. W. N. 62, 17 I.C. 885.

(*w*) *Ma Shin* v. *Ma Thin Kyi* (1934) 150 I.C. 966, ('34) A. R. 129.

(*x*) *Deo Saran* v. *Deoki Bharthi* (1924) 3 Pat. 842, 80 I.C. 980, ('24) A. P. 657.

(*y*) *Lim Charlie* v. *The Official Receiver* (1934) 12 Rang. 238, 66 Mad. L. J. 144, 59 Cal. L. J. 91, 36 Bom. L. R. 235, 1934 All. L.J. 146, 147 I.C. 328, ('34) A.PC. 67; *Bachchi Lal* v. *Debi Din* (1929) 51 All. 629, 119 I.C. 503, ('29) A.A. 300; *Hira Mani* v. *Anmol Singh* (1928) 26 All. L.J. 944, 117 I.C. 351, ('28) A.A. 699.

(*z*) *Prabati* v. *Baijnath* (1913) 35 All. 3, 16 I.C. 406; *Venkati Rama* v. *Pillati Rama*, *supra*; *Atmaram Sakharam* v. *Vaman Janardhan* (1925) 49 Bom. 388, 87 I.C. 490, ('25) A. B. 210 F.B., overruling *Subba Rama* v. *Venkat Subba* (1924) 48 Bom. 435, 80 I.C. 477, ('24) A. B. 434.

(*a*) *Kalyanasundaram Pillai* v. *Karuppa Mooppanar*, *supra*; *Venkatsubba Shrinivas* v. *Subba Rama* (1928) 52 Bom. 313, 108 I.C. 367, ('28) A.PC. 86.

(*b*) (1927) 50 Mad. 193, 54 I.A. 89, 100 I.C. 105, ('27) A.PC. 42.

(*c*) *Rameshwar Narain Singh* v. *Rik Nath Koeri* (1923) 67 I.C. 451, ('23) A.P. 165.

(*d*) *Irons* v. *Smallpiece* (1819) 2 B. & Ald. 551; *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57.

(*e*) *Janki Das* v. *East Indian Rly. Co.* (1884) 6 All. 634; *Natha Gulab* v. *Shaller* (1923) 25 Bom. L.R. 599, 87 I.C. 312, ('24) A.B. 88.

S. 123 in possession no further delivery is required according to the English cases (*f*). These would no doubt be followed in India, for the same rule obtains in regard to immoveable property (*g*). In an Allahabad case (*h*) a husband made a fixed deposit of money in a Bank repayable to himself or his wife or survivor, and it was held that this involved no delivery and was not therefore a gift to the wife. The Court referred to the general rule in India that a purchase by a husband in his wife's name is presumed to be benami and that the presumption of English law that it is an advancement does not apply (*i*). Mere entries in account books in favour of the wife would not be sufficient to complete a gift (*j*). But probably if the deposit receipt had been given to the wife that would have been proof of a gift.

Actionable claims.—Before the amendment of sec. 130 by the insertion of the words "whether with or without consideration," it was held that actionable claims were not moveable property under this section and a gift of an actionable claim must be in writing under sec. 130 and need not be registered (*k*). But delivery was held to be a sufficient transfer in the case of a promissory note, bill of exchange or cheque payable to bearer. Government promissory notes were transferable by endorsement and unless so endorsed the gift was not complete (*l*). The donee could not retain the paper on which the note was inscribed as a chattel, for it could not be separated from the debt (*m*).

Hindu law.—This section applies to Hindus. It applied to Hindus even before the amending Act 20 of 1929 for it was made applicable to Hindus by the old section 129 which expressly abrogated the Hindu rule (*n*). The section was held to abrogate the rule of Hindu Law that delivery of possession is essential to the validity of a gift (*o*). But the decision of the Privy Council in *Kali Das* v. *Kanhya Lal* (*p*) shows that there is no such rule. In *Lallu Singh* v. *Gur Narain* (*q*) a gift by a Hindu lady of seven villages made by registered deed was held valid although she reserved to herself a life interest in three of them. As to gifts to an idol see note 'Hindu Law' under sec. 122.

Mahomedan law.—Section 129 enacts that sec. 123 shall not affect any rule of Mahomedan Law. Under Mahomedan Law delivery of possession, either actual or constructive, is necessary to validate a gift (*r*). Under Shiah law delivery of actual possession of the appropriated property to the mutwalli by or by the direction of the wakf is a condition precedent to a wakf having validity and effect. The wakf may

(*f*) *Winter* v. *Winter* (1861) 4 L.T. 639 (barge given to donor's servant who has previously been in possession as a servant); *Kilpin* v. *Ratley* (1892) 1 Q.B. 582 (furniture given by a father to his daughter in whose house it was).

(*g*) *Bai Kushal* v. *Lakhma Mana* (1883) 7 Bom. 452.

(*h*) *Paul* v. *Nathaniel* (1931) 29 All. L.J. 417, 132 I.C. 573, ('31) A.A. 596.

(*i*) *Gopeekrist* v. *Gangapersaud* (1854) 6 M.I.A. 53; *Moulvie Sayyud Uzhur Ali* v. *Mst. Bebee Ultaf Fatima* (1869) 13 M.I.A. 232; *Bilas Kunwar* v. *Desraj Ranjit Singh* (1915) 37 All. 557, 42 I.A. 202, 30 I.C. 299; *Sura Lukshmiah* v. *Kothandarama* (1925) 48 Mad. 605, 52 I.A. 286, 88 I.C. 327, ('25) A.PC. 181.

(*j*) *Chambers* v. *Chambers* (1941) Mad. 232 (1940) 2 M.L.J. 963, 195 I.C. 507, (1941) A.M. 154.

(*k*) *Perumal Ammal* v. *Perumal Naicker* (1921) 44 Mad. 196, 202, 61 I.C. 461, ('21) A.M. 137.

(*l*) *Merbai* v. *Perozbai* (1881) 5 Bom. 268; *Khursedji* v. *Pestonji* (1888) 12 Bom. 573.

(*m*) *Khursedji* v. *Pestonji*, *supra*; following *Searle* v. *Law* (1846) 15 Sim. 95; *Re Richardson Shillito* v. *Hobson* (1885) 30 Ch. D. 396; *Re Hancock, Hancock* v. *Berry* (1888) 57 L.J. (Ch.) 793, and distinguishing *Rummens* v. *Hare* (1876) 1 Ex. D. 169.

(*n*) *Debi Saran* v. *Nandalal* (1929) A.P. 591.

(*o*) *Lallu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467 F.B.; *Phulchand* v. *Lakkhu* (1903) 25 All. 358; *Pahlwam Singh* v. *Ram Bharose* (1905) 27 All. 169; *Madhab Rav* v. *Kashibai* (1910) 34 Bom. 287, 5 I.C. 599; *Balbhadra* v. *Bhowani* (1907) 34 Cal. 853; *Dharmodas* v. *Nistarini Dasi* (1887) 14 Cal. 446; *Bai Rambai* v. *Bai Mani* (1899) 23 Bom. 234; *Nandu* v. *Chand Datt* (1902) 5 O.C. 89; *Muhammad Abdul* v. *Jhonti Mahton* (1917) 41 I.C. 389; *Debi Singh* v. *Bansidhar* (1922) 66 I.C. 480, ('22) A.A. 44; *Bhagwan Prasad* v. *Hari Singh* (1925) 83 I.C. 41, ('25) A.N. 199; *Kanai Lal Ghosal* v. *Kumar Purnendu Nath Tagor* 51 C.W.N. 227.

(*p*) (1884) 11 Cal. 121, 11 I.A. 218.

(*q*) (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467 F.B.

(*r*) See Mulla's Mahomedan Law, 10th Ed. pp. 115 and 116 and the case of *Qamaruddin* v. *Mst. Hassan Jan* (1935) 16 Lah. 629, ('35) A.L. 795.

appoint himself as mutwalli and in such a case the change in the character of possession amounts to delivery of possession, *e.g.*, by mutation of his name as mutwalli (*s*). If that rule is complied with a gift of immoveable property is valid even though a deed be executed and the deed is not attested (*t*), or not registered (*u*). See notes under sec. 129.

Buddhist law.—The section abrogates the rule of Buddhist law that delivery of possession is essential to the validity of a gift (*v*).

Extent.—The section does not apply to territories excluded from the operation of the Registration Act. See sec. 1. It has been extended to every cantonment in British India by sec. 287 of the Cantonments Act 2 of 1924.

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter.

There cannot be a gift of future property, for such a gift can only be a promise, and a promise not supported by consideration is invalid as a contract. Accordingly the definition in sec. 122 is limited to existing property (*w*). In a sale or mortgage there is consideration, and so an assignment of future property by way of sale or mortgage operates as a contract (*x*), and when the property comes into existence the contract becomes an assignment under the equity in *Holroyd* v. *Marshall* (*y*). But there is no scope for this equity when the transaction is invalid as a contract.

But a deed of gift of existing property is not invalid as to that property because it also professes to include future property. Similarly an unregistered deed of gift of actionable claims and of immoveable property was held to be valid as to the former but void as to the latter (*z*).

There cannot be a gift of future property either under Hindu or Mahomedan law.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several, of whom one does not accept.

This section, it is submitted, applies only when the gift is to two or more donees as tenants in common. The refusal of one will not prevent the gift taking effect as regards the share of the others.

It has been suggested that the section applies when the donees take as joint tenants and that it lays down a rule contrary to the English rule in *Humphrey* v. *Tayleur* (*a*). It is submitted that the terms of the section indicate a severance and assume that the donees take as tenants in common, for when the donees take as joint tenants there is only one donee. As already noted (*b*) the presumption of English law is in favour of a joint tenancy while that of the Hindu law is in favour of a tenancy in

(*s*) *Syed Ali Zamin* v. *Syed Akbar Ali Khan* (1937) 64 I.A. 158.

(*t*) *Karam Ilahi* v. *Sharf-ud-Din* (1916) 38 All. 212, 35 I.C. 14.

(*u*) *Nasib Ali* v. *Munshi Wajed Ali* (1926) 44 Cal. L.J. 490, 100 I.C. 296, ('27) A.C. 197; *Mt. Kulsum Bibi* v. *Shiam Sunder Lal* (1936) A.L.J. 1027, 164 I.C. 515, (1936) A.A. 600.

(*v*) *U Pandawun* v. *U Sandima* (1924) 2 Rang. 131, 83 I.C. 557, ('24) A.R. 309; *Mi Hla Zan* v. *Pa Pa Ye* (1924) 3 Bur. L.J. 111, ('24) A.R. 353; *Ma Thin Myaing* v. *Maung Gyi* (1923) 1 Rang. 351, 76 I.C. 166, ('24) A.R. 13.

(*w*) See note "Subject-matter" under s. 122.

(*x*) *Rajah Sahib Perhlad* v. *Baboo Budhu* (1869) 12 M.I.A. 275, 307.

(*y*) (1862) 10 H.L. Cas. 191.

(*z*) *Perumal Ammal* v. *Perumal Naicker* (1921) 44 Mad. 196, 61 I.C. 461, ('21) A.M. 137.

(*a*) (1752) Amb. 136.

(*b*) See note "Donee" under s. 122.

Ss. 125, 126

common. But when the terms of a Hindu gift clearly indicated that the gift was to be held in joint tenancy, the rule of survivorship was followed as a consequence of the nature of the gift and not of any peculiarity of English law (*c*).

When gift may be suspended or revoked.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations

(a) *A* gives a field to *B*, reserving to himself, with *B*'s assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A*'s lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B*'s assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to *A*.

A gift is a transfer of property and is therefore subject to the rules enacted in Chapter II of this Act. Thus if an absolute gift is made, subject to a condition restricting alienation the condition would be void (*d*). But a condition reserving the profits to the donor for life is not repugnant (*e*). A gift may be subject to a condition precedent under sec. 21, and there is no transfer and no gift unless and until the condition is fulfilled.

If the condition precedent is impossible or illegal or immoral the gift fails under sec. 25. This is exemplified by the illustrations to that section and also by the illustrations to secs. 126 and 127 of the Succession Act, 1925. So a gift by a father of an annuity to his daughter, if she lives apart from her husband, is void (*f*), but a gift to two sisters on condition of their living apart is valid (*g*). A gift to a husband and wife on condition of the donor having physical possession of the wife is invalid (*h*). Again gifts on conditions inciting to crime (*i*) or to corruption (*j*) are invalid.

(*c*) *Nandi Singh* v. *Sita Ram* (1889) 16 Cal. 677, 682, 16 I.A. 44.

(*d*) *Re Dugdale, Dugdale* v. *Dugdale* (1888) 38 Ch. D. 176; *Nabob Amiruddaula* v. *Nateri* (1876) 6 Mad. H.C. 356 (Mohamedan Law); *Anantha* v. *Nagamuthu* (1882) 4 Mad. 200 (Hindu Law); *Ali Hasan* v. *Dhirja* (1882) 4 All. 518; *Bhairo* v. *Parmeshri* (1885) 7 All. 516; *Moulvi Muhammad Abdul* v. *Fatima Bibi* (1886) 8 All. 39, 12 I.A. 159 (Mohamedan Law); *Muthukamara Chetty* v. *Anthony* (1915) 38 Mad. 867, 24 I.C. 120 (Hindu Law); *Narayanan* v. *Kannan* (1884) 7 Mad. 315 (Hindu Law—condition restraining partition).

(*e*) *Lallu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467 F.B.; cf. *Ma Shin* v. *Ma Thin Kyi* (1934) 150 I.C. 966, ('34) A.R. 129.

(*f*) *In re Moore, Trafford* v. *Maconochie* (1888) 39 Ch. D. 116.

(*g*) *Ridgway* v. *Woodhouse* (1844) 7 Beav. 437.

(*h*) *Ghumna* v. *Ram Chandra Rao* (1925) 47 All. 619, 88 I.C. 411 ('25) A.A. 437.

(*i*) *Mitchell* v. *Reynolds* (1712) 1 P. Wms. 181, 189; *Shrewsbury* v. *Hope Scott* (1859) 6 Jur. (N.S.) 452, 456.

(*j*) *Egerton* v. *Brownlow* (1853) 4 H.L. Cas. 1.

A gift may be subject to a condition subsequent under sec. 31 and then the gift fails and property revests in the donor if the condition is not fulfilled (*k*). Such conditions are exemplified by the illustrations to sec. 31 of this Act and sec. 134 of the Succession Act, 1925. A gift to a daughter with a condition that no other heir but her issue should take has been construed as a gift with a condition subsequent of defeasance on the failure of issue living at the time of her death (*l*). A curious instance of such a condition was a gift to a relation, by a man sentenced to transportation for life, of his land on condition that the land should be given back if he returned to his village (*m*). A condition of residence in a gift of a house is a valid condition subsequent (*n*); but if the gift is absolute such a condition is invalid and cannot be enforced (*o*). A condition subsequent is intended to put an end to a gift. So if the condition subsequent is impossible or illegal or immoral, the condition is void under sec. 32 and the gift stands. So a gift to a mistress on condition of her continuing to live with the donor is a valid gift though the condition is void (*p*).

Revocation under the first paragraph of this section depends upon the donor and the donee at the time of acceptance agreeing to a condition subsequent which puts an end to the gift. The condition must be made at the time, for the donor cannot impose such a condition after the gift is absolute (*q*). The condition so imposed must be one which is a valid condition subsequent and is not repugnant to the gift under secs. 10 and 11 of this Act. But even if it is invalid as a condition limiting the interest transferred, it may be valid as a personal covenant binding on the immediate parties (*r*). See note "Restraint against alienation in a gift", under sec. 10.

Service Tenures.—Service tenures are closely analogous to gifts with an implied condition of revocation. All service tenures are resumable on a refusal to render the services (*s*). But there is a distinction between the grant of a land burden with a condition of service and the grant of land as remuneration for an office. The leading case on this distinction is *Forbes* v. *Meer Mohamed Tuquee* (*t*) where the Privy Council said :—

"In every case the right to resume must depend in a great measure upon the nature of the particular tenure or the terms of the particular grant. . . . There is a clear distinction between the grant of an estate burden with a certain service, and the grant of an office the performance of whose duties is remunerated by the use of certain lands. . . . . .Assuming it to be a grant of the former kind their Lordships do not dispute that it might have been so expressed as to make the continued performance of the service a condition to the continuance of the tenure. But, in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that the service ceasing, the tenure should determine."

There is again a further distinction as to the services to be rendered, which may be either personal or public.

(*k*) *Somashekarrao* v. *K. S. Mishra* (1944) A.N. 185.

(*l*) *Bhoobun Mohini* v. *Hurrish Chunder* (1879) 4 Cal. 23, 5 I.A. 138. See also *Sham Shivendar* v. *Janki Koer* (1909) 36 Cal. 311, 36 I.A. 1, 1 I.C. 126.

(*m*) *Venkatarama* v. *Ayasami* (1922) 43 Mad. L.J. 340, 69 I.C. 673, ('23) A.M. 67.

(*n*) *Ambika Charan* v. *Sasitara* (1915) 22 Cal. L.J. 61, 30 I.C. 868; *Bhoba* v. *Peary Lall* (1897) 24 Cal. 646; cf. *Srish Chandra* v. *Kadambini* (1926) 44 Cal. L.J. 18, 97 I.C. 685, ('26) A.C. 1175.

(*o*) *Rukminibai* v. *Laxmibai* (1920) 44 Bom. 304, 56 I.C. 36.

(*p*) *Ram Sarup* v. *Bela* (1884) 6 All. 313, 11 I.A. 44.

(*q*) *Collector of Ratnagiri* v. *Vyankatrav* (1872) 8 Bom. H.C. (A.C.) 1; *Ram Sarup* v. *Bela*, *supra*; *Hussain Khan* v. *Nateri* (1876) Mad. A.C. 356.

(*r*) *Makund Prasad* v. *Rajrup Singh* (1907) 4 All. L.J. 708; *Ma Yin Hu* v. *Ma Chit May* (1929) 7 Rang. 306, 119 I.C. 737, ('29) A.R. 226.

(*s*) *Hurrogobind Raha* v. *Ramrutno* (1879) 4 Cal. 67; *Ansar Ali* v. *Grey* (1905) 2 Cal. L.J. 403.

(*t*) (1870) 14 W.R. 28, 32, 13 M.I.A. 438.

S. 126

The classification therefore is as follows :—

A. Grants of land burdened with a condition of service either (1) personal, or (2) public.

B. Grants of land as remuneration for service.

Grants of class A (1) are resumable not only if the performance of service is refused but also if the services are no longer required (u).

Grants of class A (2) are resumable if the performance of service is refused—but they are not resumable if the services are no longer required (v).

Grants of class B are really grants of an office of which the remuneration is the land. When the office is terminated, the lands can be resumed. If the office is hereditary the grantor can determine the office and resume the land when the services are no longer required (w). But if services are required and the office is hereditary, the grantor cannot resume the land and appoint another person to officiate (x).

Revocable at pleasure—No gift.—A gift may be revocable by being subject to a condition subsequent; or it may be contingent so that there is no gift at all, unless a condition precedent is fulfilled. But the condition cannot depend upon the will of the donor, for a gift revocable at pleasure is no gift at all. The same principle applies in the law of contracts, for a promise to pay what the promisor pleases is no promise at all (y); and when a party to be bound by the declaration of his will annexes to such declaration a condition that he will be bound when he wills it, he is not bound at all (z).

Revocation by rescission.—As the donee may not profit by his wrong, a gift may be revoked for coercion, fraud, misrepresentation or undue influence in the same way as a contract may be rescinded. But if the donor does not revoke, he cannot transfer his right to sue for revocation (a). But in case of the donor's death, the cause of action survives to his legal representatives (b). This is the effect of the general law enacted in sec. 306 of the Indian Succession Act 39 of 1925, and is also the law in England (c).

Coercion as defined in sec. 15 of the Indian Contract Act is wider than in English law and need not proceed from the donee. It includes the committing or threatening to commit any act forbidden by the Indian Penal Code. The Madras High Court has held that this includes a threat to commit suicide, and that a deed of release executed by a mother and son in consequence of the father's threat to commit suicide is voidable for coercion (d).

Fraud of the donor or his agent makes a gift voidable. But where the donor by reason of such fraud signs a deed of gift believing it to be an instrument of a different kind, the

(u) *Unidi Rajaha* v. *Pemmasamy* (1858) 4 W.R. 121, 7 M.I.A. 128; *Sanniyasi* v. *Salur* (1884) 7 Mad. 268; *Mahadevi* v. *Vikrama* (1891) 14 Mad. 365; *Radha Pershad* v. *Budhu Dashad* (1895) 22 Cal. 938; *Raja of Vizianagram* v. *Appalaswami* (1930) 59 Mad. L.J. 183, 127 I.C. 231, ('30) A.M. 755 F.B.

(v) *Joykishen Mookerjee* v. *Collector of East Burdwan* (1866) 1 W.R. 26, 10 M.I.A. 16; *Forbes* v. *Meer Mahomed Tuquee* (1870) 14 W.R. 28, 32, 13 M.I.A. 438; *Rajah Nilmoney* v. *The Government* (1872) 18 W.R. 321; *Raja Lalanund* v. *Thakoor Munoorunjun* (1874) 13 Beng. L.R. 124, I.A. Sup. Vol. 181; *Bhimapaiya* v. *Ramchandra* (1898) 22 Bom. 422; *Sri Raja Vencata Narasimha* v. *Sri Raja Sobhanadri* (1906) 29 Mad. 52, 33 I.A. 46.

(w) *Krishaji* v. *Vithalrav* (1888) 12 Bom. 80; *Bhimapaiya* v. *Ramchandra*, *supra*.

(x) *Bhimapaiya* v. *Ramchandra*, *supra*, at p. 426.

(y) *Roberts* v. *Smith* (1859) 4 H. & N. 315.

(z) *Secretary of State for India* v. *Arathoon* (1882) 5 Mad. 173, 179 (per Muthuswami Ayyer, J.).

(a) *Baijnath Singh* v. *Mussammat Biraj* (1923) 2 Pat. 52, 68 I.C. 383, ('22) A.P. 514.

(b) *Ghumna* v. *Ram Chandra Rao* (1925) 47 All. 619, 621, 88 I.C. 411, ('25) A.A. 437. The decision to the contrary in *Aziz-un-nissa* v. *Suraj Husain* (1934) All. L.J. 814, 152 I.C. 146, ('34) A.A. 507 is, it is submitted, unsound.

(c) *Allcard* v. *Skinner* (1887) 36 Ch. D. 145, 187 C.A.; *Tyars* v. *Alsop* (1889) 61 L.T. 8 C.A.

(d) *Ammiraju* v. *Seshamma* (1918) 41 Mad. 33, 40 I.C. 352.

deed is a nullity and void *ab initio* by the rule of *non est factum* stated in *Foster* v. *Mackinnon* (e). Such a gift is void and need not be revoked (f).

Not only fraud but even innocent misrepresentation under sec. 18 (3) of the Indian Contract Act is a ground for revoking a gift (g).

The most usual ground for revocation is undue influence, as defined in sec. 18 of the Contract Act. The Court cannot prevent a man from making an improvident gift or disposing of his property in a way that no right-minded man would be disposed to do; and if he does so deliberately the Court cannot help him (h), for it is not the province of the Court to decide upon what terms a man may dispose of his property (i). But the improvidence of the deed may afford an argument that the donor did not intend it (j). So when an improvident gift is made to a person, who is in a position to dominate the will of the donor, the presumption is that the gift was obtained by undue influence. Instances of such undue influence are a gift by a child to a parent (k); a *cestui que trust* to a trustee (l), a religious inferior to a religious superior (m); a patient to a physician (n) or a client to a solicitor (o). In *Wright* v. *Carter* (p) Cozens Hardy, L.J., said he was inclined to think that the only competent independent advice that should be given to a man who proposes to make a gift to his solicitor was to tell him not to do so.

There is also a large class of cases in which the presumption of undue influence is supported by the fact that the donors are pardanishin women (q). These women live in a certain degree of seclusion and the Courts have therefore thrown round them a cloak of protection. The donee must show that the transaction was a *bona fide* one and fully understood by her, and that the deed was explained to and understood by her (r). The test laid down is that the disposition made must be substantially understood, and must really be the mental act, as its execution is the physical act, of the person who makes it (s).

(e) (1869) L.R. 4 C.P. 704.

(f) *Baijnath Singh* v. *Mussamat Biraj* (1923) 2 Pat. 52, 68 I.C. 383, ('22) A.P. 514.

(g) Cf. *Re Glubb, Bamfield* v. *Rogers* (1900) 1 Ch. 354.

(h) *Phillips* v. *Mullings* (1871) 7 Ch. App. 244.

(i) *Dutton* v. *Thompson* (1883) 23 Ch. D. 278 C.A.; *James* v. *Couchman* (1885) 29 Ch. D. 212.

(j) *Dutton* v. *Thompson, supra; Hall* v. *Hall* (1873) 8 Ch. App. 430.

(k) *Archer* v. *Hudson* (1844) 7 Beav. 551; *Lakshmi Doss* v. *Roop Laul* (1907) 30 Mad. 169 F.B.; *Lancashire Loans Ltd.* v. *Black* (1934) K.B. 380.

(l) *Hylton* v. *Hylton* (1754) 2 Ves. Sen. 547; *Hatch* v. *Hatch* (1804) 9 Ves. 292; *Vaughton* v. *Noble* (1861) 30 Beav. 34; *Phul Chand* v. *Lakkhu* (1903) 25 All. 358; *Raghunath* v. *Varjivandas* (1906) 30 Bom. 578 and *Wajid Khan* v. *Ewaz Ali Khan* (1891) 18 Cal. 545, 18 I.A. 144 (both cases of a gift by a woman to a managing agent).

(m) *Huguenin* v. *Baseley* (1807) 14 Ves. 273 (a widow to a clergyman); *Allcard* v. *Skinner* (1887) 36 Ch. D. 145 (a novice to a lady superior of a convent); *Morley* v. *Loughnan* (1893) 1 Ch. 736 (a feeble-minded person to a spiritual adviser); *Mannu Singh* v. *Umadat Pande* (1890) 12 All. 523 (an old man to a guru); *Bai Manigavri* v. *Narondas Calliandas* (1891) 15 Bom. 549 (gift to a family priest to provide for funeral expenses).

(n) *Mitchell* v. *Homfray* (1881) 8 Q.B.D. 587 C.A.

(o) *Savery* v. *King* (1856) 5 H.L. Cas. 627; *Rhodes* v. *Bate* (1866) 1 Ch. App. 252; *Liles* v. *Terry* (1895) 2 Q.B. 679 C.A.; *Willis* v. *Barron* (1902) A.C. 271; *Re Haslam and Hier-Evans* (1902) 1 Ch. 765, 769 C.A.; *Raja Papamma* v. *Sitaramayya* (1895) 5 Mad. L.J. 233.

(p) (1903) 1 Ch. 27, 62 C.A., followed in *Kaminee Dasee* v. *Krishna Chandra* (1912) 39 Cal. 933, 16 I.C. 110.

(q) *Soondur Koomaree* v. *Kishoree Lal* (1867) 5 W.R. 246; *Ram Pershad* v. *Ranee Phoolputtee* (1867) 7 W.R. 98; *Sookyaboye* v. *Latchmi* (1870) 13 W.R. 3 P.C.; *Geresh Chunder* v. *Mussamat Bhuggobutty* (1870) 13 M.I.A. 419; *Delroos Banoo* v. *Nowab Syud Asgur* (1875) 23 W.R. 453; *Ashgar Ali* v. *Delroos* (1878) 3 Cal. 324 P.C.; *T. Sivithri* v. *M. Vasudevan* (1881) 3 Mad. 215; *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, 15 I.A. 81; *Mariam Bibi* v. *Sakina* (1892) 14 All. 8; *Deo Kuar* v. *Man Kuar* (1895) 17 All. 1, 21 I.A. 148; *Khas Mehal* v. *Administrator General of Bengal* (1900) 5 Cal. W.N. 505; *Kamini Dasee* v. *Krishna Chandra, supra; Kali Bakhsh* v. *Ram Gopal* (1914) 36 All. 81, 41 I.A. 23, 21 I.C. 985; *Kamawati* v. *Digbijai Singh* (1921) 43 All. 525, 48 I.A. 378, 64 I.C. 559, ('22) A.PC. 14; *Ruhulla* v. *Hassanalli* (1928) 32 Cal. W.N. 929, 110 I.C. 260, ('28) A.PC. 303.

(r) *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (1874) 21 W.R. 340, 1 I.A. 192; *Shambati Koeri* v. *Jago Bibi* (1902) 29 Cal. 749, 29 I.A. 127; *Sajjad Husain* v. *Wazir Ali Khan* (1912) 34 All. 455, 39 I.A. 156, 16 I.C. 197.

(s) *Faridunissa* v. *Mukhtar Ahmad* (1925) 47 All. 703, 52 I.A. 342, 89 I.C. 649, ('25) A.PC. 204; *Tara Kumari* v. *Chandra Mauleshwar* (1931) 54 Cal. L.J. 431, 58 I.A. 450, 134 I.C. 1076, ('31) A.PC. 303.

S. 126 But not only in the case of a pardanishin woman but in all cases where there is a presumption of undue influence the donee may rebut the presumption by evidence that the donor exercised a free and independent will (*t*) after a fair understanding of the whole matter (*u*); and the Court will consider whether the transaction was a righteous one, and whether the intention to make the gift originated with the donor (*v*), and whether the donor had the benefit of independent advice (*w*).

In some cases the absence of a power of revocation in the deed is a circumstance which indicates undue influence, but it is not conclusive (*x*).

The period of limitation for the revocation of a gift on the ground of coercion, fraud, misrepresentation or undue influence is under Article 91 three years from the time when the facts entitling the plaintiff to revoke became known to him (*y*). In English law the right to revoke may be lost by laches and delay, but in India the right will not be lost by mere delay, for the donor is entitled to a period of limitation allowed by the statute. But the right to revoke will be lost if the donor ratifies the gift or by his conduct shows that he has elected to abandon his right to revoke (*z*)

Mistake.—Sec. 36 of the Specific Relief Act appears to assume that a contract may be rescinded for mistake and this assumption is by sec. 126 extended to gifts. But sec. 36 of the Specific Relief Act is scarcely intelligible (*a*); for a contract is not voidable because of the mistake of one party, and if both parties are under a mistake as to an essential matter, the contract is void and does not require rescission. If both parties are under a mistake as to a matter that is not essential the remedy is not rescission but rectification. However, it is clear a gift cannot be revoked on account of the mistake of the donor alone. So in a Madras case (*b*) the Collector was not allowed to revoke a grant made under a mistake as to the effect of certain departmental orders. But a mutual mistake will justify cancellation, as when a husband made and the wife accepted a gift in ignorance of the fact that it would be subject to a covenant in the marriage settlement (*c*).

Other instances of unilateral mistakes that do not avoid a gift are a gift under the mistaken impression that the gift was necessary for the maintenance of the donee's sons (*d*), or a gift under the mistaken belief that the donee was competent to perform the funeral ceremonies of the donor (*e*). But in both these cases the gift would be revocable if made on a condition. A similar question arises in the case of gifts by will where a bequest is made to a person to whom a particular description is applied. If the gift is to the individual as *persona designata*, the mistake in description does not invalidate the

(*t*) *Huguenin* v. *Baseley* (1807) 14 Ves. 273; *Ganga Baksh* v. *Jagat Bahadur* (1895) 23 Cal. 15, 22 I.A. 153; *Kali Baksh Sing* v. *Ram Gopal Singh* (1914) 36 All. 81, 41 I.A. 23, 21 I.C. 985; *Kaminee Dasee* v. *Krishna Chandra* (1912) 39 Cal. 933, 16 I.C. 110; *Phul Chand* v. *Lakku* (1903) 25 All. 358; *Fairdunnisa* v. *Muktar Ahmad* (1925) 47 All. 703, 52 I.A. 342, 89 I.C. 649, ('25) A.PC. 204; *Mst. Barkatunnissa* v. *Debi Baksh* (1927) 25 All. L.J. 314, 101 I.C. 29, ('27) A.PC. 94.

(*u*) *Sunitabala Debi* v. *Dhara Sundari* (1919) 47 Cal. 175, 46 I.A. 272, 53 I.C. 131; *Wright* v. *Vanderplank* (1856) 8 DeG. M. & G. 133 C.A.

(*v*) *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, 15 I.A. 81.

(*w*) *Powell* v. *Powell* (1900) 1 Ch. 243; *Wright* v. *Carter* (1903) 1 Ch. 27 C.A.; *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, 15 I.A. 81; *Kali Baksh* v. *Ram Gopal* (1914) 36 All. 81, 41 I.A. 23, 21 I.C. 985; *Mariam Bibi* v. *Ibrahim* (1918) 28 Cal. L.J. 306,48 I.C. 561 F.B.

(*x*) *Hall* v. *Hall* (1873) 8 Ch. App. 430; *Kaminee Dasee* v. *Krishna Chandra*, *supra*, at p. 951; *Raja Ram* v. *Khandu* (1912) 14 Bom. L.R. 340, 15 I.C. 529.

(*y*) *Hasan Ali* v. *Nazo* (1889) 11 All. 456; *Rani Janki Kunwar* v. *Ajit Singh* (1888) 15 Cal. 58, 14 I.A. 148.

(*z*) *Savery* v. *King* (1856) 5 H.L. Cas. 627; *Wright* v. *Vanderplank* (1856) 8 DeG. M. & G. 133 C.A.; *Mitchell* v. *Homfray* (1881) 8 Q.B.D. 587 C.A.; *Lakshmi Doss* v. *Roop Laul* (1907) 30 Mad. 169; *Seetharama* v. *Bayanna* (1894) 17 Mad. 275.

(*a*) See Pollock & Mulla's Contract Act, 6th Ed., p. 330.

(*b*) *Collector of Salem* v. *Rangappa* (1889) 12 Mad. 404.

(*c*) *Ellis* v. *Ellis* (1909) 26 T.L.R. 166.

(*d*) *Sreemutty Pubitra* v. *Damoodur* (1871) 24 W.R. 397.

(*e*) *Abhachari* v. *Ramchandrayya* (1864) 1 Mad. H.C. 393.

gift (*f*); but otherwise if the gift is on condition of that description being fulfilled or if the intention was that the person named should take only in that character (*g*). In *Wilkinson* v. *Joughin* (*h*) the testator left his property to his wife Adelaide for life, and remainder to his step-daughter Sarah Ward. But Adelaide was not his wife, for she had concealed the fact that her former husband was alive, and for the same reason Sarah Ward was not his step-daughter. The wife's fraud invalidated the gift to her, but the gift to Sarah Ward was effective in spite of the testator's mistake in describing her as his step-daughter. **S. 126**

No revocation aliunde.—A gift may be revocable on a condition subsequent not depending upon the will of the donor; or it may be revocable on grounds which would justify rescission in the case of a contract. But it cannot be revoked for any other reason, for as already explained a gift revocable at pleasure is no gift at all. In *Behari Lal Ghose* v. *Sindhubala Dasi* (*i*) the Calcutta High Court said that the third paragraph in this section—"Save as aforesaid a gift cannot be revoked"—was a legislative recognition of the doctrine enunciated by Lord Nottingham in *Villers* v. *Beamont* (*j*):—

> "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly: for if you would relieve in such a case, you must consequently establish this proposition, *viz.*, that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd."

The Calcutta High Court in the case last cited decided that the heir of the donor of an occupancy holding could not revoke the gift on the ground that the holding was not transferable. Again in *Re Antaji Keshav Tambe* (*k*) it was held that Government could not by proclamation in 1851 withdraw rights to trees, which had been granted by a proclamation of 1824. And in *Rajaram* v. *Ganesh* (*l*) it was held that after a gift of a *vritti* was complete, the donor could not revoke it by his will.

Incomplete gift.—The rule that a gift cannot be revoked except on the grounds mentioned in sec. 126 does not apply to an incomplete gift. An incomplete gift can be revoked at any time (*m*). The Rangoon High Court has held that when a donee is in possession under a gift incomplete for want of a registered deed, the donor may be estopped from denying the donee's title (*n*). Under the recent decisions of the Privy Council the gift is effective but cannot be enforced until the deed is registered (*o*).

(*f*) *Schloss* v. *Stiebel* (1833) 6 Sim. 1 (fiance described as wife); *Hill* v. *Crook* (1873) L.R. 6 H.L. 265 (to my daughter Mary wife of the said John Crook but they were not legally married); *Monemotha Day* v. *Onanthnanth*, Bourke 180 (two boys described as adopted sons—living with testator but not adopted); *Nidhoomoni Debya* v. *Saroda* (1876) 26 W. R. 91, 3 I. A. 253; *Bireswar Mukerji* v. *Ardha Chunder* (1892) 19 Cal. 452, 19 I.A. 101 (bequest by name to boy independent of adoption); *Subbarayar* v. *Subbammal* (1901) 24 Mad. 214, 27 I.A. 162 (bequest to minor whose adoption was intended); *Murari Lal* v. *Kundan Lal* (1909) 31 All. 339, 1 I.C. 687; *Khub Singh* v. *Ramji Lal* (1919) 41 All. 666, 52 I.C. 811; *Bai Dhondubai* v. *Laxmanrao* (1923) 47 Bom. 65, 68 I.C. 504, ('22) A. B. 352; *Court of Wards* v. *Venkata Surya* (1897) 20 Mad. 167, on app. 22 Mad. 383, 26 I.A. 83 (donee described as aurasa son but testator knew he was not); *Sri Raja Rao Venkata* v. *Court of Wards* (1899) 26 I.A. 83.

(*g*) *Fanindra Deb* v. *Rajeswar* (1885) 11 Cal. 463, 12 I.A. 72 (donee to take in virtue of being adopted son); *Abbu* v. *Kuppammal* (1893) 16 Mad. 355 (donee to take if adopted by widow); *Surendro Keshub Roy* v. *Doorga Soondery* (1892) 19 Cal. 513, 19 I.A. 108 (in character of adopted sons and Shebaits); *Karamsi Madhowji* v. *Karsandas* (1896) 20 Bom. 718, on app. 23 Bom. 271 P.C. (direction to adopt and bequest to adopted son); *Mst. Lali* v. *Murli Dhar* (1906) 28 All. 488, 33 I.A. 97; *Chokkammal* v. *Murugathal* (1892) 2 Mad. L. J. 240.

(*h*) (1866) L. R. 2 Eq. 319.

(*i*) (1918) 45 Cal. 434, 438, 41 I.C. 878; *Lucy Moss* v. *Mah Nyein May* (1933) 149 I.C. 1113, ('33) A.R. 418.

(*j*) (1682) 1 Vern. 100. See also *Slater* v. *Burnley Corporation* (1888) 59 L.T. 636.

(*k*) (1894) 18 Bom. 670.

(*l*) (1899) 23 Bom. 131, 134.

(*m*) *Standing* v. *Bowring* (1885) 31 Ch. D. 282, 290 C.A.

(*n*) *Ma Shin* v. *Maung Hman* (1923) 1 Rang. 651, 79 I.C. 579, ('24) A.R. 651; *M. P. L. M. P. Chetty* v. *Ma Ngwe Sin* (1923) 1 Rang. 665, 79 I.C. 485, ('24) A.R. 200.

(*o*) *Kalyanasundaram Pillai* v. *Karuppa Mooppanar* (1927) 50 Mad. 193, 54 I.A. 89, 100 I.C. 105, ('27) A.PC. 42; *Venkatsubba Shrinivas* v. *Subba Rama* (1928) 52 Bom. 313, 108 I.C. 367, ('28) A.PC. 86.

Ss. 126, 127

A cheque is an order to the donor's bankers which is revoked by the donor's death; but it is not revoked by the donor's death if it was presented in the donor's lifetime and funds were appropriated by the bankers to meet it (*p*).

Bona fide purchaser.—The right of revocation, like the right of rescission in a contract, cannot be exercised against a bona fide purchaser for value without notice so as to prejudice rights honestly acquired in the belief that the apparent ownership was the real ownership (*q*). But it may be enforced against a volunteer or an innocent person claiming under the donee (*r*).

Onerous gift.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a) *A* has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. *A* gives *B* all his shares in joint-stock companies. *B* refuses to accept the shares in Y. He cannot take the shares in X.

(b) *A* having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also, as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not by his refusal forfeit the money.

The first paragraph of this section corresponds to sec. 122 of the Indian Succession Act, 1925, which refers to gifts by will. The first illustration is adapted from the case of *Moffett* v. *Bates* (*s*). The second paragraph corresponds to sec. 123 of the Indian Succession Act, 1925, and the second illustration is taken from the case of *Warren* v. *Rudall. Ex parte Godfrey* (*t*). In the first case there is one gift of several properties and the donee must take all or none. In the second case there are separate

(*p*) *Tate* v. *Leithead* (1854) Kay 658; *Re Swinburne Sutton* v. *Featherley* (1926) Ch. 38, overruling *Bromley* v. *Brunton* (1868) L.R. 6 Eq. 275.

(*q*) *Trevelyan* v. *White* (1839) 1 Beav. 588; *Ali Miji* v. *Usir Ali Sheik* (1938) 175 I.C. 712, (1938) A.C. 157.

(*r*) *Huguenin* v. *Baseley* (1807) 14 Ves. 273, 289.

(*s*) (1857) 3 Sm. & G. 468.

(*t*) (1860) 1 John & H. 1.

gifts to the same donee and he may accept those that are beneficial and reject those that are onerous. The gifts may be distinct although they are included in the same words of gift, and it is a question of the intention of the donor whether they are to be taken together or not (*u*).

The rule as to onerous gifts in the first paragraph is analogous to the rule of election under sec. 35. Under that section if an instrument confers a benefit and at the same time purports to deprive the beneficiary of other property, the beneficiary cannot take the benefit without surrendering the property, for it is said that he must either take under the instrument or against it (*v*).

A minor though not competent to contract may be a donee, but on attaining majority he has the right to repudiate the gift. If he retains the property after attaining majority, he is estopped from repudiating. The principle is the same as that applied in the case of minor partners by sec. 248 of the Contract Act, now replaced by sec. 30 of the Indian Partnership Act, 1932. In the case of a partnership the estoppel arises from omission to repudiate within a reasonable time. In the case of a gift the estoppel arises from the retention of the property, and no doubt a reasonable time would be allowed for repudiation. Similarly when a minor has been made a shareholder in a joint-stock company he cannot repudiate his holding in the company, if he has drawn dividends after attaining majority (*w*). But during minority the gift is complete, so that if the donee dies a minor his heir takes (*x*).

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by *and liabilities of* the donor at the time of the gift to the extent of the property comprised therein.

Universal donee.

Amendment.—The words "and liabilities of" were inserted by the Amending Act 20 of 1929. The Special Committee observe that the effect of the amendment is to make the scope of the section clear, for a universal donee should be liable to the extent of the property in his hands not only for the debts of the donor but also for his other liabilities.

Universal donee.—A universal donee is unknown to English law according to which there is no universal succession except in the case of death or bankruptcy. But in Hindu law this would occur when a man retires from the world and becomes an ascetic.

A gift of the whole estate of the donor would in most cases be impeachable as to land as a fraudulent transfer under sec. 53.

But this section is exclusive of sec. 53 and rests on the same principle as the first paragraph of sec. 127—*Qui sensit commodum debet et sentire onus*. The donee accepting the whole property becomes liable for the debts and other liabilities of the donor. Similarly when a Hindu widow transfers the whole of her estate in favour of the next reversioner the donee is liable for her maintenance (*y*). *A* executed a promissory note in

(*u*) *Guthrie* v. *Walrond* (1883) 22 Ch. D. 573.

(*v*) *Cooper* v. *Cooper* (1874) L. R. 7 H. L. 53; *Whistler* v. *Webster* (1794) 2 Ves. 367; *Re Chesham (Lord) Cavendish* v. *Dacre* (1886) 31 Ch. D. 466.

(*w*) *Fazulbhoy* v. *Credit Bank of India* (1915) 39 Bom. 331, 27 I.C. 335 following *Ebbett's* case (1870) 5 Ch. App. 302; *Re Yeoland Consols Ltd.* (1888) 58 L. T. 922; *London North Western Railway Co.* v. *M'Michael* (1851) 20 L.J. Ex. 233.

(*x*) *Subramania Ayyar* v. *Sitha Lakshmi* (1897) 20 Mad. 147.

(*y*) *Narbadabai* v. *Mahadeo Narayan* (1881) 5 Bom. 99.

Ss. 128, 129

favour of *B* and subject to the payment of the amount due thereunder made a gift of his entire property in favour of *C*. It was held that *C* could not retain the benefit, at the same time repudiate the burden (*z*). In another case a reversioner in whose favour a Hindu female taking a woman's interest relinquished the property was held liable for her debts (*a*).

When a universal donee sued to redeem a mortgagee of the donor, the mortgagee was allowed to tack a simple contract debt of the donor on to the mortgage debt (*b*). The position of the universal legatee and the universal donee is practically the same. In the case of a universal donee, it was necessary to provide for his liability under sec. 128, as otherwise, in case of personal liabilities, the donor being still alive, the donee would escape such liabilities (*c*).

Subject to the provisions of sec. 127.—If the universal donee were a minor, he would be under no liability unless he retained the property after attaining majority.

If any portion of the donor's property, whether moveable or immoveable, is excluded from the gift, the donee is not a universal donee and the creditor is not entitled to the benefit of this section (*d*). But in a case in which a life interest in part of the property was reserved to the donor, the donee was held to be a universal donee (*e*). So also where the part retained by a donor is insignificant and is for his own maintenance, the donee is nevertheless a universal donee (*f*).

Saving of donations *mortis causa* and Muhammadan law.

129. Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law. * * * * *

Amendment.—Before the Amending Act 20 of 1929 the second clause of the section was " or shall be deemed to affect any rule of Mahomedan law, or, save as provided by sec. 123, any rule of Hindu or Buddhist law."

The reference to Buddhist law has been omitted as it was considered that the chapter was consistent with Buddhist law. In a case decided before the amendment it was held that the reference to sec. 123 had the effect of abrogating the rule of Buddhist law if there was one, that delivery of possession is essential to the validity of a gift (*g*).

Nothing in this chapter applies to Mahomedan gifts (*h*).

Section 123 was extended to the Pegu District in Burma but sec. 129 was not extended. The Privy Council held that the omission to extend sec. 129 had not the effect of making sec. 123 operate to abrogate any rule of Mahomedan law. Sec. 123 required Mahomedan gifts of immoveable property in the Pegu District to be effected by deed registered and attested, and it superimposed this requirement on the existing Mahomedan law requiring delivery of possession. Therefore in the Pegu District a Mahomedan gift of immoveable property must be effected both by registered deed and by delivery of possession (*i*). The question was fully considered by the Full Bench of the

(*z*) *Ram Sarup* v. *Shiv Dayal* (1940) 190 I.C. 463, (1940) A.L. 285.
(*a*) *Sudhamoyee* v. *Bhujendra Nath* (1937) A.C. 226.
(*b*) *Ragho Govind* v. *Balwant* (1883) 7 Bom. 101.
(*c*) *Sahu Jali* v. *Bahal Singh* (1945) A.A. 433.
(*d*) *Shyam Behari Mal* v. *Maha Prasad* (1930) 28 All.L.J. 99, 123 I.C. 824 ('30) A.A. 180; *Anrudh Kumar* v. *Lachmi Chand* (1928) 50 All. 818, 115 I.C. 114, ('28) A.A. 500; *Brij Raj Kuar* v. *Ram Dayal* (1931) 7 Luck. 411, 135 I.C. 369, ('32) A. O. 49.
(*e*) *Shahzad Singh* v. *Madan Gopal* (1933) 140 I.C. 120, ('33) A.A. 146.
(*f*) *Bapurao* v. *Bulakidas* (1944) A.N. 225.
(*g*) *Ma Thin Myaing* v. *Maung Gyi* (1923) 1 Rang. 351, 75 I.C. 166, ('24) A. R. 13; *U Pandawun* v. *U Sandima* (1924) 2 Rang. 131, 83 I.C. 557, ('24) A. R. 309.
(*h*) *Musa Miya* v. *Kadar Bux* (1928) 52 Bom. 316, 321, 55 I.A. 171, 109 I.C. 31, ('28) A. PC. 108.
(*i*) *Ma Mi* v. *Kallander Ammal* (1927) 5 Rang. 7, 54 I.A. 23, 100 I.C. 32, ('27) A.PC. 22.

Rangoon High Court and the Court came to the conclusion that in places where the rules of the Mahomedan Law are not applicable to gifts as between Mahomedans as law by legislative enactment, such as the Civil Courts Act or the Burma Laws Act, there is no provision in the Transfer of Property Act which can be affected by any rule of the Mahomedan Law. In such cases a deed of gift by a Mahomedan to a Mahomedan must be effected in the manner prescribed by sec. 123 (*j*). But it would be otherwise if the question arises in a Court of a place where the Burma Laws Act section 13(2) applies, *e.g.*, Rangoon (*k*).

(*j*) *Ma Asha* v. *B. K. Haldar* (1936) 14 Rang. 439, 164 I.C. 984, (1936) A.R. 430 (F.B.)

(*k*) *Rahmat Bibi* v. *Maung Po Kin* (1936) 14 Rang. 485.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

S. 130

Transfer of actionable claim.

130. (1) The transfer of an actionable claim *whether with or without consideration* shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, * * * shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of section 38 of the Insurance Act, 1938.

Illustrations.

(i) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer, as prescribed in section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(ii) *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A*'s executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

Amendment.—Section 130 when first enacted was a definition of actionable claims. That definition was :—

"A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary."

The transfer of an actionable claim was the subject of the former sec. 131. That section was :—

"No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.

Illustration.

A owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, having no notice of the transfer, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt."

The Chapter was remodelled and the sections were altered and rearranged by Act 2 of 1900. The definition of actionable claim was transferred to sec. 3 and sec. 131 became sec. 130. That section was substantially the same as the present one. The words "notwithstanding anything contained in sec. 123" were inserted by Act 38 of 1925 in consequence of representation made by Insurance Companies that it was a hardship that a gift of a life policy could only be made by a registered instrument under sec. 123. These words have been omitted by Act 20 of 1929 in view of the insertion of the words, "whether with *or without consideration.*"

Actionable claims.—In English law moveable property was said to be either in possession and enjoyment and therefore a chose in possession; or out of possession, but realizable by action, and therefore a chose in action. A chose in action is in English law a term used to describe all personal rights of property which can only be claimed or enforced by action and not by physical possession. In *Colonial Bank* v. *Whinney* (*l*) the Court pointed out that the term was used in different ways to include not only the right to obtain something not in possession or enjoyment but also certain classes of incorporeal personal property. It is also used to denote a document evidencing a right or title. Accordingly choses in action included debts, benefits of contract, damages for breach of contract or tort, also stock, shares and debentures and even such incorporeal rights as patents, copyrights and trademarks.

The former definition of actionable claims was a good working definition of the English term choses in action in the widest acceptation of the term—but it led to several difficulties.

In the first place although there were many conflicting decisions as to whether a mortgage debt was immoveable or moveable property, it was generally agreed that the transfer of a mortgage debt was an assignment of an actionable claim (*m*) in spite of the powerful dissenting judgment of Prinsep, J., in *Muchiram Barik* v. *Ishan Chunder Chuckerbutty* (*n*). Now under the repealed sec. 135 an assignee of an actionable claim could not recover from the debtor more than what he had paid for the assignment, so that although the security passed with the debt under sec. 8, yet the assignee of the mortgage might not be entitled to recover the whole balance due on the mortgage at the time of the assignment. This is entirely inconsistent with the principle that a mortgage is an interest in land. Rankin, C.J., in *Imperial Bank of India* v. *Bengal National Bank* (*o*)

(*l*) (1885) 30 Ch. D. 261.

(*m*) *Subbammal* v. *Venkatarama* (1887) 10 Mad. 289; *Rathnasami* v. *Subramanya* (1888) 11 Mad. 56; *Lala Jugdeo* v. *Brij Behari* (1886) 12 Cal. 505; *Modun Mohun* v. *Futtarrunnissa* (1886) 13 Cal. 297; *Muchiram Barik* v. *Ishan Chunder Chuckerbutti* (1894) 21 Cal. 568 [F.B.]; *Hakim-un-Nissa* v. *Deonarain* (1891) 13 All. 102.

(*n*) (1894) 21 Cal. 568.

(*o*) (1931) 58 Cal. 136, 131 I.C. 689, ('31) A.C. 223.

S. 130 said that if a mortgage debt could be assigned as an actionable claim the provisions of secs. 54 and 59 which require a transfer of immoveable property by sale or mortgage to be by registered instrument would be defeated, for the assignment of the actionable claim would by virtue of sec. 8 draw the security after it. Again sec. 132 would give the mortgagor the right to set up against the mortgagee's transferee an equity of which he may have had no notice. In English law although a mortgage debt is a chose in action yet it is well settled that the assignee of a mortgage debt is in a much stronger position than the assignee of an unsecured debt. Stirling, L. J., in his judgment in *Taylor* v. *London & County Banking Co.* (*p*) said:—

> "Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having an 'interest in land,' and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty."

The reason is thus stated by Sir Williams Grant in *Jones* v. *Gibbons* (*q*)—"A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt."

But under the old sec. 131 there was no transfer of the mortgage debt until express notice of the transfer had been given to the mortgagor. This also was inconsistent with the transfer being a transfer of an interest in land.

Again the old definition was wide enough to include a mere right of suit. Thus the following were held to be actionable claims: the right of a minor on attaining majority to set aside a lease of his share of the family property (*r*); the right to obtain by partition a plot of land (*s*); and the right of a usufructuary mortgagee, who had not been given possession to sue for the mortgage money (*t*).

Lastly the section had to be construed as limited to cases where the cause of action had accrued before the assignment (*u*). This was to escape from the old sec. 135 under which the purchaser of an actionable claim was discharged by payment not of the amount of the claim but of the price he had paid and the expenses of the sale.

All these difficulties have been removed by the amended definition. Debts secured by a mortgage of immoveable property or by a pledge of moveable property are excluded from the definition. These are now transfers not of claims to property but of the property itself. All claims under contract are excluded except claims to the payment of a liquidated sum of money, or debt, or price. That a right to sue for damages is not an actionable claim is also stressed by the amendment made in sec. 6 (e) to the effect that a mere right to sue cannot be transferred (*v*). On the other hand the definition has been extended so as to include such equitable choses in action as debts or beneficial interests in moveable property whether existent, accruing, conditional or contingent.

(*p*) (1901) 2 Ch. 231, 254.
(*q*) (1804) 9 Ves. 407, 410.
(*r*) *Rajanikanth* v. *Hari Mohan* (1886) 12 Cal. 470.
(*s*) *Rudra Perkash* v. *Krishna* (1890) 14 Cal. 241.
(*t*) *Rani* v. *Ajudhia Prasad* (1894) 16 All. 315.
(*u*) *Shib Lal* v. *Azmat Ullah* (1896) 18 All. 265 F.B.; *Arunachellam Chetty* v. *Subramania Chetti* (1907) 30 Mad. 235.
(*v*) *Abu Mahomed* v. *S. C. Chunder* (1909) 36 Cal. 345, 1 I.C. 827.

Actionable claims therefore include claims recognised by the Courts as affording grounds for relief either—

(1) as to unsecured debts or

(2) as to beneficial interests in moveable property not in possession, actual or constructive—whether present or future, conditional or contingent.

Civil Court.—A suit by a co-sharer to recover his share of the profits from a lambardar in the province of Agra and Oudh is cognizable by a Revenue Court and not by a Civil Court—Agra Tenancy Act, 1926, s. 230 and Schedule IV—Such a claim by a co-sharer is therefore not within the definition of actionable claim (*w*).

Debt.—A debt is an obligation to pay a liquidated or certain sum of money (*x*). A Mahomedan widow's claim for unpaid dower is an actionable claim (*y*). A debt may be present or future. If it is present it is existent or now due and owing. If it is future it is existent but accruing or payable in the future. The distinction between present and future debts is made in the case of *Subramanian* v. *Arunachalam* (*z*) where the phrase "now due, owing or payable" was held to exclude debts accruing after the date of the deed. Both present and future debts are existing debts, and can be attached, and are actionable claims. In order to be an accruing debt there must be a present debt, although it may be payable in the future. It has accordingly been held that sums paid into the bank to the credit of the judgment-debtor after the service of the garnishee summons on the bank was not accruing debt from the Bank to the judgment-debtor and was not bound in the hands of the garnishee Bank by the service of the garnishee summons (*a*). Conditional or contingent debts cannot be attached, but under the present definition they too are actionable claims. Instances of contingent debts are the price payable by a purchaser of immoveable property before the execution of the conveyance (*b*), or a maintenance allowance payable at a future date (*c*), or future rents (*d*). Or annuities payable under a deed of Waqf (*e*); or an amount due under a policy of insurance (*f*). A judgment debt or decree is not an actionable claim, for no action is necessary to realize it. It has already been the subject of an action and is secured by the decree (*g*). Arrears of rent constitute a debt or actionable claim (*h*), but a claim to mesne profits is not a claim to any debt but is a mere right to sue which cannot be assigned (*i*), for mesne profits are unliquidated damages (*j*). As to the distinction between a debt or actionable claim and a mere right to sue, which cannot be transferred, see note under sec. 6 (e) " Mere right to sue distinguished from actionable claim."

(*w*) *Lallu Singh* v. *Chandra Sen* (1934) 56 All. 624, 1934 All. L.J. 1, 147 I.C. 937, ('34) A.A. 155.

(*x*) *Webster* v. *Webster* (1862) 31 Beav. 393; *Johnson* v. *Diamond* (1856) 11 Exch. 73; *Sabju Sahib* v. *Noordin* (1899) 22 Mad. 139.

(*y*) *Amir Hasan Khan* v. *Muhammad Nazir Hussain* (1933) 54 All. 499, 1932 All. L.J. 275, 136 I.C. 833, ('32) A.A. 345.

(*z*) (1902) 25 Mad. 603, 29 I.A. 138; *Venkata Gurunadha* v. *Kesava Ramiah* (1926) 50 Mad. L.J. 54, 92 I.C. 973, ('26) A.M. 417.

(*a*) *Heppenstall* v. *Jackson* (1939) 1 K.B. 585.

(*b*) *Ahmaduddin* v. *Majlis Rai* (1881) 3 All. 12.

(*c*) *Haridas* v. *Baroda Kishore* (1900) 27 Cal. 38; *Asad Ali* v. *Haidar Ali* (1911) 38 Cal. 13, 6 I.C. 826; *Palikandy* v. *Krishnan* (1917) 40 Mad. 302, 34 I.C. 381.

(*d*) *Poothekka Nachiar* v. *Annamalai Chetty* (1926) Mad. W. N. 774, 98 I.C. 263, ('26) A.M. 1173; *Chidambaram Pillai* v. *Doraisami Chetti* (1916) 31 I.C. 473.

(*e*) *Mt. Bibi Alimunissa* v. *Abdul Aziz* (1936) 165 I.C. 298, (1936) A.P. 527. (The Wakf had been executed before 1929 when cl. (dd) was added to sec. 6).

(*f*) *Varjivandas* v. *Maganlal* (1937) 39 Bom. L.R. 493, (1937) A.B. 382, 170 I.C. 850.

(*g*) *Afzal* v. *Ramkumar Bhudra* (1886) 12 Cal. 610; *Dagdu* v. *Vanji* (1900) 24 Bom. 502; *Govindarajulu Naidoo* v. *Ranga Rao* (1921) 40 Mad. L.J. 124, 62 I.C. 255, ('21) A.M. 113.

(*h*) *Sheogobind Singh* v. *Gouri Prasad* (1925) 4 Pat. 43, 83 I.C. 81, ('25) A.P. 310; *Rameshwar Narain Singh* v. *Ribnath Koeri* (1923) 67 I.C. 451, ('23) A.P. 165; *Madhabilata* v. *Butto Kresto* (1944) A.P. 129.

(*i*) *Jai Narayan* v. *Kishun Dutta* (1924) 3 Pat. 575, 78 I.C. 105, ('24) A.P. 551.

(*j*) *Seettamma* v. *Venkataramanayya* (1915) 38 Mad. 308, 21 I.C. 387; *Durga Chunder* v. *Koilas Chunder* (1897) 2 Cal. W.N. 43; *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India* (1883) 9 Cal. 695; *Chendrasekharalingam* v. *Naghabhushanam* (1927) 53 Mad. L.J. 342, 104 I.C. 409, ('27) A.M. 817.

S. 130

Debt secured by a mortgage.—Although a mortgage debt is not an actionable claim, yet in the case of *Imperial Bank of India* v. *Bengal National Bank* (k) the Privy Council held that an unregistered assignment of a mortgage debt might be treated as an assignment of the debt dissociated from the security. The debt divorced from the security was not an actionable claim; but their Lordships said that it was a species of property for the transfer of which, no specific provision is made in the Act, so that the assignee has to sue in the name of the assignor. This was the procedure as to choses in action in England before the Judicature Acts.

Debt secured by a charge.—See note under the same heading under section 8.

Beneficial interest in moveable property.—The property must not be in possession actual or constructive, for such possession is ownership. Thus a right to recover elephants trapped on the owner's land is a right of ownership in the elephants and not an actionable claim (l). In *Jaffer Meher Ali* v. *Budge Budge Jute Mills* (m) the right to claim the benefit of a contract, or the right on certain conditions to call for delivery of goods mentioned in the contract, was held to constitute a beneficial interest in moveable property conditional or contingent within the meaning of the definition of actionable claim and as such assignable. The assignability of such a contract was said by Sale, J., to be subject to two conditions: (1) that the benefit sought to be assigned was not coupled with any liability, and (2) that the contract was not induced by any personal considerations—See note *infra* "Assignment of contracts." A partner's right to sue for an account of a dissolved partnership is in actionable claim, being a beneficial interest in moveable property not in possession (n). The right to recover the insurance money on the death of the assured person or on the expiry of the endowment period is an actionable claim (o). A right to recover back the purchase money on the sale being set aside is an actionable claim (p). So also is the right to recover money left in the hands of a vendee (q).

Transfer of actionable claims.—This section of the Act, as observed by Rankin, J., in a Calcutta case (r) contains a very special scheme which has some of the features both of the English Common Law and of Equity.

In Common law choses in action were not assignable, but the King could grant or receive a chose in action, and if the King granted an annuity, the grantee could bring an action in his own name; and certain choses in action became assignable by custom and by statute, *e.g.*, bills of exchange, promissory notes and policies of life and marine insurance.

Equity, however, from early times recognised the assignment of choses in action on the principle that equity considers that as done which ought to be done. In *Rodick* v. *Gandell* (s) Lord Truro said:—

> 'An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the

(k) (1931) 58 I.A. 323, 59 Cal. 377, 134 I.C. 651, ('31) A.PC. 245.

(l) *Ramakrishna* v. *Kurukal* (1888) 11 Mad. 445.

(m) (1906) 33 Cal. 702, followed in *Hunsraj* v. *Nathoo* (1907) 9 Bom. L.R. 838.

(n) *Thawardas Jethanand* v. *Seth Vishindas* (1925) 79 I.C. 384, ('25) A.S. 72; *Re Bainbridge, Ex parte Fletcher* (1878) 8 Ch. D. 218; *Mulchand* v. *Shamdas* (1940) 194 I.C. 380, (1941) A.S. 78.

(o) *Somashekarrao* v. *K. S. Mishra* (1944) A.N. 185; *Varjivandas* v. *Maganlal* (1937) A.B. 382, 39 Bom. L.R. 493, 170 I.C. 850.

(p) *Chinnapareddi* v. *Venkataramanappa* (1942) A.M. 209.

(q) *Agrenath* v. *Ram Ratan* (1938) A.L.J. 854, 177 I.C. 700 (1938) A.A. 544.

(r) *Messrs. Sadasook Ramprotap* v. *Hoare Miller & Co.* (1923) 27 Cal. W. N. 733, 80 I.C. 632, ('23) A.C. 719; *Ranjit Ram* v. *D. A. David* (1934) 62 Cal. 1, 38 C.W.N. 1190, (1935) A.C. 218, 155 I.C. 198.

(s) (1852) 1 De G. & M. and G. 763, 777-778, 12 Beav. 325.

order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such funds; in other words, will operate as an equitable assignment of the debts or fund to which the order refers." S. 130

Thus in equity debts were assignable, and also contingent interests and future property when the assignment was for valuable consideration.

Choses in action have been classed according to the procedure adopted for reducing them into possession. Legal choses in action were those enforceable by action at law such as promissory notes, bills of exchange or policies of insurance (t). Equitable choses in action, sometimes called choses in equity, were enforced by action in equity, e.g., a beneficial interest in a partnership (u) or an interest in trust fund (v).

The remedy of the assignee was imperfect. At law he had to sue in the name of the assignor on giving him an indemnity against costs. In equity he could sue in his own name, but there had to be consideration for the assignment, and the assignee could not sue the debtor in equity, but had to sue in law in the name of the assignor, unless the assignor had refused to allow the assignee to sue in his name (w). Moreover the assignee could not give a valid discharge, unless expressly empowered to do so by the assignment.

Section 25 (6) of the Judicature Act, 1873, (36 and 37 Vict., c. 66) now substantially re-enacted in sec. 136 of the Law of Property Act, 1925, was designed to simplify the remedy of the assignee and to protect the debtor. Sec. 25 (6) of the Judicature Act, 1873, commenced as follows :—

> "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the rights of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

This sub-section refers to notice to a trustee, and it is therefore clear that it is not limited to legal choses in action properly so called but includes choses in action assignable in equity; and in *Torkington* v. *Magee* (x) Channell, J., said—"I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable'." Again in *Walker* v. *Bradford Old Bank* (y) the section was applied to the assignment of a future debt. But otherwise the scope of the sub-section is limited in several ways. For—

(a) It is purely a matter of procedure. It does not create new rights but only affords a new method of enforcing old rights (z).

(b) It is restricted to absolute assignments in writing not purporting to be by way of charge. It does not apply to conditional assignments, which leave the debtor in doubt as to who his creditor is.

(c) It does not exclude the procedure of equitable assignment nor the recognition of assignments by way of charge in equity.

(t) *Chowne* v. *Bayliss* (1862) 31 Beav. 351.
(u) *Re Bainbridge, Ex parte Fletcher*, *supra*.
(v) *Pigott* v. *Stewart* (1875) W.N. (Eng.) 69.
(w) *Hammond* v. *Messenger* (1838) 9 Sim. 327, 332.
(x) (1902) 2 K. B. 427, 430.
(y) (1884) 12 Q. B. D. 511.
(z) *Ibid.*

Thus after the Judicature Act assignments of choses in action in England are either statutory under sec. 25 (6) of the Act or equitable.

A statutory assignment—

(1) must be an absolute assignment,

(2) must be in writing,

(3) takes effect from date of notice to the debtor,

(4) enables the assignee to sue in his own name and to give a valid discharge.

An equitable assignment—

(1) may be an assignment by way of charge,

(2) need not be in writing,

(3) takes effect as between the assignor and the assignee from the date of the assignment, notice being necessary only to bind the debtor,

(4) must be made for value and the assignee cannot give a valid discharge unless expressly empowered by the assignment.

The section of the Transfer of Property Act has some of the features of the statutory and some of the equitable modes of assignment. It resembles the equitable assignment in that it applies to assignments by way of charge as well as to absolute assignments and takes effect as between the assignor and the assignee from the date of the assignment. On the other hand it resembles a statutory assignment in that it must be in writing and that it enables the assignee to sue in his own name and to give a valid discharge.

Assignment of debts.—As an actionable claim includes future debts there can be a valid assignment of a future debt, *e.g.*, of salary to become due (*a*), or of future book debts (*b*), or of future rents (*c*). The law is not settled in England whether an assignment of part of a debt is within the statute. Darling, J., in a case (*d*), which was reversed upon another ground, held that an ascertained part of an existing debt could be assigned. But Bray, J., in another case held that it could not (*e*), and in the more recent case of *In re Steel Wing Co., Ltd.* (*f*) an assignment of part of a debt was held not to be within the statute so as to pass the legal right but that it constituted the assignee a creditor of the debtor in equity. This has been followed in a recent Madras case (*g*), but in an earlier case (*h*) the same Court held that a part of a debt could not be assigned, and now that the Legislature has abolished partial subrogation, this would seem to be correct. The Calcutta High Court followed the earlier Madras case and held that a part of a debt could not be assigned (*i*). The question was recently considered by the Patna High Court (*j*). After a review of the English authorities it was said that though the point was not finally settled in England the weight of authority in that country was that assignment of a part of a debt did not pass the legal right to that portion of the debt under sec. 25(6) of the Judicature Act but operated in equity to constitute the assignee a creditor of the debtor. In India the position was different. It followed from the definition of an actionable claim that a claim to a debt which could not be enforced by action, *e.g.*, when it was barred by limitation was not property and the same limitation must apply to a part of a debt which could not be sued upon under O.2, r.2, C. P. C. Therefore

(*a*) *Jones* v. *Humphreys* (1902) 1 K. B. 10.

(*b*) *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523.

(*c*) *Knill* v. *Prowse* (1884) 33 W.R. 163.

(*d*) *Skipper and Tucker* v. *Holloway and Howard* (1910) 2 K. B. 630.

(*e*) *Forster* v. *Baker* (1910) 2 K.B. 636.

(*f*) (1921) 1 Ch. 349.

(*g*) *Rajamier* v. *Subramanian* (1929) 52 Mad. 465, 116 I.C. 827, ('28) A.M. 1201.

(*h*) *Doraiswami Mudaliar* v. *Doraiswami Aiyangar* (1925) 48 Mad. L.J. 432, 87 I.C. 382, ('25) A.M. 753.

(*i*) *Ghisulal Ganeshilal* v. *Gambhirmal Pandya* (1934) 62 Cal. 510, (1938) A.C. 377, 39 C.W.N. 606.

(*j*) *Durga Singh* v. *Kesho Lal* (1939) 18 Pat. 530, 185 I.C. 514, (1940) A.P. 170.

although the Transfer of Property Act did not make any distinction between whole debt and part of a debt and both might be transferred but the transferee might find that what had been transferred to him was not an actionable claim. It may be noted that it was a case of a separate and distinct debt and the above observations of the learned Judges were in the nature of *obiter dicta*. The Lahore High Court has, however, dissented from the Patna case and held that a part assignment of a debt is valid in law and an action can be maintained thereon by the transferee provided he makes the transferor and any other transferee who may be concerned parties to the suit and that O.2, r.2, C.P.C., has no bearing on the question (*k*). It may be mentioned that although a decree is not an actionable claim, it has been held that there cannot be transfer of part of a decree (*l*). S. 130

Assignment of contracts.—The benefit of a contract can be assigned but not the burden, for the promisor cannot shift the burden of his obligation without a novation. If the contract has been broken nothing is left but a right to sue for damages, which cannot be assigned—sec. 6 (e)—although a difference due on cross contracts in which delivery was not to be given or taken has been held to be a debt or actionable claim (*m*). But if the contract has been executed, the promisor having discharged the burden, may assign the benefit. If the contract is still executory, the assignment involves a delegation of performance to the assignee and hence it is said that contracts involving special personal qualifications are not assignable (*n*). The Calcutta High Court in *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.* (*o*), and the Bombay High Court in *Hunsraj Morarji* v. *Nathoo Gangaram* (*p*), held that the interest of a buyer of goods in a contract for forward delivery can be assigned as an actionable claim. In the former case Sale, J., said—"The rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term *benefit* the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby. This rule is however subject to two qualifications: first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and next that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it." In an earlier case (*q*), the Bombay High Court held that in a contract for future delivery of goods sold neither the buyer nor the seller could assign the contract, but that case was decided before the Transfer of Property Act was applied to Bombay. The right to call for payment of goods delivered would be a mere right of suit and therefore under sec. 6 (e) not transferable.

The benefit of a contract giving an option to purchase land may be assignable (*r*) or it may be personal to the party to whom the option is given and therefore not capable of assignment (*s*).

The benefit of a contract giving a power of submission to arbitration is personal to the parties and cannot be assigned (*t*). An agreement for the sale or purchase of immoveable property is a contract, the benefit of which can be assigned, unless the performance depends upon something personal or special (*u*).

(*k*) *Ram Kishen* v. *Girdhari Lal* (1941) A.L. 337, 97 I.C. 735.

(*l*) *Narandas* v. *Tejmal* (1932) 58 Bom. 226; *Kusum Kamini* v. *Sailes Chandra* (1934) 38 C.W.N. 1053.

(*m*) *Nagappa* v. *Badridas* (1930) 32 Bom. L. R. 894, 127 I. C. 410, ('30) A. B. 409.

(*n*) *Beckham* v. *Drake* (1849) 2 H. L. Cas. at p. 622, 81 R. R. 329; *Tolhurst* v. *Associated Portland Cement Manufacturers* (1902) 2 K. B. 660 C. A. (1903) A. C. 414; *Toomey* v. *Rama Sahi* (1890) 17 Cal. 115, 121; *Namasivaya Gurukkal* v. *Kadir Ammal* (1894) 17 Mad. 168.

(*o*) (1906) 33 Cal. 702, 707 on app. 34 Cal. 289.

(*p*) (1907) 9 Bom. L. R. 838.

(*q*) *J. H. Tod* v. *Lakhmidas* (1892) 16 Bom. 441; but see *Dayabhai Dipchand* v. *Dullabhram Dayaram* (1871) 8 Bom. H. C. 183 A. C.

Sakalaguna Nayudu v. *Chinna Munuswami Nayakar* (1928) 51 Mad. 583, 55 I. A. 243, 109 I. C. 765, ('28) A.PC. 174.

Gobardhan v. *Raghubir Singh* (1930) 28 All. L. J. 799, 124 I. C. 405, ('30) A. A. 101.

Desu v. *Girdharilal* (1932) 139 I. C. 605, ('32) A. S. 128 following *Cottage Club Estates* v. *Woodside Estates Co.* (1928) 2 K. B. 463.

Bhabhootmal v. *Moolchand* (1943) Nag. 643, 209 I. C. 25 (1943) A.N. 236.

S. 130

Mode of assignment.—No particular form of words is necessary in order to effect an assignment if the intention is clear from the language used (*v*). An assignment can be absolute or by way of security. But a deposit creating a pledge merely cannot amount to an assignment (*w*). The delivery of a bond to *A* with a letter requesting the debtor to pay *A* constitutes an assignment of the bond to *A* (*x*). In *Hunsraj* v. *Nathoo* (*y*) an endorsement on the back of a contract for the purchase of goods by the purchaser that he had sold all his right and interest in the contract to a person named was held to be a transfer of an actionable claim. A declaration by a retiring partner that he has no interest does not operate as a transfer to the remaining partners (*z*). But where there has been an oral assignment of an actionable claim, a subsequent letter recording the transfer is a sufficient instrument in writing for the purposes of the section (*a*).

A promissory note which is not negotiable may be transferred by a separate deed (*b*) and a direction endorsed on such a promissory note operates as an assignment (*c*). If the promissory note is negotiable, some early cases supposed that the note could not be assigned as an actionable claim (*d*). But later cases have held that even if the promissory note is negotiable it may be assigned by instrument in writing although such an assignment renders the assignee under sec. 132 subject to the equities to which his assignor was subject (*e*). A document whereby the owner of a Government promissory note authorizes a person to recover the note or its value from the person with whom it is deposited operates as an assignment (*f*).

In a case already cited (*g*) Ramesam, J., said that the instrument of transfer should in general be in favour of the assignee. The learned Judge used the words " in general," for when the obligee of a bond delivered it to *A* without any endorsement but gave *A* a letter to the debtor requesting him to pay *A*, this was held to constitute an assignment (*h*). Again in a Bombay case (*i*) Chandavarkar, J., held that a havala or letter authorising a person to recover a sum of money due to the writer was an assignment.

Illustration.

A, a contractor, was owed Rs. 2,156 by the Public Works Department. He intended to assign Rs. 1,600 of this money to a creditor, *B*, and accordingly wrote two letters, (1) to the creditor assigning Rs. 1,600 out of the debt to him, and (2) to the executive engineer giving him notice of the assignment. Letter (1) was lost and secondary evidence of its contents was not admissible as it was not stamped. It was then contended that the notice, letter (2), operated as an assignment. This contention was repelled as the letter was not addressed to the assignee, did not contain words of transfer, did not require payment out of a specific fund, and referred only to part of the debt: *Doraiswami Mudaliar* v. *Daraiswami Aiyangar* (1925) 48 Mad. L.J. 432, 87 I.C. 382, ('25) A.M. 753.

(*v*) *Rama Iyen* v. *Venkatachallam Patter* (1907) 30 Mad. 75; *Nanak Chand Kishori Lal* v. *Ram Sarup Gujar Mal* (1924) 78 I. C. 163, ('24) A. L. 684.

(*w*) *Official Assignee* v. *Hukumchand* (1941) Mad. 378, (1940) 2 M. L. J. 891, 195 I. C. 422, (1941) A. M. 217.

(*x*) *Konjeti Veeraswamy* v. *Varada Veersawamy* (1913) 13 Mad. L.T. 77, 16 I.C. 708.

(*y*) (1907) 9 Bom. L.R. 838.

(*z*) *Dharm Chand* v. *Mauji Sabu* (1912) 16 Cal. L.J. 486, 16 I.C. 440.

(*a*) *Jivraj* v. *Lalchand & Co.* (1932) 34 Bom. L.R. 837, 139 I.C. 582, ('32) A. B. 446.

(*b*) *Sugappa* v. *Govindappa* (1902) 12 Mad. L.J. 351.

(*c*) *Rama Iyen* v. *Venkatachellam Patter* (1907) 30 Mad. 75.

(*d*) *Pattal Ambadi Marhar* v. *Krishna* (1888) 11 Mad. 290; *Abhoy Chetti* v. *Ramchandra Rao* (1894) 17 Mad. 461; *Arunachala Reddi* v. *Reddy Subba* (1907) 17 Mad. L.J. 393.

(*e*) *Muhammad Kumarali* v. *Ranga Rao* (1901) 24 Mad. 654 (endorsement invalid, being by one of two payees, treated as an assignment to the other payee); *Muthar Sahib* v. *Kadir Sahib* (1905) 28 Mad. 544; *Raman Chetty* v. *Nagarathna Naicker* (1912) 15 I. C. 380; *Akhoy Kumar* v. *Haridas Bysack* (1914) 18 Cal. W.N. 494, 22 I. C. 500; *Venkatarama Ayyar* v. *Krishnaswami Chettiar* (1933) 138 I.C. 262; ('33) A.M. 133.

(*f*) *Kattick Ramunni* v. *Udayamangalath* (1912) 14 I.C. 279.

(*g*) *Doraiswami Mudaliar* v. *Doraiswami Aiyangar* (1925) 48 Mad. L.J. 432, 87 I.C. 382, ('25) A.M. 753.

(*h*) *Konjeti Veeraswamy* v. *Varada*, *supra*.

(*i*) *Nandubai* v. *Gau* (1903) 27 Bom. 150.

In England an equitable assignment can be made by a document addressed to the debtor. Lord MacNaghten in *William Brandts Sons & Co.* v. *Dunlop Rubber Co.* (*j*) said :—

"It (the assignment) may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

A legal assignment in England can also be made by a writing addressed to the debtor. Thus in *Harding* v. *Harding* (*k*) trustees under a will sent George Harding, a residuary legatee, a statement of account showing the balance due to him and he sent it to his daughter Laura with the following endorsement :—

"I hereby instruct the trustees in power to pay to my daughter Laura Harding the balance shown in the above statement."

This was held to be a valid assignment under the statute.

Pay order.—Section 130 seems to require a transfer in writing addressed to the assignee, but the English rule under which assignments both equitable and legal can be made by a direction to the debtor has no doubt influenced Indian decisions. It is therefore necessary to distinguish an assignment from a mandate or a pay order. A pay order gives the payee no interest in the fund, and the liability of the debtor is still to the creditor and not to the payee. A pay order generally presupposes moneys of the drawer in the hands of the party to whom the order is addressed held on terms of applying such moneys as directed by the order of the person entitled to them (*l*). Again a pay order is revocable, while an assignment is not, and a pay order ceases to be operative after the death of the creditor, while an assignment does not. The specification of a particular fund generally points to an assignment (*m*). The distinction is clearly made in English cases.

The following are English instances of assignments :—

Brice v. *Bannister* (*n*):—Creditor's letter addressed to the debtor and given to the assignee in the following terms :—"I do hereby order, authorize and request you to pay to Mr. *W. B.* the sum of £100 out of the moneys due or to become due from you to me, and his receipt for the same shall be a good discharge."

Buck v. *Robson* (*o*) :—Creditor's letter addressed to the debtor and given to the assignee as follows :—"I hereby assign to Messrs. Robson & Son the sum of £40 or any other sum now due or that may hereafter become due in respect of the steam launch which I am building for you."

Fisher v. *Calvert* (*p*) :—Creditor's letter to the debtor : "I hereby authorize and direct you to pay to............or their order the sum of £40 out of the moneys now due or hereafter to become due to me under the will of my late father and before making any payment to me thereout."

Brandts Sons & Co. v. *Dunlop Rubber Co.* (*q*) :—Merchants' letters to purchasers of their goods to pay the price to the Bank who financed their business on receipt of documents from the Bank.

(*j*) (1905) A.C. 454, 462.
(*k*) (1886) 17 Q.B.D. 442.
(*l*) *Buck* v. *Robson* (1878) 3 Q. B. D. 686, 691.
(*m*) *Row* v. *Dawson* (1749) 1 White and Tud, L.C. 9th Ed. 87.
(*n*) (1878) 3 Q. B. D. 569, 571.
(*o*) (1878) 3 Q.B.D. 686, 687.
(*p*) (1879) 27 W.R. 301.
(*q*) (1905) A.C. 454.

S. 130 The following are English instances of pay orders :—

Percival v. *Dunn* (r) :—An order given by a creditor to his debtor to pay sums of money to a tradesman where no fund is specified.

Rodick. v. *Gandell* (s) :—*A* being pressed by *B* for payment of a debt wrote to the solicitors of a Railway Company, against which he had a claim, asking them to receive the money from the Company and to pay *B*.

The Indian cases are not very consistent. Thus while the delivery of a bond with a letter to the debtor directing him to pay was held to be an assignment (t), yet the delivery of a banker's deposit receipt with a letter to the bank directing payment was held to be only a pay order (u). However in *Thakar Das* v. *Malik Chand* (v) a letter by a dairy man to the purchasers of his milk directing them to pay the price of milk supplied to his creditor was held to be an assignment. While in a Calcutta case (w) a vendor's endorsement on a bill for goods sold requesting the purchaser to pay the amount to a third person, who would collect the amount on behalf of the vendor, was correctly held to be a pay order. This was because there was no transfer but a receipt of the money as agent of the creditor. In a Patna case, a letter of authority written by a debtor of a society authorising his Employer to deduct from the amount of his salary, sums due to the Society was held as not constituting an assignment of an equitable charge (x). In another case where the subscribers of a company purchasing chits from the company deposit money with a bank for payment to the company of the instalments of the chits as and when they fall due, it has been held that the money deposited by subscribers with the bank operates as a valid assignment in favour of the company (y).

Novation.—In a Bombay case (z), one *M* owed a sum of Rs. 27,500 to *G & Co.* As against that amount *G & Co.* held as pledgees 212 bales of cotton belonging to *M*. At the same time *M* was also a debtor of one *J* in a certain sum of money. As between *M*, *G & Co.* and *J* a tripartite agreement was arrived at, whereby *J* took over the liability of *M* to pay *G & Co.*; and *G & Co.* agreed that they would hold the 212 bales to the account of *J* instead of to the account of *M*. *G & Co.* thereafter wrote the following letter to *J* :—"212 bales of *M* are credited to your account as per his and your instructions and Rs. 27,500 have been debited to your account and credited to the account of *M*." Under the above circumstances the Court held that the transaction amounted to a novation, and sec. 130 had no application.

Whether with or without consideration.—The words "whether with or without consideration" have been inserted by Act 20 of 1929 to include cases of *gifts* of choses in action. As to the law before the amendment, see note to sec. 123, "Actionable claim."

As to an assignment for consideration, it has been held that a conditional assignment by way of security is valid (a).

Instrument in writing.—The section embodies an important alteration of the law for a transfer of an actionable claim cannot be made otherwise than by writing (b). An entry in a settlement of account between the assignor and assignee is sufficient (c), but an

(r) (1885) 29 Ch. D. 128.
(s) (1852) 12 Beav. 325, 1 De G.M. & G. 763.
(t) *Konjeti Veersamy* v. *Varada* (1913) 13. Mad. L.J. 77, 16 I.C. 708.
(u) *Sethna* v. *Hemingway* (1914) 38 Bom. 618, 28 I.C. 114; cf. *Re Griffin* (1899) 1 Ch. 408 and *Re Westerton, Public Trustee* v. *Gray* (1919) 2 Ch. 104.
(v) (1933) 14 Lah. 325, 144 I. 6, ('33) A.L. 102; *Jat Mal* v. *Hakam Mal Tani* (1930) 128 I.C. 494, ('30) A.L. 820; *Khaman Lal* v. *Sant Lal* (1897) P.R. 43.
(w) *Kissen Gopal* v. *Bavin* (1926) 42 Cal. L.J. 43, 89 I.C. 785, ('26) A.C. 447.
(x) *B.N.R. Employees Urban Bank* v. *Seager* (1941) 201 I.C. 342, (1942) A.P. 307.
(y) *T. N. Subsidiary Co.* v. *T. N. & Q. Bank* (1940) A.M. 258.
(z) *Jivraj* v. *Lalchand* (1932) 34 Bom. L. R. 837, 838, 139 I.C. 582, ('32) A.B. 446.
(a) *Muthukrishnaier* v. *Veeraraghava Iyer* (1915) 38 Mad. 297, 21 I.C. 316 F.B.; *Venkatachalam* v. *Subramania* (1912) Mad. W. N. 461, 14 I.C. 144.
(b) *Velayuthan* v. *Pillaiyar Chetti* (1911) 9 Mad. L. T. 102, 9 I.C. 287.
(c) *Seetharama Iyer* v. *Narayanasami Pillai* (1916) 47 I.C. 749.

oral transfer is invalid (*d*). But under the old section before the Act of 1900 a parole assignment was valid (*e*). As the assignment must be in writing, an equitable mortgage or charge is not created by the deposit of a policy of insurance (*f*). S. 130

Illustration.

The deceased had insured his life, and in 1904 deposited the policy with *A* to secure present and future debts. In 1909 the deceased executed a written deed of assignment of the policy to *B*, and then committed suicide the day after the notice of the assignment was received by the insurance company. *B* being an assignee in writing was entitled to payment. The deposit of the policy with *A* not being accompanied with a written transfer did not create a charge on the policy. Lord Moulton said—"In the present case the respondent (*A*) bases his claim on a deposit of the policy and not under a written transfer and claims that this creates a charge on the policy. The section specifically enacts that such a proceeding shall not have any such effect; such a charge can only be created by a written document. It follows that the respondent acquired no right whatsoever to the policy or its proceeds by reason of the deposit": *Mulraj Khatau* v. *Vishwanath Praburam* (1913) 37 Bom. 198, 40 I.A. 24, 30, 17 I. C. 637.

Again while an oral gift can be made of a cash balance, there can be no valid oral gift of rents in arrears and current dues, for the latter are actionable claims (*g*).

Illustration.

A debt was due by *A* to *B* for work done. *B* gave his creditor *C* a power of attorney and deposited with him vouchers for the work in order to enable him to get payment. Before *C* could draw the money, the debt was attached by another creditor. Held that *C* had no lien or charge on the money, for there was no written assignment of the debt: *Sidambaram Nadar* v. *D. R. Maganlall Brothers* (1929) 7 Rang. 365, 120 I.C. 238, ('29) A. R. 318.

For the same reason a policy of Insurance, to which sec. 6 of the Married Women's Property Act, 1874, does not apply, gives the widow no right to the policy moneys, although the policy has been effected by her husband and expressed to be for her benefits unless the husband has divested himself of his beneficial interest by an assignment in writing or by a declaration of trust under sec. 5 of the Trusts Act (*h*).

In the Punjab where the Act is not in force, an assignment of an actionable claim may be made orally (*i*).

Upon execution of such instrument.—The assignment is effectual from the date of the assignment. This is a departure from the English section by which the assignment only operates from date of notice, though an equitable assignment is complete as between the assignor and the assignee even when no notice is given to the debtor (*j*). Under the old section the assignment operated against the debtor from the date of express notice given to him, unless he was a party to or otherwise aware of the transfer. If the debtor were a party to the transfer, the case would be one of novation and there would be no doubt as to his liability (*k*). But the words "otherwise aware of such transfer" had the

(*d*) *Raman Chetty* v. *Nagarathana Naicker* (1912) 11 Mad. L.T. 246, 15 I.C. 380.

(*e*) *Autu Singh* v. *Ajudhia Sahu* (1887) 9 All. 249, 251; *Ganga Prasad* v. *Chandrawati* (1885) 7 All. 256.

(*f*) *Mulraj Khatau* v. *Viswanath Prabhuram* (1913) 40 I.A. 24, 37 Bom. 198, 17 I.C. 627; *Official Assignee* v. *Thompson* (1915) 30 I.C. 602.

(*g*) *Rameshwar Narain Singh* v. *Riknath Koeri* (1923) 67 I.C. 451, ('23) A.P. 165.

(*h*) *Shankar Vishvanath* v. *Umabai* (1913) 37 Bom. 471, 19 I.C. 736. See also *Balamba* v. *Krishnayya* (1914) 37 Mad. 483, 29 I.C. 934 F. B. and the Married Women's Property Amendment Act 13 of 1923.

(*i*) *Teja Singh* v. *Kalyan Das Chet Ram* (1925) 6 Lah. 487, 91 I.C. 778, ('25) A. L. 575; *Lacha Ram* v. *Hem Raj* (1931) 134 I.C. 121, ('32) A. L. 30.

(*j*) *Gorringe* v. *Irwell* (1886) 34 Ch. D. 128 C.A.

(*k*) *Ganga Prasad* v. *Chandrawati* (1885) 7 All. 256; *Autu Singh* v. *Ajudhia Sahu* (1887) 9 All. 249.

S. 130 effect of admitting constructive notice, and the section was interpreted to mean that the assignment was not void but that its operation was suspended as against the debtor until he had notice of it, and it was sufficient if the debtor was made aware of it by the writ served upon him in the assignee's suit (*l*). These cases are now obsolete, for by the present section the assignment takes effect from its date, and the rights of the debtor are safeguarded by the proviso.

Proviso.—The proviso is intended for the protection of a debtor who without knowledge of the assignment pays his creditor after the assignment. Such a payment is a valid discharge as against the assignee, if the debtor has not been a party to the assignment or has not received express notice of it. When the debtor has been a party there has been a novation, and he has accepted the assignee as his creditor instead of the assignor. A debtor, the debt due from whom has been assigned over to a third person, cannot after the notice of the assignment of the debt pay a portion of the debt even under the orders of the Court in a case to which the assignee was not a party so as to protect him from paying it over again to the assignee (*m*). Express notice must be notice in writing as required by sec. 131. Constructive notice is no longer sufficient.

The undernoted Madras case (*n*) is an instance of the application of the proviso. The creditors had hypothecated a debt due to them by a Railway Company to the plaintiffs. They gave the plaintiffs a power of attorney to collect the debt and the plaintiffs gave notice of the assignment to the Company. The Company for no apparent reason refused to recognise them and paid the creditors, and they had to make a second payment to the plaintiffs.

The principle of the proviso was applied in a Patna case (*o*). A judgment debtor who had not notice of the assignment of the decree paid the decretal amount into Court under Order 21, rule 1 (1)(a) of the Code of Civil Procedure. The decree was held to be discharged although no notice of the payment had been given to the decreeholder under sub-rule (2), and the assignee was not entitled to execute the decree.

The assignee cannot recover from the debtor a debt which he has paid without notice of the assignment but he has his remedy against the creditor who is accountable to him for what he has recovered after his assignment (*p*).

Priority.—Under the English law, priority in the case of successive assignments of choses in action, each one without notice of the earlier one, is determined by the date of notice to the debtor. But in India no such notice to the debtor is necessary to perfect the assignee's title. Under sec. 130 the title vests in the assignee on the execution of the transfer deed and no further action on his part, *e.g.*, sending of notice, is necessary to complete his title. In such cases, priority has ordinarily to be determined with reference to the date on which title vested in the transferee, that is the date of execution of the transfer deed. The proviso to sec. 130 is only for the benefit of the debtor and it has nothing to do with the title of the transferee or with priority of claims (*q*).

Right of suit.—The section follows the English statutory rule by which the assignee has the right to sue in his own name and to give a valid discharge, but while the English rule is limited to absolute assignments the section embraces all assignments. In fact

(*l*) *Lala Jugdeo* v. *Brij Behari* (1886) 12 Cal. 505; *Subbammal* v. *Venkatarama* (1887) 10 Mad. 289; *Kalka Prasad* v. *Chandan Singh* (1888) 10 All. 20; *Ragho* v. *Narayan* (1897) 21 Bom. 60.

(*m*) *Burma Shell Co.* v. *Official Receiver* (1943) Mad. 587, (1942) 2 M.L.J. 681, 207 I.C. 317, (1943) A.M. 244.

(*n*) *Gopalakrishna Iyer* v. *Gopalakrishna* (1910) 33 Mad. 123, 4 I.C. 420.

(*o*) *Tata Iron & Steel Co., Ltd.* v. *Baidyanath* (1923) 2 Pat. 754, 76 I.C. 55, ('24)A.P.118.

(*p*) *Fortescue* v. *Barnett* (1834) 3 My. & K. 36; *In re Patrick, Bills* v. *Tatham* (1891) 1 Ch. 82, 87.

(*q*) *Subramania* v. *Rama Subba* (1895) 50 Mad. 141.

Ss. 130, 130A.

after the assignment the assignee is the only person, who is entitled to recover the debt (*r*). The second illustration shows that after the death of the assignor his executor is not a necessary party to the suit. In *Sham Kumari* v. *Rameswar Singh* (*s*) when a mortgagor assigned a debt to a mortgagee and the latter made no attempt to recover it, he was debited with the amount in the mortgage account.

Marine or fire policies.—Policies of marine or fire insurance are excepted from this section as they cannot be assigned apart from the property insured. See sec. 135.

Stocks and shares.—Debentures, negotiable instruments and mercantile documents of title are excepted from this section by sec. 137.

Fixed deposits.—A fixed deposit is not a deposit of specie, but is a debt or actionable claim and a transfer of it can only be made by an instrument in writing under this section (*t*).

Public Policy—Some actionable claims are not assignable on grounds of public policy. Such are salaries of public officers and military, civil and political pensions; see sec. 6 (f) and (g) of this Act.

Transfer by operation of law.—Actionable claims may also be transferred by operation of law. On the death of the person entitled, his actionable claims pass as a rule to his legal representative. The legal representative is entitled to enforce performance of a contract with the deceased, unless his personal qualities were a material ingredient in the contract (*u*). So also on insolvency the benefit of a contract with the insolvent (*v*) or the right of an insolvent partner to sue for an account of a dissolved partnership (*w*) vests in the official assignee, the right to sue for an account of a dissolved partnership being not a mere right to sue under sec. 6 (e) but an actionable claim. Again on the death of a joint tenant or coparcener the interest in the actionable claim passes to the other joint holder.

Dedication.—Just as sec. 123 does not apply to a gift to an idol, so the dedication of an actionable claim, such as a bond, to an idol is not a transfer to which sec. 130 applies and it may be made orally (*x*).

130A. (*1*) A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.

Transfer of policy of marine insurance.

(*2*) A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.

(*3*) Where the insured person has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this sub-section affects the assignment of a policy after loss.

(*r*) *Muthukrishnier* v. *Veeraraghava Iyer* (1915) 38 Mad. 297, 21 I.C. 716 F.B.; *Arunachellam Chettiar* v. *Madaswami* (1920) 27 Mad. L.T. 289, 56 I.C. 146.

(*s*) (1904) 32 Cal. 27, 31 I.A. 176.

(*t*) *Mayavi Dalip Rajeshwari* v. *Bikram* (1945) A.A. 409.

(*u*) *Mohan*...

Mohendra Nath v. *Kali Proshad* (1903) 30 Cal. 265.

Jaffer Meher Ali v. *Budge Budge Jute Mills Co., Ltd.* (1907) 34 Cal. 289.

Thawendas Jethanand v. *Seth Vishindas* (1925) 79 I.C. 384, ('25) A.S. 72.

Bhopalrao v. *Shri Ramchandra* (1926) 96 I.C. 1004, ('26) A.N. 469.

Ss. 130A, 131

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section.

This section was inserted by s. 2 of the Transfer of Property (Amendment) Act (VI of 1944).

Notice to be in writing signed.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Amendments.—Before the Chapter was remodelled by Act 2 of 1900, the sections as to notice in the Act of 1882 were :—

132—Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

133—On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless where the debtor resides or the property is situate in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

The present section was substituted for these sections by Act 2 of 1900 and there has been no alteration since then.

The old sec. 132 merely provided for notice by the transferor. Farran, C.J., in *Ragho* v. *Narayan* (y) thought this was a slip, because there is no particular reason why the transferor should give notice, for it is required by the transferee for his own protection. The Legislature apparently thought that a bogus transferee might give notice and claim payment of the debt. The amended section therefore requires that the transferee shall give notice in default of the transferor. The requirement as to the name and address of the transferee is another amendment which is a convenience to the debtor. The English section only requires that express notice in writing should be given but does not specify by whom. The second clause of the old section 133 has been omitted as the reference to international law is out of place, for municipal law is always construed as subject to the provisions of international law.

Effect of notice.—It has been said that the assignment is not valid as against the debtor until the debtor has in fact had notice of the assignment (z); but a more correct statement of the effect of notice is that notice is not necessary to perfect the title of the assignee of a debt, but until the debtor receives notice of the assignment in accordance with law, his dealings with the original creditor will be protected (a). See note under sec. 130 : Priority.

Form of notice.—The notice must be express notice in writing. This was so under the old section, but old sec. 131 had the effect of admitting constructive notice, for the assignment was effective against the debtor if he were otherwise aware of the transfer (b). The section is to be construed strictly and in order that the exception in the proviso to sec. 130 should be operative there must be a strict compliance with the requirements

(y) (1897) 21 Bom. 60.

(z) *Tata Iron & Steel Co., Ltd.* v. *Baidyanath* (1923) 2 Pat. 754, 76 I.C. 55, ('24) A.P. 118.

(a) *Gopalakrishna* v. *Gopalakrishna* (1910) 33 Mad. 123, 4 I.C. 420; *Messrs. Sadasook Ramprotap* v. *Hoar Miller & Co.* (1923) 27 C.W.N. 733, 80 I.C. 632, ('23) A.C. 719. In the matter of Arlet Stephens (1937) 175 I.C. 786, (1938) A.R. 1; *Balthazar* v. *Official Assignee* (1938) A.R. 426.

(b) *Lala Jugdeo* v. *Brij Behari* (1886) 12 Cal. 505; *Subbamal* v. *Venkata* (1887) 10 Mad. 289; *Kalka Prasad* v. *Chandan Singh* (1888) 10 All. 20; *Ragho* v. *Narayan* (1897) 21 Bom. 60.

of sec. 131 (*c*). A notice which did not give the address of the transferee was held to be invalid (*d*). So also a notice which only gave the name of the transferee and the name and address of his solicitor (*e*).

Waiver of notice.—In *Messrs. Sadasook Ramprotap* v. *Hoar Miller & Co.* (*e*) it was suggested that the debtor might waive the provisions of sec. 131. Rankin, J., said that if the assignor had offered to let the debtor have the transferee's address in writing, and the debtor had said that there was no need to trouble as he would make no point of the omission the debtor might be liable to the assignee. In such cases it is submitted the debtor becomes either by parole or by conduct, a party to the assignment and is therefore liable.

Conditional notice.—It is submitted that notice must be unconditional, otherwise there would be an intolerable increase to the burden upon the debtor. In a Madras case (*f*), *A* assigned to his creditor *B* a debt due to him by Railway Company, and gave *B* a power of attorney to collect the debt from the Railway. On the date of the power of attorney *A* wrote to the Company to inform them of the transaction and directed them to pay *B*, if he (*A*) had not in the meantime otherwise paid off his debt to *B*. The Railway Company refused to recognise *B* and paid *A* but they were held not to be discharged by such payment. The Court seemed to hold that a notice may be conditional, but added that if it were not a good notice, it was validated by subsequent notices given by the plaintiff—a somewhat inconclusive and unsatisfactory decision.

Liability of transferee of actionable claim.

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations.

(i) *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him; although *C* was unaware of it at the date of such transfer.

(ii) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

Amendments.—Before Act 2 of 1900 the corresponding section was 137. That section was :—

"137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Illustration.

A debenture is issued in fraud of a public company to *A*. *A* sells and transfers the debenture to *B*, who has no notice of the fraud. The debenture is invalid in the hands of *B*."

The present section was substituted by Act 2 of 1900. The word "equities" has been inserted. The word "charge" and the illustration were no longer appropriate, as the amended definition of actionable claim does not include secured debts.

Liabilities and equities.—The word "liabilities" indicates only the plain rule that the assignee can get no better title than the assignor. If nothing is due to the assignor the assignee gets nothing. Thus in *Tooth* v. *Hallet* (*g*) a building contractor

---

(*c*) *Messrs. Sadasook Ramprotap* v. *Hoar Miller & Co.*, *supra*.

(*d*) *Hunsraj* v. *Nathoo* (1907) 9 Bom. L.R. 832; *Basant Singh* v. *Burma Railways Co., Ld.* (1916) 8 L.B.R. 288, 30 I.C. 278.

(*e*) *Messrs. Sadasook Ramprotap* v. *Hoar Miller & Co.*, *supra*.

(*f*) *Gopalakrishna* v. *Gopalakrishna* (1910) 33 Mad. 123, 4 I.C. 420.

(*g*) (1869) 4 Ch. App. 242.

132 made an assignment of £200 balance then due to him under a building contract, but as he did not complete the building the owner employed other builders and debited the sum paid to them to the contractor's account. This he was entitled to do by the terms of the contract, so that no balance remained due to the contractor, and the assignee's suit was dismissed, for he could recover nothing.

The insertion of the word "equities" brings the section into line with sec. 233 of the Code of Civil Procedure of 1882 now sec. 49 of the Code of Civil Procedure of 1908. A right of set off is an equity. A judgment debtor has a right to set off a cross decree under Order 21, rule 18 of the Code of Civil Procedure, and he has this right also against an assignee of the decree-holder (*h*). So a debtor is entitled when sued by the assignee of his creditor to set off a debt due to him by the assignor on a transaction independent of the debt assigned (*i*). This right of set off is the subject of the first illustration, and it will be observed that it matters not that the assignee was not aware of the right. Indeed it is incumbent on the purchaser of a right of action to make inquiries as to any equities or limitations affecting the subject-matter of this purchase (*j*). The second illustration is the case of *Graham* v. *Johnson* (*k*) in which *G* gave *J* a bond without consideration to enable him to raise money; *J* assigned it to *B* for consideration, but the Court held that *B* took it subject to the equities between *G* and *J* and that he could not enforce it against *G*. The debtor may also set off unliquidated damages claimable by him from the assignor provided they arise out of the same transaction as give rise to the debt. Thus in *Young* v. *Kitchin* (*l*) where a building contractor assigned the moneys due to him for the price of the building, the owner was allowed to set off damages for breach of the contract.

The equity must be one existing at the time of the assignment. In *Brice* v. *Bannister* (*m*) a shipbuilder had made an assignment of moneys due or to become due to him under a shipbuilding contract with the defendant, and the defendant had made further advances after the assignment—the Court said that these advances were in no way connected with the contract, but that if there had been any arrangement that the shipbuilder was to be accountable for these advances that would have been an equity subject to which the claim was transferred. In *Christie* v. *Taunton Delmard, Lane & Co.* (*n*) *T* who held shares and debentures in a Company, mortgaged the debentures to the Plaintiff Bank. On the 3rd November 1890 a call was made on *T*'s shares. On the 6th November the Bank gave notice of assignment to the Company. The Plaintiff Bank began a debenture holder's action against the Company which went into voluntary liquidation and further calls were made in the winding-up. The Company were held entitled to set off the call made before the winding-up but not further calls. This was under the English law because the assignment was only operative against them when notice was given on the 6th November. Again in *Arunachellam Chetti* v. *Subramanian Chetti* (*o*) a case decided under the old section, an assignee of the right to rents sued the lessees for rent, and the lessees were allowed to set off a mortgage debt due to them by the assignor at the time of the assignment. The assignor had sued the lessees to cancel the lease and the lessees claimed that if the suit succeeded they would be entitled to a refund of rents, but the Court said that such a future and possible equity could not be set off.

Court sales.—The principle of the section has been applied to Court sales (*p*).

(*h*) *Kristo Ramani* v. *Kedarnath* (1889) 16 Cal. 619; *Sinnu* v. *Santhoji* (1903) 26 Mad. 428.

(*i*) *Arunachellam* v. *Subramaniam* (1907) 30 Mad. 235; *Subramaniam Pattar* v. *Kiradadasan* (1912) Mad. W.N. 1235, 16 I.C. 686; *Ram Bhaj Datta* v. *Ram Dhas* (1922) 3 Lah. 414, 69 I.C. 720, ('23) A.L. 261.

(*j*) *Mangles* v. *Dixon* (1852) 3 H.L.C. 702; *Venkata Subbiah Chetty* v. *Subba Naidu* (1915) Mad. W.N. 822, 31 I.C. 152; cf. *Subbaraya Aiyer* v. *Srinivasa* (1900) 10 Mad. L.J. 211.

(*k*) (1869) L.R. 8 Eq. 36.

(*l*) (1878) 3 Ex. D. 127.

(*m*) (1878) 3 Q.B.D. 569.

(*n*) (1893) 2 Ch. 175.

(*o*) (1907) 30 Mad. 235.

(*p*) *Ram Bhaj Datta* v. *Ram Dhas* (1922) 3 Lah 414, 69 I.C. 720, ('23) A.L. 261; *Ramchandra* v. *Shankar* (1944) A.N. 98.

Illustration.

A sold his house to *B* but remained in possession as *B*'s tenant. *B* owed *A* Rs. 2,818 for part of the price. This debt was attached and sold by a creditor of *A*. The purchaser at the Court sale was *C*, who sued to recover the amount from *B*, but *B* was allowed to set off the rent due by *A* at the time of the Court sale: *Ram Bhaj Datta* v. *Ram Dhas* (1922) 3 Lah. 414, 69 I.C. 720, ('23) A.L. 261. **S. 132**

Notice immaterial.—As already stated it is immaterial that the assignee had no notice of the equity or liability to which the assignor was subject at the date of the assignment. This is expressly stated in the second illustration, and it is incumbent on the purchaser to make inquiries as to any equities and liabilities affecting his purchase (*q*). Nevertheless in a Calcutta case (*r*) decided under sec. 49 of the Code of Civil Procedure, 1908, with reference to the assignment of decrees, it was assumed that the assignee should have notice. This was incorrect, and in the later case of *Monmohan* v. *Dwarka Nath* (*s*) the Court said: "The assignee of a decree stands in no better position than his assignor, as regards equities existing between the original parties to the judgment, and takes it subject to all the equities and defences subsisting at the time of the assignment, which the judgment debtor could have asserted against it in the hands of the judgment creditor, notwithstanding the assignee may have had no notice thereof."

Estoppel.—The debtor may be estopped from asserting or enforcing an equity. If on receiving notice of the assignment, he sees that the assignee has been deceived and yet stands by and allows him to be defrauded, he will not be allowed to set up an equity which he has against the assignor (*t*). In a Madras case (*u*) the Court said that if there is an assignment of money in the hands of a debtor and the debtor communicates to the assignee his assent to deliver the moneys in accordance with the terms of the assignment, he cannot afterwards assert as against the assignee any claim of his own. So in *Macfarlane* v. *Lister* (*v*) the debtor's solicitors accepted a written order directing them to pay out of a fund on which they had a prior claim, and they were not allowed to enforce that claim against the assignee. Again when a Company issued invalid bonds in favour of an ex-director who assigned them to the plaintiff, the Company were estopped from disputing the validity of the bonds, for the assignment had been registered in their books and the Company had admitted liability in a suit by the assignee to recover interest on the bonds (*w*).

Mortgage debt.—As a mortgage debt is excluded from the definition of an actionable claim, the assignee takes subject to the liabilities of the mortgagee transferor but not to the equities to which he was subject. The assignee takes subject to the state of account between the mortgagor and the mortgagee at the date of the transfer (*x*). But the mortgagor cannot as against the assignee claim a right of equitable set off (*y*).

Benefit of contract annexed to ownership of land.—Where the benefit of a contract is annexed to the ownership of land and passes with the estate the assignee is not affected with any defences personal to his assignor (*z*). Thus in *Reeves* v. *Pope* (*a*) a building company agreed to build a hotel for the defendant and granted him a lease of the land. They then mortgaged the premises to the plaintiff who sued the defendant for rent. The defendant claimed to set off damages for failure to build within the time agreed. The Court said that the set off could have been pleaded if the plaintiff were the assignee of the building contract but was not available as he was the transferee of the land.

(*q*) *Mangles* v. *Dixon*, *supra*; *Venkata Subbiah Chetty* v. *Subba Naidu*, *supra*.

(*r*) *Kristo Ramani* v. *Kedarnath* (1889) 16 Cal. 619.

(*s*) (1910) 12 Cal. L.J. 312, 321, 7 I.C. 35.

(*t*) *Mangles* v. *Dixon* (1852) 3 H.L. Cas. 702.

(*u*) *Venkata Subbiah Chetty* v. *Subba Naidu* (1915) Mad. W.N. 822, 31 I.C. 152.

(*v*) (1887) 37 Ch. D. 88.

(*w*) *Re South Essex Estuary Co., Ex parte Chorley* (1870) L.R. 11 Eq. 157. See also *Hercules Insurance Co., Brunton's Claim* (1874) L.R. 19 Eq. 302.

Dixon v. *Winch* (1900) 1 Ch. 736; *Chinnayya Rawutan* v. *Chidambaram Chetti* (1880) 2 Mad. 212.

Subramania Ayyar v. *Subramania Pattar* (1917) 40 Mad. 683, 34 I.C. 859.

David v. *Sabin* (1893) 1 Ch. 523.

(1914) 2 K.B. 284 C.A.

Ss. 132, 133

Repealed section 135.—This section was omitted when the Act was amended by Act 2 of 1900. It was as follows:—

"135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of the Section applies:—

(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

(b) where it is made to a creditor in payment of what is due to him;

(c) where it is made to the possessor of a property subject to the actionable claim;

(d) where the judgment of a competent court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment."

The Privy Council had held that the English law of champerty and maintenance did not apply to India (*b*), and this section was an attempt to prevent trafficking and speculation in litigation. It gave a benefit to the debtor at the expense of the assignee and was therefore contrary to the principle that the debtor's liability is not affected by the assignment and that he is in no way concerned with the price paid by the assignee to the original creditor. The Calcutta and Bombay High Courts sought to mitigate the severity of the rule by limiting it to cases where the debtor had made a tender of the amount mentioned to the assignee. In default of such tender it was said that the assignee was not disentitled to recover the full amount of the debt (*c*).

This construction was not accepted in Allahabad and Madras (*d*). The exceptions referred to cases which were not within the mischief against which the rule was directed. Clause (d) excluded claims which have been adjudicated upon, for the assignment of such claims could hardly be the subject of speculation. The Calcutta High Court however inferred from this clause that the section did not apply in cases where the debtor disputed the claim (*e*). The section was in force up to the 2nd February 1900. As it would not now be applied to secured debts, its provisions are only of historical interest.

Warranty of solvency of debtor.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Amendments.—This was sec. 134. It was numbered 133 by the amending Act 2 of 1900. There has been no change in the section.

Warranty of solvency.—A warranty of solvency of the debtor is not implied. If there is a warranty, then unless it is expressed to be of continued solvency, it is limited to solvency at the time of the assignment. The liability under such an assignment is further limited to the consideration for the assignment which is all that is necessary to

(*b*) *Chedambara Chetty* v. *Renga Krishna* (1874) 1 I.A. 241, 13 B.L.R. 509; *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876) 4 I.A. 23, 2 Cal. 233.

(*c*) *Grish Chandra* v. *Kashisauri Debi* (1886) 13 Cal. 145; *Khoshdeb Biswas* v. *Satar Mondol* (1888) 15 Cal. 436; *Vishnu Mahadev* v. *Dagadu* (1895) 19 Bom. 290; *Anandrao* v. *Durgabai* (1898) 22 Bom. 761.

(*d*) *Jani Begam* v. *Jehangir Khan* (1887) 9 All. 476; *Hakim-un-Nissa* v. *Deonarain* (1891) 13 All. 102; *Nilakanta* v. *Krishnasami* (1890) 13 Mad. 225 F.B.

(*e*) *Rajendra Narain* v. *Watson & Co.* (1891) 18 Cal. 510.

indemnify the assignee. No warranty of title is expressed in the Act, but probably the principle of sec. 14 of the Indian Sale of Goods Act 3 of 1930 would be applied. Ss. 133, 134

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery: secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged debt.

Amendment.—This was sec. 138. It was renumbered 134 by Act 2 of 1900 which also made some verbal alterations and added the words "or other person entitled to recover the same." Since then there has been no change.

Assignment by way of mortgage.—A debt may be assigned by way of security (*f*). The distinction which exists in the English law between an absolute transfer of a chose in action and a transfer by way of charge does not exist under the Transfer of Property Act (*g*). A right to rent to fall due in future is an actionable claim which may be the subject of a mortgage (*h*). It has been said in a Calcutta case (*i*): "The position created by the precise language of sec. 134 seems to be somewhat anomalous, because where there is a transfer under sec. 130, all the rights and remedies of the transferor vest in the transferee. The expression 'all rights' must of course include the right of ownership, and yet sec. 134 says that the residue, if any, belongs to the transferor which is only another way of saying that if there is anything left over, after the debt between the transferor and the transferee is satisfied, the transferor is the owner of the balance whatever it may be. The anomaly consists in this, that there is a contradiction between the provisions of sec. 130 and those of sec. 134. One would have expected that instead of saying any 'residue belongs to the transferor' the section would have said 'the residue, if any, shall be retransferred by the original transferee to the original transferor.'" It is submitted that there is really no conflict between the two sections. Under sec. 130 "all rights and remedies" of the transferor vest in the transferee *vis a vis* the debtor and the transferor cannot, after assignment even by way of security, sue the debtor, for that remedy is vested by the assignment in the transferee (*j*). Sec. 134 deals with the rights *inter se* the transferor and transferee, when the debt is transferred by way of security, after the debt is recovered. The section prescribes the mode or realization of a mortgaged debt. The assignee recovers the debt and pays the surplus, if any, to the assignor. A transaction may be described by the parties as a charge or lien and yet it may be in substance an assignment, for when a creditor purports to create a lien or charge on a debt due to him in favour of another person, the words have no meaning except as giving the latter a right to recover the debt from the debtor (*k*).

As already stated a mortgage in English form which transfers the property with a proviso for reconveyance is an absolute assignment under the English statute; though an

(*f*) *Gopalakrishna Iyer* v. *Gopalakrishna Iyer* (1910) 33 Mad. 123, 4 I.C. 420; *Ramasami Pillai* v. *Muthu Chetti* (1911) 34 Mad. 58, 5 I. C. 884; *Muthukrishnier* v. *Veeraraghava* (1915) 38 Mad. 297, 21 I. C. 316 F. B.

(*g*) *Santuram* v. *Trust of India Assurance Co.* (1945) A. B. 11

(*h*) *Chidambaram Pillai* v. *Doraisami Chetty* (1916) 31 I.C. 473; *Poothakka Nachiar* v. *Annamalai Chetty* (1926) Mad. W. N. 774, 98 I. C. 263, ('26) A. M. 1173.

(*i*) *Ranjit Roy* v. *D. A. David* (1935) 62 Cal. 1, 38 C.W.N. 1190, 155 I.C. 193, (1935) A.C. 218.

(*j*) *Santuram* v. *Trust of India Assurance Co.*, *supra*.

(*k*) *Ardesir Bejonji* v. *Syed Sirdar Ali Khan* (1909) 33 Bom. 610, 4 I.C. 804; *Ramasami Pillai* v. *Muthu Chetti*, *supra*.

Ss. 134-135A

assignment by way of charge only is a conditional assignment and not within the English statute (l). In *Mulraj Khatau* v. *Vishwanath* (m) the Privy Council rejected the contention that the requirement of an assignment in writing under sec. 130 referred only to a transfer of absolute rights and not to the creation of a charge.

An assignment by way of mortgage or charge of a book debt of a company is void as against the liquidator or any creditor of the company unless the provisions of sec. 109 (d) of the Companies Act, 1913, are complied with (n).

An assignment by way of charge on future property is a valid assignment in equity, which will attach to the property when it comes into existence (o). The section does not permit a transferor to recover the debt. If the transferee and the debtor collude, the transferor can file a suit for redemption and can get the debt reassigned to him (p).

Assignment of rights under policy of insurance.

135. Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

Amendment.—This section was inserted by Act 2 of 1900. It was transferred with slight alteration from the Policies of Insurance (Marine and Fire) Assignment Act, 1866, 5 of 1866, which is now entirely repealed.

Policies of Marine and Fire Insurance.—These policies constitute an exception to the general rule, for they cannot be assigned without a transfer of the property insured. So when the ownership of goods passed to the plaintiffs on delivery into their lighters they could not recover on a policy which was not agreed to be transferred to the plaintiffs by the contract of sale though it was subsequently transferred to them (q). But a marine policy may be assigned after loss (r).

Assignment of rights under policy of marine insurance.

135A. (*1*) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(*2*) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in

(l) *Durham Bros.* v. *Robertson* (1898) 1 Q.B. 765.

(m) (1913) 37 Bom. 198, 40 I.A. 24, 17 I.C. 627.

(n) *Ranjit Roy* v. *D. A. David* (1935) 62 Cal. 1, 38 Cal. W.N. 1190, 155 I.C. 193, ('35) A.C. 218.

(o) *Lagdir Nanji* v. *Surendra Mohan* (1938) 177 I.C. 920, (1938) A. C. 606.

(p) *Santuram* v. *Trust of India Assurance Co.* See *supra*.

(q) *North of England Oil-Cake Co.* v. *Archangel Insurance Co.* (1875) L.R. 10 Q.B. 249.

(r) *Lloyd* v. *Fleming* (1872) L.R. 7 Q.B. 299.

respect of that subject-matter as from the time of the casualty causing the loss. Ss. 135A, 136

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss.

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section.

This section was inserted by sec. 4 of the Transfer of Property (Amendment) Act (VI of 1944).

Incapacity of officers connected with Courts of Justice.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.

Amendment.—Section 136 was originally as follows :—

"136. No Judge, pleader, muktear, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions."

The present section was substituted by Act 2 of 1900. The amendment considerably enlarges the scope of the section. The general words "legal practitioner" make it apply to advocates and solicitors. The words "traffic in or stipulate for" prevent a legal practitioner bargaining for an interest in the subject-matter of a suit. Again the omission of the words "falling within the jurisdiction of the Court in which he exercises his functions" makes the prohibition apply to actionable claims generally and it is not exclusive, as it was formerly, of those on which an action might have been brought in another Court (s). Moreover the amended section makes it clear that the prohibited transactions are not only illegal but unenforceable. On the other hand the amendments made in the definition of actionable claim and in sec. 137 show that a legal practitioner may take an assignment of a secured debt, and that dealings in stocks, shares and debentures are not prohibited.

Object.—The intention of the former section was said to be that officers attached to a Court should not be placed in a position in which they may be tempted to use the influence or the information which they may have acquired by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims (t). The section was therefore not applied to a High Court pleader purchasing at a sale held in a Subordinate Court in which he did not habitually practise. But the principle underlying the section is of wider import affecting the administration of justice in all Courts.

(s) *Rathnasami* v. *Subramanya* (1888) 11 Mad. 56; *Singaracharlu* v. *Sivabai* (1888) 11 Mad. 498.

(t) *Rathnasami* v. *Subramanya*, *supra*.

Ss. 136, 137

In *Kerakoose* v. *Serle* (u) the Privy Council said— "It is of great importance in all countries, and more particularly in a country like India, that no officer of a Court of Justice should be even exposed to the suspicion that in the discharge of his official duties his conduct may be influenced by any personal consideration." The section is therefore analogous to Order 21, rule 73 of the Civil Procedure Code, 1908, which provides that "no officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold." The words "or other person" did not occur in the corresponding provision of the Code of Civil Procedure of 1882 and under that Code a pleader was said not to be an officer of the Court and not debarred from purchasing property sold in execution, though the Courts disapprove of such purchases (v). But sec. 136 does not apply to such purchases nor to the purchase of a decree, for a decree is not an actionable claim (w). The word "buy" in this section does not refer to purchases at Court sales, for sec. 136 is subject to sec. 2 (d), and it has been held that a purchase by a pleader of a policy of life insurance at a Court sale is not invalid (x). The prohibition applies whether a suit has been filed on the actionable claim or not, and a purchase after suit offends against public policy more than the purchase of such a claim before suit (y). Nor is the prohibition restricted to actionable claims in respect of which the pleader has a professional duty to perform; and when a pleader purchased a house under a kabala which assigned to him the rents which were in arrears, this section was a bar to his enforcing his claim (z). Again an assignment by a Mahomedan widow to a pleader of her claim for unpaid dower is invalid (a). But a pleader may make an assignment of arrears of rent, for a sale of an actionable claim is not forbidden and a mere sale is not trafficking (b).

Saving of negotiable instruments, etc.

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression, "mercantile document of title to goods," includes a bill of lading, dock-warrant, warehousekeeper's certificate, railway-receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Amendment.—This section was sec. 139. The repealed section 139 was as follows:—"Nothing in this Chapter applies to negotiable instruments." This section was substituted by the amending Act 2 of 1900 and there has been no change since then.

Negotiable Instruments and the Law Merchant.—The assignment of a negotiable instrument is effected under the Negotiable Instruments Act by endorsement and delivery, or if payable to bearer by delivery only. The old section referred only to such instruments. The amending Act 2 of 1900 included instruments which are used in

(u) (1846) 3 M.I.A. 329, 346.

(v) *Nundeepat Mahta* v. *Urquhart* (1870) 13 W.R. 209; *Syed Wajed Hossein* v. *Hafez Ahmed* (1872) 17 W.R. 480; *Subbarayudu* v. *Kotayya* (1892) 15 Mad. 389; *Aghore Nath* v. *Ram Churn* (1896) 23 Cal. 805; [illegible] v. *Ramanathan* (1887) 10

(w) *Govindarajulu* v. *Ranga Rao* (1921) 40 Mad. L.J. 124, 62 I.C. 255, ('21) A.M. 113.

(x) *National Insurance Co.* v. *Haridas Bosu* (1927) 46 Cal. L.J. 225, 104 I.C. 729, ('27) A.C. 691.

(y) *Muni Reddi* v. *Venkata Row* (1914) 37 Mad. 238, 17 I.C. 544.

(z) *Sheogobind Singh* v. *Gouri Prasad* (1925) 4 Pat. 43, 83 I.C. 81, ('25) A.P. 310; *Hiralal Singha* v. *Tripura Charan Rai* (1913) 40 Cal. 650, 19 I.C. 129.

(a) *Amir Hasan Khan* v. *Muhammad Nazir Hussain* (1933) 54 All. 499, 1932 All. L.J. 275, 136 I.C. 833, ('32) A.A. 345.

(b) *Hirday Narain Singh* v. *Jugal Prasad Singh* (1927) 97 I.C. 378, ('27) A.P. 2.

the ordinary course of business as proof of the possession and control of goods and which are similarly transferable by the Law Merchant, *i.e.*, by the law or custom of merchants. As to these the section merely provides that they are not subject to the special requirements of Chapter VIII as to actionable claims, and whether or not they are negotiable depends upon the Law Merchant (*c*). A bill of lading is transferable by endorsement (*d*); but a mate's receipt is not a document of title and cannot be transferred by endorsement (*e*). A debenture was given as an illustration of the old sec. 137, but as it is a secured debt it is not an actionable claim under the definition in this Act. In *Imperial Bank of India* v. *Bengal National Bank* (*f*) Rankin, C. J., said— "The meaning of this section seems to be that debentures and certain other things may be transferred otherwise than in the manner provided by sec. 130 and that the effect of the transfer is not controlled by the subsequent sections. I do not think it has reference to debentures considered as transfers, but only as the subject-matter of a transfer." Bearer debentures are now by the general custom of merchants regarded as negotiable instruments (*g*). A railway receipt entitles the endorsee to delivery as a document of title to goods (*h*); and so does a delivery order (*i*). A pledge of a railway receipt has the effect of a pledge of the relative goods (*j*). Shares can only be transferred as provided by the Companies Acts (*k*). Shares are not, however, actionable claims and are excluded from the operation of this Chapter (*l*). When a negotiable instrument is negotiated the holder in due course does not take subject to the liabilities and equities affecting his transferor but may acquire a better title. But the transfer of such instruments may be effected by an instrument in writing under sec. 130 and the transfer will then be subject to sec. 132 (*m*). This is because sec. 137, while it gives an extended privilege to mercantile documents is in no way restrictive (*n*). The section is no bar to the transfer of a negotiable instrument otherwise than by way of endorsement. Thus in places like the Punjab where the Transfer of Property Act is not in force, an oral assignment has been held to be sufficient (*o*). If a promissory note is executed in favour of a joint Hindu family the whole family can sue to recover the debt evidenced by the note; and if a partition is effected each member may sue (not on the note but on debt) to recover his share (*p*). The beneficial owner cannot sue on the note alleging that the payee is his benamidar, though he may sue for the debt evidenced by the note (*q*). In some cases a promissory note has been held to be transferred without an endorsement, by operation of law. Thus the party entitled to possession after the release of the property from the superintendence of the Court of Wards, is entitled to sue on promissory notes executed by tenants to the Court of Wards (*r*). So also when a promissory note was purchased at a Court Auction (*s*). But in a case where a negotiable instrument was allotted to a party by a partition award and decree the Bombay High Court held that there was no transfer by operation of law (*t*).

Section 136 does not apply to instruments under this section, otherwise it would be questionable if a legal practitioner could take a cheque in payment of his fees.

Section 137 must by virtue of sec. 4 be read as part of the Contract Act (*u*).

(*c*) *Arunachallam* v. *Ko Po Yan* (1923) 68 I.C. 694, ('23) A.R. 1.

(*d*) *Lickbarrow* v. *Mason* (1794) 5 Term Rep. 683; *Burgos* v. *Nascimento* (1908) W.N. 237.

(*e*) *Natcheappa* v. *Irrawaddy Flotilla Co.* (1914) 41 Cal. 670, 22 I.C. 311 P.C.

(*f*) (1931) 58 Cal. 136, 152, 131 I.C. 689, ('31) A.C. 223.

(*g*) *Bechuanaland Exploration Co.* v. *London Trading Co.* (1898) 2 Q.B. 658.

(*h*) *Ramdas* v. *S. Amerchand & Co.* (1916) 40 Bom. 630, 43 I.A. 164, 35 I.C. 954; *Secretary of State* v. *Rishi Ram* (1928) 50 All. 227, 108 I.C. 457 ('28) A.A. 145.

(*i*) *Anglo Indian Jute Mills Co.* v. *Omademull* (1911) 38 Cal. 127, 10 I.C. 359.

(*j*) *Mercantile Bank of India* v. *Official Assignee of Madras* (1933) 56 Mad. 177, 64 Mad. L.J. 320, 143 I.C. 641, ('33) A.M. 207.

(*k*) *Torkington* v. *Magee* (1902) 2 K.B. 427, 430.

(*l*) *Elaya Nayar* v. *Krishna Pattar* (1943) Mad. 115, (1942) 2 M. L. J. 120, 205 I. C. 210, (1943) A.M. 74.

(*m*) *Akhoy Kumar* v. *Haridas Bysack* (1916) 18 Cal. W.N. 494, 22 I.C. 500; *Muthar Sahib* v. *Kadir Sahib* (1905) 28 Mad. 544; *Muhammad Khumarali* v. *Ranga Rao* (1901) 24 Mad. 654; *Palawan* v. *Kanu* (1922) 66 I.C. 501; *Raman Chatty* v. *Nagarathana Naicker* (1912) 11 Mad. L.T. 246, 15 I.C. 380.

(*n*) *Venkatarama Ayyar* v. *Krishnaswami Chettiar* (1933) I.C. 262, ('33) A.M. 188; *Ghanashyamdas* v. *Sahu* (1936) 16 Pat. 74, 167 I.C. 51, (1937) A.P. 100.

(*o*) *Ram Ratan* v. *Gobind Ram* (1939) A.L. 501, 185 I.C. 426.

(*p*) *Gopalu Pillai* v. *Kothandarama Ayyar* (1934) 57 Mad. 1082, 67 Mad. L.J. 843, 153 I.C. 916, ('34) A.M. 529.

(*q*) *Harkishore Barua* v. *Gura Mia* (1931) 58 Cal. 732, 131 I.C. 570, ('31) A.C. 387; *Peary Pasi* v. *Gauri Lal* (1934) 13 Pat. 655, 151 I.C. 694, ('34) A.P. 382.

(*r*) *Sowcar Lodd Govinda Doss* v. *Lepati Muneppa Naidu* (1908) 31 Mad. 534.

(*s*) *Kutalingam Pillai* v. *Pakiyam Fernandes* (1910) 21 Mad. L.J. 422, 8 I.C. 17.

(*t*) *Virappa* v. *Mahadevappa* (1934) 36 Bom. L.R. 807, 153 I. C. 352, ('34) A.B. 356.

(*u*) *Ramdas* v. *S. Amerchand & Co., supra.*

APPENDIX I.

THE HINDU TRANSFERS AND BEQUESTS ACT, 1914,

BEING

MADRAS ACT NO. I OF 1914.

[*Came into force on the* 14*th February*, 1914.]

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons [*in the Mufassal of Madras*].

Preamble.

WHEREAS it is expedient to declare the rights of person governed by the Hindu law to make transfer and bequests in favour of unborn persons; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Hindu Transfers and Bequests Act, 1914."

Application and extent.

2. (*1*) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras.

(*2*) In the case of transfers *inter vivos* or wills executed before the date of this Act the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date: Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Explanation.—Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely :—

(*a*) in respect of dispositions by transfers *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

Sections 3 and 4 were substituted for the original secs. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s. 11, which came into force on the 1st April 1930. The original secs. 3, 4 and 5 were as follows :—

3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator as the case may be.

Transfers and bequests in favour of unborn persons.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some persons who shall be in existence at the expiration of that period and to whom if he attains full age, the interest created is to belong.

Rule against perpetuity in regard to transfers.

This is sec. 14 *of the Transfer of Property Act*, 1882.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity in regard to bequests.

This is sec. 101 *of the Indian Succession Act*, 1865, *now sec.* 114 *of the Indian Succession Act*, 1925.

APPENDIX II.

THE HINDU DISPOSITION OF PROPERTY ACT, 1916,

BEING

ACT NO. XV OF 1916.

[*Received the assent of the Governor-General on the 28th September 1916.*]

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition; It is hereby enacted as follows:—

Short title and extent.

1. (*1*) This Act may be called the Hindu Disposition of Property Act, 1916.

(*2*) It extends, in the first instance, to all the Provinces of India, *except the province of Madras:* Provided that the Governor-General in Council may, by notification in the Gazette of India, extend this Act to the province of Madras.

As to Madras, see App. I and App. III.

Dispositions for the benefit of person not in existence.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitations and conditions.

3. The limitations and provisions referred to in section 2 shall be the following, namely:—

(*a*) in respect of dispositions by transfer *inter vivos* those contained in Chapter II of the Transfer of Property Act, 1882, and

"Chapter II" was substituted for "sections 13, 14 and 20," by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s. 12, which came into force on the 1st April, 1930.

(*b*) in respect of disposition by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

The words and figures "sections 113, 114, 115 and 116 of the Indian Succession Act, 1925" were substituted for the words and figures "sections 100 and 101 of the Indian Succession Act, 1865" by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s. 12.

4. (*Omitted by the Transfer of Property (Amendment) Supplementary Act* 21 *of* 1929, *s.* 12.)

The original sec. 4 was as follows:—

Failure of prior disposition.

4. Where a disposition of property fails by reason of any of the limitations referred to in section 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.

Application of this Act to the Khoja community.

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja", as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification and this Act shall thereupon have effect accordingly.

APPENDIX III.

THE HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) ACT,

BEING

ACT VIII OF 1921.

[*Received the assent of the Governor-General on the 27th March, 1921.*]

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

WHEREAS it is expedient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act, 1921.

Application and extent.

2. (*1*) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras.

(*2*) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14th February 1914:

Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of this Act.

Explanation.—Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfers *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely :—

(*a*) in respect of disposition by transfer *inter vivos* those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

Sections 3 and 4 were substituted for the original secs. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s. 13, which came into force on the 1st April 1930. The original ss. 3, 4 and 5 were as follows:—

Transfers and bequests in favour of unborn persons.

3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

Rule against perpetuity in regard to transfers.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age, the interest created is to belong.

This is sec. 14 *of the Transfer of Property Act*, 1882.

Rule against perpetuity in regard to bequests.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some persons who shall be in existence at the expiration of that period, and to whom if he attains full age, the thing bequeathed is to belong.

This is sec. 101 *of the Indian Succession Act*, 1865, *now sec.* 114 *of the Indian Succession Act*, 1925.

APPENDIX IV.

CROWN GRANTS ACT, 1895.

(Act XV OF 1895).

[*Passed on the 10th October,* 1895].

Historical Memoir.

Year.	No. of Act.	Name of Act.	How affected.
1895.	XV	Crown Grants	Rep. in part, Act X of 1914.

An Act to explain the Transfer of Property Act, 1882, *so far as relates to grants from the Crown, and to remove certain doubts as to the powers of the Crown in relation to such grants.*

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act, 1882, and, as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows:—

Title, extent and commencement.

1. *(1)* This Act may be called the Crown Grants Act, 1895.

(2) It extends to all the Provinces of India; *[a].

(3) * * *[a].

Transfer of Property Act, 1882, not to apply to Crown grants.

2. Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

Crown grants to take effect according to their tenor.

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding

[a] Repealed by Act X of 1914.

APPENDIX V.

TRANSFER OF PROPERTY AND THE INDIAN REGISTRATION (BOMBAY AMENDMENT) ACT, 1939.

BOMBAY ACT NO. XIV OF 1939.

(First published, after having received the assent of the Governor-General, in the "Bombay Government Gazette" on the 15th June 1939.)

An Act to amend the Transfer of Property Act, 1882, and the Indian Registration Act, 1908, in their application to the Province of Bombay.

WHEREAS it is expedient to amend the Transfer of Property Act, 1882, and the Indian Registration Act, 1908, in their application to the Province of Bombay for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939.

Application of Act.

2. This Act shall apply to notices in respect of suits or proceedings which relate to immoveable properties situate wholly or partly in the City of Bombay with effect from such date as may be directed by the Provincial Government in this behalf by notification in the Official Gazette:

Provided that the Provincial Government may by similar notification direct that the provisions of this Act shall apply to such notices relating to immoveable properties situate wholly or partly in such other area as may be specified in the said notification.

Amendment of section 52 of Act IV of 1882.

3. Section 52 of the Transfer of Property Act, 1882, shall be renumbered as sub-section (1) of section 52 of the said Act and IV of 1882

(*i*) in sub-section (1) so renumbered after the word "question," the words and figures "if a notice of the pendency of such suit or proceeding is registered under section 18 of the

XVI of 1908. Indian Registration Act, 1908," and after the word "property" where it occurs for the second time the words "after the notice is so registered," shall be inserted; and

(ii) after the said sub-section (1) so renumbered the following shall be inserted, namely:—

"(2) Every notice of pendency of a suit or prc ing referred to in sub-section (1) shall contain the following particulars, namely:—

(*a*) the name and address of the owner of immoveable property or other person whose right to the immoveable property is in question;

(*b*) the description of the immoveable property, the right to which is in question;

(*c*) the court in which the suit or proceeding is pending;

(*d*) the nature and title of the suit or proceeding; and

(*e*) the date on which the suit or proceeding was instituted."

Amendment of sections 18 and 28 of Act XVI of 1908.

4. In the Indian Registration Act, 1908,—

(1) in section 18—

(*i*) the word "and" after clause (*e*) shall be deleted; and

(*ii*) after clause (*e*) the following shall be inserted, namely:—

"(*ee*) notices of pending suits or proceedings referred to in section 52 of the Transfer of Property Act, 1882; and"; IV of 1882.

and

(2) in section 28 for the brackets, letters and word "(*b*) and (*c*)," the brackets, letters and word "(*b*), (*c*) and (*ee*)," shall be substituted.

APPENDIX VI.

DISPOSITIONS OF PROPERTY (BOMBAY) VALIDATION ACT, 1947.

BOMBAY ACT NO. LIV OF 1947.

(First published, after having received the assent of the Governor-General, in the "Bombay Government Gazette" on the 16th January, 1948.)

An Act to validate certain dispositions of property in the Province of Bombay.

WHEREAS it is expedient to validate certain dispositions of property in the Province of Bombay; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Dispositions of Property (Bombay) Validation Act, 1947.

Application of Act.

2. This Act shall apply to all trusts made, and to all wills and other testamentary dispositions of persons who have died, before the first day of January one thousand nine hundred and forty-five—

(*a*) where such trusts, wills or testamentary dispositions relate to immoveable property situate within the Province of Bombay;

(*b*) where such trusts, wills or testamentary dispositions relate to property of every description other than immoveable property and are declared, executed or made by a settlor or testator, as the case may be, in the Province of Bombay, notwithstanding anything to the contrary contained in Part II of the Indian Succession Act, 1925. XXXIX 1925.

Validation of certain dispositions.

3. (*1*) The following provisions of law shall not apply and shall be deemed never to have applied to the dispositions of property contained in or made by the instruments mentioned in section 2, namely, (*a*) section 13 of the Transfer of Property Act, 1882, and (*b*) section 113 of the Indian Succession Act, 1925. IV of 1882. XXXIX of 1925.

(2) To the dispositions of property contained in or made by the instruments mentioned in section 2 the enactments mentioned in the first column of the Schedule to this Act shall apply, and shall be deemed to have always applied, with the omissions and modifications specified in the second column of the Schedule.

Saving.

4. Nothing in this Act shall be deemed to affect or prejudice in any way any right, title or interest accrued to any person under a final decree or order of a competent court or acquired by any person for valuable consideration before the coming into force of this Act.

SCHEDULE.

1. Enactments.	2. Omissions and modifications.
Section 15 of the Transfer of Property Act, 1882.	For "sections 13 and" substitute "section".
Section 16 of the Transfer of Property Act, 1882.	For "sections 13 and" substitute "section".
Clause (b) of section 3 of the Hindu Disposition of Property Act, 1916.	Omit "113,".
Section 115 of the Indian Succession Act, 1925.	Omit "section 113 or".
Section 116 of the Indian Succession Act, 1925.	For "sections 113 and" substitute "section".
Schedule III to the Indian Succession Act, 1925.	Omit "113,".
Clause (5) under the heading "Restrictions and modifications in application of foregoing sections" in Schedule III to the Indian Succession Act, 1925.	Omit "one hundred and thirteen,".

APPENDIX VII.

GLOSSARY.

Ab initio.—(Latin). From the beginning.

Abadi.—A cultivated tract. A farm.

Abkari.—Revenue derived from duties on the manufacture and sale of intoxicating liquor.

Accessio cedit principali.—(Latin). The accession is added to the principal. A maxim of Roman law by which ownership is acquired by accession.

Adaimaham patram.—(Tamil). A deed of simple mortgage.

Adhlapi.—A transaction, customary in the Punjab, by which a person sinks a well and clears the land and receives in return a proprietary interest in a share of the land.

Advancement.—A payment to start a child in life or to make provision for him.

Alieno jure.—(Latin). In the right of another.

Alio intuitu.—(Latin). With a different view of prospect. For a different purpose.

Ba Farzandan.—(Persian). With children, including descendants. The words indicate that the grant is to the grantee and his posterity.

Bai-bil-wafa.—*See* 'Bye-bil-wafa.'

Bandhak.—(Sanskrit). A pledge, a mortgage.

Bandhakikhat.—(Bengali). A deed of mortgage. Also bandhaknama and bandhak patra.

Bastu.—A house site, a building plot.

Batai.—(From Sanskrit *Vut* to divide). A share. A division of the crop between the landlord and the cultivating tenant.

Battaki.—*See* Buttaki.

Bemaidi.—Without a term. Also *Bemeyadi.* For the construction of a bemaidi lease see *Janaki Nath* v. *Dina Nath* (1931) 54 Cal. L.J. 412, 133 I.C. 732. ('31) A. PC. 207.

Benami.—Nameless, fictitious. A transaction under a false name.

Bhagbandhak.—A possessory mortgage.

Birt.—(From the Sanskrit *Vritti,* maintenance, means of livelihood). Fees to family priest. A right, custom or privilege derived from the performance of offices whether secular or religious. A grant of land to a person for maintenance or for religious or charitable objects.—Wilson's Glossary.

Birt-maha-brahamani.—Fees or presents received by a Brahmin who conducts funeral ceremonies.

Brahmottar.—(Bengali). Land granted rent free to Brahmins for their support and that of their descendants. Such lands have frequently been acquired by non-Brahmins.—Wilson's Glossary.

Burgadar.—A person who cultivates the land and gives a share of the profits to the owner. He is not necessarily a lessee. See *Brahmamoyee* v. *Sheikh Munsur* (1920) 32 Cal. L.J. 37.

Buttaki.—Proclamation by beat of drum.

Butwara.—Partition. Butwara proceedings are proceedings for partition with the sanction of the revenue authorities.

Bye-bil-wafa.—(Arabic). Literally a sale with faith. A mortgage by conditional sale.

Caveat emptor.—(Latin). Let a purchaser beware. "'*Caveat emptor*' does not mean either in law or in Latin that the buyer must take chances, it means that the buyer must take care": *Wallis* v. *Russell* (1902) 2 I.R. 585, 615.

Cess.—A tax or rate. A great many miscellaneous cesses, imposts and charges were imposed under the Government of the Moghuls in addition to the land revenue both by the Government and the zemindars. These have been either abolished or assimilated with the land revenue. The cesses abolished are called *siwai* (*i.e.* extras) or *abwa* or *mathaut*: S. 74 Bengal Tenancy Act 8 of 1885. Other cesses indirectly connected with the use of land and water and called *sayar* the landlord was allowed to retain: S. 3 (4) Agra Tenancy Act, U. P. Act 3 of 1926. Such cesses were bankar or a tax on jungle products and *Julfar* a tax on fisheries and *Phulkar* a tax on fruit trees.

Cestui que trust.—The beneficiary of a trust.

Chakran lands.—Lands held on service tenure. Generally speaking the term includes all lands so held whether by police officials, chowkidars or persons whose duties are personal to the zemindar: *Ranjit Singh* v. *Kali Dasi* (1917) 44 I.A. 117, 44 Cal. 841, 40 I.C. 981.

Champerty and maintenance.—Practices forbidden by English law which are the fomentation of litigation in which one has no interest of one's own. A bargain whereby one party is to assist another in recovering property and is to share in the proceeds of the suit.

Char.—Land formed by alluvion.

Chevisance.—The business of a scrivener, *i.e.*, a shroff or dealer in money.

Chose in action.—A term of English law, for a thing recoverable by action as contrasted with a thing or chose in possession. An actionable claim.

Chowk.—A courtyard. A square.

Chowkidar.—A village watchman remunerated by an allotment of land held either rent free or at a low rent in consideration of services to be rendered to the zemindar who before the English occupation was responsible not only for the payment of revenue but also for the preservation of peace and order within his district. The chowkidar rendered not only police service but personal service to the zemindar: *Ranjit Singh* v. *Kali Dasi* (1917) 44 I.A. 117, 44 Cal. 841, 40 I.C. 981.

Chuck.—A corruption of 'Chak'. (Sanskrit *Chak*, or *Chakra* a circle or district). A portion of land divided off. The detached fields of a village. A patch of rent free land. A separate estate or farm. A sub-division of survey number.—Wilson's Glossary.

Covinous.—Collusive. Covine is 'a secret assent determined in the hearts of two or more to the defrauding and prejudice of another.'—Co. Litt. 357.

Damdupat.—A rule of the Hindu law of debts by which the interest recoverable at any one time cannot exceed the principal.

Darpatni.—A tenure subordinate to a patni. A sub-leasehold. *See* 'Patni'.

Darpatnidar.—A holder of a darpatni.

Dartaluk.—A subordinate taluka or estate the holder of which pays revenue through a superior talukdar or zemindar.

Darwans.—Doorkeepers. Porters.

Debutter.—(A corruption of *Deotar* from the Sanskrit *Devatra* belonging to the deity). Land granted rent free for the support of a temple or idol.

De die in diem.—(Latin). From day to day.

Demise.—A transfer by way of lease.

Deorha.—One and half. Used to express interest in kind at the rate of fifty per cent.

Deshgat watan.—A hereditary district office remunerated by a cash allowance or a grant of rent free land.

Dharm.—(From the Sanskrit *Dhar*, to hold). That which holds a man in the right path. Law, virtue, legal or moral duty.—Wilson's Glossary.

Dhrista bandhaka.—(From Sanskrit *Dhristi*, sight and *Bandhak*, a pledge). A simple mortgage.

Diggubhogyam.—(Tamil). A simple mortgage.

Dowlferist or Daulferist.—A rent roll. A statement of rents demanded by zemindar from his tenants.

Ejusdem generis.—(Latin). Of the same nature. A rule of construction whereby general terms following particular ones are taken to apply to persons and things which are of the same nature as those comprehended in the particular terms.

En ventre sa mere.—(French). In his mother's womb.

Ex-proprietary tenant.—A landlord or proprietor who has lost his proprietary rights by alienation voluntary or involuntary and has become a tenant with a right of occupancy in his *sir* land and in land which he has cultivated continuously for a specified number of years. *See* The Oudh Rent Act, 1886 (U.P. Act 22 of 1886) s. 7A; The Agra Tenancy Act, 1926, (U.P. Act 3 of 1926) s. 14; The North-West Provinces Tenancy Act, 1901, (N.W.P. Act 2 of 1901) s. 10. *See* also 'Sir.'

Ex-proprietary tenant.—An ex-proprietary tenant is a landlord who has lost his proprietary right but who remains a tenant with a right of occupancy of his *sir* or home farm land: *See* The Agra Tenancy Act, U. P. Act 3 of 1926, ss. 14 & 15; The North-West Provinces Tenancy Act, N.W.P. Act 2 of 1901, s. 10. *See* also 'Sir.'

Fee Simple.—A term of English real property law denoting an absolute estate. 'Fee signifieth inheritance and simple is added for that is descendible to his heirs generally that is simply without restraint to the heirs of the body or the like. The word (simple) properly excludeth both conditions and limitations that defeat or abridge the fee' (Co. Litt. 1. b.; Halsb. Vol. 24, para. 315).

Fee Tail.—A term of English real property law denoting a restricted estate or *feudum talliatum* or an estate tail. 'To hold in Fee Tail or in Tail is where a man holdeth certain lands or tenements to him and to his heirs of his body begotten' (Terms de la Ley; Halsb. Vol. 24, para. 442).

Feoffment.—A term of English real property law denoting a conveyance in fee simple.

Forehand rent.—Rent payable in advance.

Gage.—A pawn or pledge. (From the same root as the word engage).

Gahan.—(Marathi). A pledge. A mortgage.

Gahan Lahan.—(Marathi). A mortgage by conditional sale.

Ghatwal.—Literally the guard of the ghat or hill pass. Ghatwal lands were holdings created in frontier territories so that the holders might be 'wardens of the Marches, the State granting lands to be held free on condition of guarding the passes: Baden Powell Land Systems of British India, Vol. I, p. 532. The person holding the office of ghatwal is bound to perform police duties and quasi military duties in consideration of a remuneration which may take the form of the use of land or an actual estate in land, heritable and perpetual: *Narayan Singh* v. *Niranjan Chakravarti* (1924) 51 I.A. 37, 3 Pat. 183, 79 I.C. 825, ('24) A. PC. 5. The tenure though peculiar because of a certain reserved power of selection nevertheless ranks as hereditary: *Raja Durga Prasad* v. *Tribeni* (1918) 45 I.A. 251, 46 Cal. 362; *Secretary of State* v. *Jyoti Prasad* (1926) 53 I.A. 100, 53 Cal. 533, 94 I.C. 974, ('26) A. PC. 41. The Birbhum Ghatwal lands were declared transferable and heritable subject to a rent fixed in perpetuity by Beng. Reg. 29 of 1814.

Gross.—A thing or right in gross is one which is independent of anything else. Thus a right or common of pasture appendant may exist in respect of arable land: *Tyrringham's* case (1584) 4 Co. Rep. 36a, 37. But a right or common of pasture in gross appertaineth to no land and must be in writing or prescription: Co. Litt. 122a.

Guzara.—From the Persian word *Guzarish*. Maintenance.

Hat.—A market, a market held on certain days, a fair.

Hathchitti.—A letter or note written or vouched by the hand of.

Havala.—A transfer of a debt from the original debtor to a person who becomes liable for it to the creditor.

Hereditament.—A term of English real property law. The word hereditament *is* of as large extent as any word, for whatever may be inherited, be it corporeal or incorporeal, real personal or mixt, is a hereditament: Co. Litt. 16a, 383a, b.—Tenement is a large word to grant realty but hereditament is the largest: Coke Inst., Vol. 1, p. 6. Jarman says that the most comprehensive words of description applicable to real estate are tenements and hereditaments as they include every species of realty as well corporeal as incorporeal.

Heriot.—A term of English real property law denoting the right of the Lord of the manor, on the death of a freeholder to the best beast or other chattel of such freeholder: Halsb., 2nd Ed. Vol. 7, para. 574.

Hiba-bil-iwaz.—A gift with an exchange. A mutual gift. A gift for a consideration as when a man gives property to his wife in lieu of her dower.

Homestead land.—In Bengal the expression denotes a permanent tenancy created before the Transfer of Property Act for the purpose of habitation when a pucca building has been erected on the land leased: *Safar Ali* v. *Abdul Rasid* (1924) 39 Cal. L.J. 585. With reference to the Bombay Bhagdari Act (Bom. Act 5 of 1862) a homestead has been defined as including the site of the building, the dwelling house, the trees, wells and shrine and all the appendages which together constitute the usual surroundings of the ordinary village home: *Collector of Broach* v. *Venilal* (1897) 21 Bom. 588, 593.

Id certum est quod certum fieri potest.—(Latin). Another reading is 'Id certum est quod certum reddi potest.' That is (sufficiently) certain which can be made certain. A maxim of construction: *Owen* v. *Thomas* (1834) 3 My. and K. 353 (a contract): *Adams* v. *Jones* (1852) 9 Hare 485 (a will).

In esse.—(Latin). In being.

In gremio.—(Latin). In the bosom of.

In odium spoliatoris.—(Latin). The whole maxim is 'In odium spoliatoris omnia praesumuntur.' Every presumption is made against a wrongdoer. A rule of evidence that as between an innocent party and a wrongdoer unexplained circumstances are presumed unfavourably to the wrongdoer: Halsb., 2nd Ed., Vol. 13, para. 705.

In pari delicto potior est conditio possidentis.—(Latin). In equal fault the condition of the possessor is the stronger.

Inam.—An Arabic word meaning a gift or benefaction. A gift by a superior to an inferior. The term is applied to gifts of land rent free or at a quit rent in hereditary and permanent occupation. There are many classes of inam but the word is of generic significance applicable to the grant as a whole.

Inter vivos.—(Latin). Between living persons.

Istimrari.—From the Arabic word *Istimrar* meaning perpetual. Permanent. Perpetual. The word may by usage refer to perpetuity during the lifetime of the grantee. *See* Istimrari Mokarari. In the absence of such usage an istimrari lease was held to convey a permanent and hereditary right: *Din Dayal* v. *Sifat Ali* (1923) 10 O.L.J. 630. The istimrari estates in Ajmere are held in absolute proprietary right and only pay revenue to Government in the form of a permanent and unenhanceable tribute: Baden Powell Land Systems of British India, Vol. II, p. 336.

Istimrari Mokarari.—From the Arabic word *Istimrar* meaning perpetual in point of time, and the Arabic word *Mokarar* meaning fixed as to rent. A perpetual tenure at a fixed rent. But the words in their lexicographical sense do not imply any heritable character as mourasi does: *Narsingh Dyal* v. *Ram Narain* (1903) 30 Cal. 883 approved in *Kamakhya* v. *Rama Raksha* (1928) 55 I.A. 212, 7 Pat. 649, 109 I.C. 663, ('28) A. PC. 146. This is because permanence may only be during the lifetime of the grantee and the words by themselves only confer a life estate on the grantee: *Ramnarain Singh* v. *Chota Nagpur Banking Association* (1916) 43 Cal. 332, 36 I.C. 321.

Jaghir.—From the Persian word *Jai* meaning a place, and the Persian word *Gir* meaning a holder. A grant generally from the Moghul Government of the royal share of the revenue but not of the soil. Such grants were originally for life to a Court favourite or as an appanage to an office or title and were resumable at pleasure. In time either because of the decline of the Central Government or because it was thought below the dignity of the ruler to resume, the grant became permanent and hereditary and many assignments of revenue grew into landlord tenures. Again jaghir grants were sometimes made with the express object of settling waste lands so that the terms of the grant were such as to make the estate hereditary and alienable. Baden Powell Land Systems of British India, Vol. I, p. 189: *Ramkrishnarao* v. *Nanarao* (1903) 5 Bom. L.R. 983; *Maya Das* v. *Gurdit Singh* (1912) 16 I.C. 855. See *Gulabdas* v. *The Collector of Surat* (1878) 6 I.A. 54.

Jaghirdar.—The holder of a jaghir.

Jamma.—Total rent or assessment payable.

Jenmi or Janmi.—Probably a corruption of zemindar. A proprietor of land. *See* Malabar Tenancy Act, Mad. Act. 14 of 1930, s. 3 (k). *See also Kanam.*

Joshi.—A Brahmin versed in astrology. A priest.

Jote.—A holding for purposes of agriculture. It may mean a raiyiti or a nonraiyiti holding or any sort of holding. It does not necessarily mean an occupancy holding: *Upendra Kishore* v. *Khalil* (1932) 55 Cal. L.J. 170, 139 I.C. 544, ('32) A.C. 568.

Jus ad rem.—A right to a thing. A contractual right.

Jus disponendi.—(Latin). The right to dispose of. The right of sale, control and management.

Jus in rem.—A right in a thing. A proprietary right.

Kabuliyat.—*See* Razinama and Kabuliyat.

Kadam sharif.—A Mahomedan religious ceremony.

Kamaki.—Waste land adjoining cultivated land. The adjoining ryot has certain rights called kamaki rights over the waste land, *e.g.*, the right of pasturage and of gathering leaves for manure.

Kanam.—A customary mortgage in Madras which partakes of the character of a mortgage and of a lease. It cannot be redeemed before 12 years and the mortgagee-lessee or kanamdar is entitled to compensation for improvements on redemption. The annual payments to the mortgagor-lessor or janmi (probably a corruption of Zemindar) are regulated by what remains of the fixed share of the produce after deducting interest. If the mortgage is not redeemed, but is renewed at the expiry of 12 years, a renewal fee is payable to the janmi. This mortgage has a feudal origin, the mortgage debt having been originally a fee paid in token of feudal allegiance by the holder of the land to the lord: Baden Powell Land Systems of British India, Vol. III, pp. 159-177. Kanam is defined in the Malabar Tenancy Act, Mad. Act 14 of 1930, sec. 3 (1), as follows:—

"**Kanam** means the transfer for consideration in money or in kind or in both by a landlord of an interest in specific immoveable property to another (called the kanamdar) for the latter's enjoyment, the incidents of which include:—

(1) a right in the transferee to hold the said property liable for the consideration paid by him or due to him which consideration is called 'kanartham',

(2) the liability of the transferor to pay to the transferee interest on the kanartham,

(3) the payment of 'michavaram' by the transferee,

(4) the right of the transferee to enjoy the said property for twelve years or any other period, and

(5) the liability of the transferee to pay a renewal fee to the transferor, if the transferee is permitted to enjoy the said property for a further period after the termination of the original period."

The word 'michavaram' in the above definition is defined in sec. 3 (q) of the said Act as 'whatever is agreed by a kanamdar in a kanam deed to be paid periodically in money or in kind or in both, to or on behalf of the janmi.'

Sec. 17 of the said Act gives the kanamdar a right of renewal and regulates the renewal fee.

Kanamdar.—*See* Kanam.

Karnam.—A village servant employed in revenue duties in Madras, and corresponding to a patwari in Northern India and kulkerni in Western India. The office is remunerated by a hereditary estate in land. The appointment and succession to the office is regulated by the Madras Hereditary Village-Offices Act, Mad. Act 3 of 1895.

Karnavan.—A term of Malabar law denoting the manager of a tarwad. *See* 'Tarwad'.

Kayam or Kalm.—Fixed. Imports non-fixity of rent but permanence of occupation: *Mehr Ali* v. *Kalai Khalashi* (1915) 19 Cal. W.N. 1129, 29 I.C. 461; *Shyama Charan* v. *Fakir Chandra* (1927) 101 I.C. 45, ('27) A.C. 546; *Chandra Kanta* v. *Amjad Ali* (1920) 32 Cal. L.J. 296 F.B.

Kayam and Saswatham.—(Telugu). Fixed and permanent. Construed as equivalent to Istimrari Mokarari and therefore not necessarily hereditary: *Rajaram* v. *Narsinga* (1891) 15 Mad. 199.

Khata.—A ledger account. Also a current account. Also the book in which the account is kept.

Khatkabala.—A conditional engagement. A mortgage by conditional sale.

Khewat.—The record or register of persons who hold shares in a co-parcenary village.

Khorposh or Khor-o-posh.—Literally food and clothing. A grant for maintenance.

Khot.—A hereditary farmer of land revenue. The khoti tenure is customary in the Konkan.

Khot nisbat.—Lands held by permanent tenants of the khot who have hereditary but not transferable rights. For the distinction between khot nisbat land and khot khasgi land which is the private property of the khot, see *Ganpati Gopal* v. *Secretary of State* (1924) 48 Bom. 599, 83 I.C. 370, ('25) A.B. 44.

Khudkast.—(Literally, self sown). Land cultivated by the proprietor himself.

Kuttubadi.—(Telugu). A Madras revenue term for the quit rent of land granted to a public servant.

Lac.—Resin exuded from the bark of certain trees.

Lambardar.—From the English word *Number*. A cultivator who pays the assessment and is registered in the Collector's roll according to his number. He is representative of the co-sharers of his Mahal or village, collects their share of the revenue and has a right of suit against them for their share of the revenue, village expenses and other dues. *See* The Agra Tenancy Act, U. P. Act 3 of 1926, ss. 221 and 265; The North-Western Provinces Tenancy Act, N. W. P. Act 2 of 1901, s. 159; The North-Western Provinces and Oudh Land Revenue Act, N. W. P. Act 3 of 1901, ss. 45, 144 and 184; The Central Provinces Land Revenue Act, C. P. Act 2 of 1917, ss. 2 (6), 187 and 188.

Lekha Muki.—A customary mortgage in the Punjab where the mortgagee is in possession and is responsible for the accounts.

Locus poenitentiae.—Place or opportunity for repentance or change of intention.

Malikhana.—From the Arabic word *Malik* meaning a proprietor. An impost originally payable by the holders of the village to the proprietor of the parent estate from which their holdings were carved out. For a history of these imposts, see *Rameshwa Singh* v. *The Secretary of State* (1906) 11 Cal. W.N. 448.

Malikhandar.—The proprietor entitled to receive the malikhana allowance. *See* 'Malikhana.'

Math.—An abode for students of the Hindu religion. An establishment where Hindu religious mendicants reside. The origin of Maths is explained in *Sammantha* v. *Settappa* (1878) 2 Mad., at p. 179.

Melwaram.—(Tamil). The proportion of the crop claimed by Government as opposed to the Kudivaram or the cultivator's share. See *Seethoyya* v. *Subramanya* (1929) 56 I.A. 146, 52 Mad. 453, 117 I.C. 507, ('29) A. PC. 115.

Miras.—An Arabic word denoting inheritance or heritability: *Ajimanessa* v. *Panna Lal* (1923) 27 Cal. W.N. 1037. The permanency of Miras tenure is indisputable. The Mirasdar and his descendants from generation to generation enjoy the land so long as they pay the rent: *Khanderao* v. *Ramji* (1899) 1 Bom. L.R. 373; *Vithalbowa* v. *Narayan* (1894) 18 Bom. 507.

Mohant.—The head of a math. *See* 'Math.'

Mohurrum or Muharram.—The first month of the Mohamedan year when it is unlawful to make war. It is the month in which Hasan and Husain the sons of Ali were killed. This event is celebrated every year by the Shias with public mourning and lamentation.

Mokarari.—Derived from the Arabic word *Mokarar*, an agreement. Means agreed upon or fixed. The word is applied to a tenure with a fixed rental: *Gaydatulla* v. *Girischandra* (1910) 15 Cal. W.N. 175. But the word raises no presumption that the tenure is hereditary, for fixity may only be for the lifetime of the grantee: *Bilasmoni* v. *Raja Sheopershad* (1882) 8 Cal. 664, 9 I.A. 33; *Nabendra Kishore* v. *Chaudhury Mian* (1931) 52 Cal. L.J, 583, 131 I.C. 584, ('31) A.C. 265.

Mortis causa.—(Latin). Because of death.

Mortuary.—A payment due by custom on a man's death out of his property to the parson. (Halsb., Vol. 3, para. 917).

Mourasi.—Derived from the same root as *Miras* an Arabic word meaning hereditary. It implies a succession from generation to generation, a heritable and permanent tenure: *Giribala* v. *Kedar Nath* (1929) 56 Cal. 180, 117 I.C. 534, ('29) A.C. 454.

Muafi.—A tenure by which land is held rent free for a time.

Muddata Kriyam or Muddata Kayam.—(Telugu). A mortgage by conditional sale.

Mukhtiar.—A law agent. A legal practitioner of an inferior grade.

Mukkadami.—The tenure of the mukkadam or headman of the village who is responsible for the collection of the revenue. In the absence of clear evidence to the contrary it is not heritable or transferable: *Bhagwati* v. *Hanuman* (1900) 23 All. 67.

Mulgeni.—A tenure in the Carnatic of new and previously uncultivated lands with hereditary succession. A hereditary farm at a fixed rate indefeasible as long as the stipulated rent is paid.

Murra.—A weight of grain; 25 maunds in some places and 28 maunds in other places.

Mustagharaq.—Security. A word indicating a hypothecation.

Mutawalli.—A person appointed to the care and management of wakf property. *See* 'Wakf.'

Naslan bad Naslan.—Generation after generation. Words used to indicate an estate of inheritance: *Gnanendra Mohan Tagore* v. *Upendra Mohan Tagore* (1870) 4 Beng. L.R. 103, 182 O. C. J.; *Tulshi Pershad Singh* v. *Ram Narain Singh* (1886) 12 Cal. 117, 12 I.A. 205.

Nazar or Nazr.—A lump sum paid as a premium; a royalty or bonus or commission; a fine paid to the State on succeeding to office or property.

Nazarana or Nazrana.—A premium. A sum exacted by a superior in the guise of a present.

Nirantar.—Perpetually; for ever. *See* Bom. H.C. Printed Judgments (1876) 227.

Non est factum.—(Latin). It is not done or executed. A plea by which a man charged upon a writing avers that it is not his deed: Halsb., Vol. 10, para. 721.

Novation.—A new contract whereby a liability under an existing contract is extinguished and a liability under a new contract is substituted for it: *Scarf* v. *Jardine* (1882) 7 App. Cas. 345.

Omne majus continent in se minus.—(Latin). The greater includes the less. He who has authority to do the more important act shall not be debarred from doing that of less importance.

Omne principal trahit ad se accessorium.—(Latin). Every principal draws the accessory after it. *See* 'Acessio cedit principali.'

Optimus rerum interpres usus.—(Latin). Usage is the best interpreter of things. *See* Broom's Legal Maxims, 7th Ed., p. 592.

Otti.—A form of kanam mortgage in Madras in which the interest on the sum advanced covers the whole of the janmi's share of the produce. *See* 'Kanam.'

Owelty.—Compensation given for inequality of shares on a partition.

Pala.—A turn of worship. The right of the officiating priest in a temple to conduct the public worship and receive the offerings in rotation with the other pujaris or priests.

Palyam.—(Tamil). Land settled on Polygars or robber chieftains at a quit rent on condition of rendering police services. For a history of the tenure see *Appayasami Naicker* v. *Midnapore Zemindari Co.* (1921) 48 I.A. 100, 44 Mad. 575, 60 I.C. 953.

Paracudi.—(Tamil). A migratory or non-resident cultivator who does not belong to the village community. *See* Ulwadi.

Pardanishin.—Sitting behind the screen. A woman who observes the rule of seclusion.

Parwarish.—(Persian). Cherishing or fostering. Maintenance.

Pata or Patta or Putta.—A lease. A generic term embracing every kind of engagement between a Zemindar and his Tenants, or Ryots: *Dhunput Singh* v. *Gooman Singh* (1867) 11 M. I. A. 433.

Patni.—An estate carved out of his proprietary interest by a Bengal Zemindar either as a device for raising money or to be relieved of the trouble of direct management: Baden Powell Land Systems of British India, Vol. I, p. 543; Wilson's Glossary.—At first the zemindar was prohibited from giving a lease for more than ten years. This restriction was removed by Regulation 5 of 1812 and the practice became common for the zemindar to create permanent subordinate tenures. These tenures are called Patni talooks and are by their very nature heritable and alienable, the zemindar retaining the status of zemindar but parting with all control and interest, except as to a quit rent: *Tarinee Churn Gangooly* v. *Watson & Co.* (1869) 3 Beng. L.R. 437 A.C., 12 W.R. 413. Patni talooks created before the permanent settlement were recognised by Bengal Regulation 8 of 1793. The Patni Law, *i.e.*, Bengal Regulation 8 of 1819 was enacted to grant facilities to the zemindar to create Patni talooks for the punctual payment of rent: *Surendra Narain Sinha* v. *Bijoy Singh* (1925) 52 Cal. 655, 89 I.C. 785, ('25) A.C. 962.

Patnidar.—The holder of a Patni talook. *See* 'Patni.'

Pattidar.—The owner of a patti or share of a mahal or village separately assessed to land revenue. He pays his share of the revenue through the Lambadar of the mahal. The shares are generally fractional according to the laws of inheritance: Baden Powell Land Systems of British India, Vol. I, p. 126. *See* The Central Provinces Land Revenue Act, C.P. Act 2 of 1917 ss. 2 (12), 97, 123, and 161. The North-West Provinces and Oudh Land Revenue Act, N.-W. P. Act 3 of 1901 ss. 84 (1) (c), 146 (e), and 160. *See* also 'Lambadar.'

Patwari.—A village servant employed in the keeping of revenue accounts in Northern India corresponding to the karnam in Madras and the talati or kulkerni in Bombay. The appointment and remuneration of patwaris is regulated by ss. 22, 23 and 24 (b) of the North-West Provinces and Oudh Land Revenue Act, N.-W.P. Act 3 of 1901. Patwaris are also in existence in some districts in the Central Provinces; Ss. 42 and 227 (d) of the Central Provinces Land Revenue Act, C.P. Act 2 of 1917.

Permutatio est vicina emptioni.—(Latin). Exchange is analogous to purchase.

Persona designata.—(Latin). A person designated. A person specified or nominated.

Peruarthum.—A customary mortgage in Malabar. It is a mortgage by conditional sale redeemable by payment of the market value of the land at the time of redemption: *Shekari Varma* v. *Mangalom* (1876) 1 Mad. 57.

Pro tanto.—(Latin). For so much, for as much as is paid.

Proprio motu.—(Latin). Of his own motion, by his own act.

Proprio vigore.—(Latin). By its own force.

Pujari.—A priest in a Hindu temple who conducts public worship and receives offerings either for himself or for the idol.

Quicquid inædificatur solo, solo cedit.—(Latin). Whatever is built on the soil falls into or becomes part of the soil. Whatever is built on the soil belongs thereto.

Quicquid plantatur solo, solo cedit.—(Latin). Whatever is planted in the soil falls into, or becomes part of the soil. Whatever is planted in the soil belongs thereto.

Qui facit per alium facit per se.—(Latin). He who acts through another is deemed to act in person.

Qui prior est tempore potior est jure.—(Latin). He who is first in time prevails in law. He has the better title who is first in time. The equitable doctrine of priority.

Qui sensit commodum debet et sentire onus.—(Latin). He who derives the advantage must sustain the burden.

Raiyat.—A cultivator, a peasant; a tenant who is given the right to bring the land under cultivation: *Hira Lal* v. *Matukdhari* (1928) 7 Pat. 275, 109 I.C. 461, ('28) A.P. 316. *See* the definition in s. 5 (2) of the Bengal Tenancy Act, 1885.

Ram Lila.—A public performance in the month of Ashwin of a drama illustrating the adventures of the God Rama.

Razinama and Kabulayet.—Surrender and agreement. The procedure by which one person relinquishes his holding in land and another person agrees to become the holder or Khatedar under the Bombay Land Revenue Code, Bom. Act 5 of 1879.

Regalia.—Royal rights pertaining to the Crown. Things belonging to the Sovereign. The crown, sceptre, orb and other articles used at the coronation.

Rehan or Rahn.—(Arabic). A pledge; a mortgage.

Relief.—Money payable to the lord by a freeholder on his succession to land of which his ancestor died tenant of the manor. (Halsb., 2nd Ed. Vol. 7, para. 594).

Rent note.—An agreement to lease signed only by the lessee.

Res communes.—Things that are common to all men. Things the property in which belongs to no one, but the use to all; such as air, light, running water, etc.

Res extra commercium.—Things not the subject of commerce or trade. Things which cannot be bought or sold.

Res gestæ.—(Latin). Things done.

Restitutio ad integrum.—(Latin). Restoration in full.

Royalty.—In mining leases a royalty is a payment to the lessor proportionate to the amount of the demised mineral worked within a certain period: Halsb., Vol. 20, para. 1418—It is in reality the price paid for a portion of the soil the payment whereof is distributed over a number of years: *Krishna Kishore* v. *Kasunda Nyadi Collieries* (1922) 65 I.C. 673, ('22) A.P. 36; *A. G. of Ontario* v. *Mercer* (1883) 8 App. Cas. 767.

Ryot.—*See* Raiyat.

Sadavarat.—(Sanskrit). A guest house for the accommodation of travellers or religious mendicants.

San.—A form of anomalous mortgage unaccompanied with possession prevalent in Gujerat.

Sankalp.—(Sanskrit). A vow; a gift in accordance with a vow.

Sarabarakar.—A manager or land agent who collects rents, retains a portion as his profit and pays the balance to the zemindar. In some cases the office is hereditary but without right of alienation without the permission of the zemindar.—Wilson's Glossary.

Sarabarakari interest.—The interest of a sarabarakar or middle man. *See* Sarabarakar.

Saranjam.—The maharati equivalent of Jaghir. *See* "Jaghir."

Saswatham.—(Telugu). Permanent. *See* Kayam and Saswatham.

Scheduled district.—A scheduled district is defined in s. 3 (49) of the General Clauses Act to be a scheduled district as defined in the Scheduled Districts Act, 1874. The Indian Statute Book contained from the earliest time 'deregulationizing' enactments barring the application of the ordinary law, which was at first contained in the old 'regulations' in the more backward and less civilised parts of the country. These enactments became so complicated that it was difficult to ascertain what laws were and what laws were not in force in the 'deregulationized' tracts. The Scheduled Districts Act was passed to remove doubts as to the extent of these tracts and the law in force therein. It specifies and constitutes a number of the deregulationized tracts as scheduled districts and gives power to declare by notification what enactments are, and what enactments are not in force in any scheduled district. It further enacts that any district to which 33 Vict. c. 3 s. 1 (giving power to make regulations for the peace and good government of British India) is made applicable, is a scheduled district.—Illbert's Government of India, p. 214.

Seisin.—A term of English real property law. It signifies possession of a freehold so that a man cannot be said to be seised of land unless he is in possession of the freehold either personally or by means of tenants: Topham New Law of Property, 4th

Ed., p. 12. It has nothing to do with seizure which is a forcible taking of possessions. It meant originally quiet possession sitting on land, *i.e.*, the possession of a settlor or squatter from the Latin sessio, sitting. It was formerly used of chattels but is now a technical term of real property law.

Sheba.—(A corruption of *Seva*). Service. Attendance upon an idol. Worship.

Shebait.—The manager and superintendent of an endowed Hindu temple.

Shikmi.—A subordinate tenure the holder of which pays his revenue or share of revenue through some other person, and not direct. The word means belly and a shikm tenure is a tenure which has been carved out of the head tenure. The word 'Shikmi' is a common expression meaning an undertenant: *Doma Singh* v. *Gobind* (1931) 135 I. C. 93, ('31) A.P. 36.

Sir.—The word means 'his own'—The proprietor's Sir land is his own land as distinguished from the land in which the old tenants of the village have ancient rights. It is the home farm land in which the landlord or co-sharer in the joint village holds directly in his own management, either cultivating it himself or by his farm servants or personal tenants. Certain privileges attach to the Sir and if the landlord or sharer defaults in the payment of revenue and is put out of possession and becomes an ex-proprietary tenant, he still retains his Sir: Baden Powell Land Systems of British India, Vol. 1, p. 166. *See* also The Agra Tenancy Act, U. P. Act 3 of 1926, ss. 4 to 7, 14, 15, 18 and 69; The Central Provinces Land Revenue Act, C. P. Act 2 of 1917, ss. 2 (17), 68, 93, 94, 106, 120 and 137: The North-Western Province Tenancy Act, N.-W.P. Act 2 of 1901, ss. 10, 11 and 89; The North-Western Provinces and Oudh Land Revenue Act, N.-W.P. Act 3 of 1901, ss. 4 (12), 4 (13), 122 to 127.

Specialty.—A contract under seal. A contract made by deed, *e.g.*, a mortgage.

Spes successionis.—(Latin). An expectancy to succeed to the property of a living person. It confers no actual interest in property, not even a contingent interest.

Stridhan.—Property held by a Hindu woman unconditionally and subject to no restriction. That alone is her peculiar property which she has power to give, sell or use independently of her husband's control: *Phukar Singh* v. *Ranjit Singh* (1878) 1 All. 661.

Sudbharnabond.—From Sud, interest, and Bharna, paying in full. A usufructuary mortgage bond.

Sui juris.—(Latin). Literally, of his own right. A person capable of exercising his rights. An adult who is no longer under the disability of infancy.

Suo jure.—(Latin). In one's own right.

Swadhin Adhamanam.—Literally possession deed. A possessory mortgage in Malabar

Tabula in naufragio.—(Latin). Literally a raft in a shipwreck. A description applied to the English doctrine of tacking.

Tagavi or **Takavi.**—Literally assisting. Advances of money made by the Government to cultivators for the purchase of seed to be repaid when the crop is reaped.

Tahsildar.—An official in charge of the collection of the revenue of a tahsil or division of a district.

Taluka or Talook.—A division of a district. An estate. Talukas in Oudh were originally granted by the Moghul Government at a favourable assessment. *See* The Oudh Estates Act 1 of 1869 as amended by Act 3 of 1885. As to Gujerat *see* Bom. Act 6 of 1888. As to Patni Talukas *see* 'Patni'.

Tal kdar.—The holder of a taluka. *See* 'Taluka.'

Taran Gahan.—Literally security pledge. A simple mortgage in Bombay.

Tarwad.—A term of Malabar law denoting a group of persons all of them tracing their descent from a common female ancestor, owning joint property under the absolute management and control of the senior male member who is called the karnavan: *Shuppu Menon* v. *Narayanan* (1905) 28 Mad. 182 F.B.

Tenant by curtesy.—'A tenant by curtesy of England is where a man taketh a wife seised in free simple or in fee tail general or seised as heir in tail general, and hath issue by the same wife, male or female, born alive albeit the issue after dieth or liveth yet if the wife dies the husband shall hold the land during his life by the law of England.'—Coke on Littleton s. 35 cited in *Eager* v. *Furnivall* (1881) 17 Ch. D. 115, 120.—The husband was said to have an estate by curtesy meaning probably an estate given by the curia or Court. The estate of curtesy has been abolished by the Administration of Estates Act, 1925.

Tenement.—A term of English real property law. Blackstone says that a tenement though in its vulgar acceptation is only applied to houses and other buildings, yet in its original proper and legal sense, it signifies everything that may be holden provided it be of a permanent nature.

Terminus a quo.—(Latin). The starting point from which.

Toda giras hak.—The right to an annual payment of toda giras. The custom of toda giras arose out of the dispossession by conquest of old Rajput Chiefs in Malwa, Gujerat and Central India. They were cadets of ruling Rajput families to whom territory had been assigned for giras or maintenance, the word *Giras* meaning literally a mouthful. When dispossessed they waged war and levied contribution all around them. Their exactions were compromised, the word *Toda* meaning a composition. Toda giras was therefore in its origin a cash composition which secured protection and freedom from plunder. The allowance has now become an item in the rent roll of the villages: Baden Powell Land Systems of British India—, Vol. 3, pp. 277, 281.

Transit in rem judicatam.—(Latin). Passes into or becomes a thing adjudged or finally decided. When the judgment is delivered the cause of action is extinguished and transit in rem judicatam or merges in the judgment.

Ulavadi.—(Tamil). A cultivator who has inherited land. An ulavadi mirasdar was held not to be a permanent tenant when he was also described as paracudi, *i.e.*, migratory: *Mayandi Chettyar* v. *Chokkalingam* (1904) 27 Mad. 291, 31 I.A. 83.

Uraller.—The trustee or manager of a temple in Malabar.

Utbandi.—A system of cultivation in Bengal by which the tenant cultivates for a year or a season only and the rent is fixed by agreement when the crop is on the ground, Hunter's Statistical Account of Bengal cited in *Beni Madhub* v. *Bhuban Mohun* (1891) 17 Cal. 393.

Ut lite pendente nihil innovetur.—(Latin). Let nothing be altered or renewed while the suit is pending.

Utpat.—A priest attached to the temple at Pandharpur.

Ut res magis valeat quam pereat.—(Latin). Literally rather let the matter prevail than let it perish or rather let it operate than let it be inefficient. A canon of construction whereby if a deed is capable of a twofold construction, that construction should be adopted which will uphold the deed.

Varashasan.—(Marathi). An annual allowance paid either by the Treasury or by assignment of the revenues of a village; an assignment or charge on the revenues of a village made by the proprietor.

Verumpattamdar.—A verumpattam tenant. *See* Verumpattam tenant.

Verumpattam tenant.—A tenant who has taken a lease for the cultivation of land or gardens without any loan or advance. See The Malabar Tenancy Act, Mad. Act 14 of 1930 s. 3 (w).

Vinaya.—A code of ecclesiastical law following the precepts of Buddha and recited by Buddha's disciple Upali at the first Council after Buddha's death. Rules of discipline for the monastic order.

Vritti.—A Sanskrit word meaning maintenance, means of livelihood or profession. A customary allowance; a payment or a fee to a Brahmin.

Wakf.—The word in Arabic means literally 'detention' or 'immobilisation'. Hence Baillie's definition—' The detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind' Baillie's Mahomedan Law p. 558. Hamilton translates the word as appropriation. Hence the definition—'The appropriation of any particular article in such a manner as subjects it to the rules of divine property whence the appropriators right to it is extinguished and it becomes the property of God by the advantages resulting to his creatures.' Hamilton's Hedaya p. 231. The definition in the Wakf Act is 'Wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.' This represents the meaning now attached to the word in the Courts.

Wajib-ul-arz.—(Arabic). Literally fit or worthy of representation. A record of rights prepared by a Settlement Officer in a co-parcenary village. In the North-West Provinces it is the most important document relating to the administration of the village: *Mussammat Lali* v. *Murli Dhar* (1906) 33 I.A. 97. It is a register of the shares and holdings in the village and states the mode of payment of the revenue and the powers and privileges of the Lambardars. It is also an official record of local custom. *Balgobin* v. *Badri Prasad* (1923) 50 I.A. 196.

Watan.—The word includes an office held hereditarily for the performance of duties connected with the administration or collection of the public revenue or with village police. The Watan property, if any, the hereditary office, and the rights and privileges attached to them, together constitute the Watan. Watan land is land held or assigned for providing remuneration for the performance of the duties of the watandar or person holding the hereditary office. *See* Bom. Act 3 of 1874.

Yajman.—A person who employs a priest or priests to perform for him either fixed or occasional religious ceremonies; a householder; a head of a family; a master or head of a caste.

Yajman Vahis.—Books containing names of pilgrims who have visited the shrine in past years.

Yajman vritti.—An obligation imposed upon the purohit or family priest to perform certain religious rites, the performance of which carries with it certain emoluments: *Kadulal* v. *Beharilal* (1932) 25 S.L.R. 451, 137 I.C. 136, ('32) A.S. 60.

Zarichaharam.—A fourth part of the price; claimed by the zemindar as a perquisite on the sale of a holding.

Zur-i-peshgi.—Literally a payment in advance or a lease for a premium. A usufructuary mortgage in the form of a lease.

INDEX

Abandonment of security—
by mortgagee, 464, 474.

Abatement of rent—
diluvion, where land lost by, 693.
eviction of tenant, by lessor, 692, 693.
eviction of tenant by title paramount, 693.
Land Acquisition Act, where land is acquired under, 694.
onus on tenant, 693.

Abstract of title, 312.
rarely delivered in India, 340.

Acceleration doctrine of, 152-154.
not accelerated, 153.
under the Indian Succession Act, 153, 154.
vesting of estate when accelerated, 152.

Accession to leasehold property, 659, 671. *See* Accretion.

Accession to mortgaged property, 436.
acquired accession, 438, 439.
after decree extinguishing mortgage, 438, 489.
contract excluding mortgagee's right over, 489.
during continuance of the mortgage, 438, 488, 489.
extinction of mortgage, after, 489.
grove planted by mortgagee, 439.
inseparable, when, 438, 439.
lease renewed, right to, 490.
mortgagee's right to, 213, 488.
mortgagee's right to accession for the purpose of security only, 489.
mortgagor's right to accession made by mortgagee, 436, 438.
mortgagor discharging prior incumbrance, 213, 488.
natural accession, 436, 437.
separable, when, 438.
terms of mortgage may exclude mortgagee's right to, 489.
Trusts Act, effect of, on the law as to, 436, 437.
waste land reclaimed by mortgage is not, 438.

Account—
claimable by mortgagor only on redemption, 511.
liability of mortgagee in possession to keep, 509.
failure to, 510.
on footing of wilful default, 506, 510.
rents and mesne profits, of, 505, 506.

Accretion to leasehold property, 671.
encroachments are not, 671, 672.
right to, 660, 671.
licensee, whether entitled to, 671.
need not be imperceptible, 671.

Accumulation, 123.
direction for, does not affect vesting, 135, 136.
direction for, is exception to s. 11, 125.
exceptions, 126, 127.
Hindu law, 127, 128.
of income does not postpone vesting of property, 135, 136.
periods for which accumulation is allowed, 123, 125.
under the Indian Succession Act, 127.

Acquiescence—
mortgagee's remedy to sue for mortgage money lost by, 472.

Acquisition under Land Acquisition Act—
abatement of rent payable by tenant, 693, 694.
compensation for, 499.
is not destruction of security, 469-499.

Actionable claim, 13, 14, 766, 767.
beneficial interest in moveable property, 770.
benefit of contract annexed to ownership of land, 783.
benefit of contract, 63, 64, 773.
contracts, assignment of, 773.
debt, assignment of, 772.
assignment of part of debt discussed, 772, 773.
decree is not, 69, 88.
definition, 13, 14, 25.
failure of purpose, 126.
fire policies, 779.
gift of, 754, 776.
marine policies, 779.
mere right to sue, distinguished from, 67, 68.
mortgage debt is not, 13, 86-88, 767-769, 783.
negotiable instruments, 788, 789.
notice of transfer of. *See* Notice of transfer of Actionable Claim.
pay order, 775, 776.
share of profits in the hands of lambardar in U. P., 769.
transfer of, 770. *See* Transfer of actionable claims, and Notice of transfer of actionable claim.

Acts—Bengal—*See* Regulations.
Bengal Tenancy (Amendment) Act, (4 of 1928), 77.

Acts—Bombay—
Bombay Land Revenue Code, (5 of 1879), 89.

Acts—Bundelkhand—
Bundelkhand Land Alienation Act, 457.

Acts—English—*See* Statutes.

Acts—India—
Bengal Land Revenue Sales Act, (11 of 1859), 82, 253-254.
Bengal Tenancy Act, (8 of 1885), 222, 498, 687.
Burma Laws Act, (13 of 1928), 12.
Civil Procedure Code, (5 of 1908), vi, viii, 53, 71, 75, 130, 194, 205, 536, 542.
Civil Procedure Code (Amendment) Act, (16 of 1930), x.
Contract Act, (9 of 1872). *See* Contract Act.
Crown Grants Act, (15 of 1895), 13, 658.

Acts—India—*contd.*
Devolution Act, (38 of 1920), vi, 739.
Easements Act, (5 of 1882), 83, 644.
Evidence Act, (1 of 1872), 391, 710.
Hindu Disposition of Property Act, (15 of 1916), 12, 106, 792.
Hindu Transfers and Bequests (City of Madras) Act, (8 of 1921), 12, 106, 794.
Land Acquisition Act, (1 of 1894), 469, 499, 694.
Landlord and Tenant (war damages) Act, 1939, 694.
Limitation Act, (9 of 1908), viii. *See* also, Limitation, period of.
Married Women's Property Act, (3 of 1874), viii, 97, 777.
Mesne Profits and Improvements Act, (11 of 1855), 227.
Mussalman Wakf Validating Act, (6 of 1913), 11, 132.
North-West Provinces Rent Act, (12 of 1881), 74.
Pensions Act, (23 of 1871), 71.
Presidency-towns Insolvency Act, (3 of 1909), 274.
Provincial Insolvency Act, (5 of 1920), 274.
Registration Act, (16 of 1908), viii. *See* Registration Act.
Repealing and Amending Act, (10 of 1927), vi, 18, 752.
Sale of Goods Act, (3 of 1930), 196, 310.
Specific Relief Act, (1 of 1877), vii, 48, 73, 193, 208, 285, 293, 333.
Succession Act, (39 of 1925), viii, 12, 91, 98, 102, 104, 117, 119, 121, 127, 128, 130, 133, 137, 139, 141, 142, 143, 144, 146, 148, 150, 151, 153, 155, 158, 159, 161, 163, 166, 170, 171, 172, 762.
Transfer of Property Amendment Acts, (2 of 1900), vi, 296, 767; (11 of 1915), vi, (38 of 1925), vi, (27 of 1926), vi, 18, 752; (20 of 1929), viii, *and See commentaries on sections referred to at p. viii*; (5 of 1930), viii, 15.
Transfer of Property (Amendment) Supplementary Act, (21 of 1929), viii, 12, 43, 97, 111, 791, 792, 793.
Trustees' and Mortgagees' Powers Act, (28 of 1866), 476.
Trusts Act, (2 of 1882), 48, 73, 136, 193, 437, 500, 505.

Acts—Madras—*See* Regulations.
Hindu Transfer and Bequests Act, (1 of 1914), 12, 106, 790.
Transfer of Property Amendment (Madras City Tenants) Act, (3 of 1922), vi.

Acts—United Provinces—
Agra Pre-emption Act, (2 of 1922), 251.
Agra Pre-emption (Amendment) Act, (9 of 1929), 251.
Agra Tenancy Act (12 of 1881), 74, 225, 258.

Actual Demise, 642.

Administrator—
power to grant leases, 625.
power to mortgage, 362.

Advancement, doctrine of, 184.
Eurasians, applicability to, 184.
unknown among Indians, 184.

Adverse possession—
of limited interest, 638.

Affirmative covenants, 191.
contractual obligation, 192.

Agent—
authority to transfer, 79.
communication by, to principal, 41, 42.

Agent—*contd.*
fraud of, and notice, 14, 42, 43.
fraudulent transfer by, 73.
limitations to rule of imputed notice, 39-41.
mortgagor's service or tender on or to, 622, 623.
notice to, 14, 39.
service of notice to quit on, 654.

Agreement to lease, 641.
actual demise, effecting, 642.
distinguished from lease, 641.

Indian law, 641, 642.

English law, 641.
when operates as a lease, 641.
when does not operate as a transfer, 641.

Agricultural leases, 739.
agricultural purposes, 740.
application of principles of English law as reproduced in the Transfer of Property Act, 709, 730, 731, 740.
disclaimer in, 721.
exempted from the Chapter on Leases in T. P. Act, 739.
forfeiture in agricultural tenancies, 721.
oral lease whether valid, 739, 740.

Alternative limitations, 121.

Annexation—
easements annexed to land, 83.
meaning of, 21, 83.
mode of, 22.
things annexed to or imbedded in the earth, 21.

Annuity—
whether transferable, 65.

Anomalous mortgage—*See* Mortgage—Anomalous.

Appointment deed of—
power of appointment whether property, 46.
whether transferable, 49.

Apportionment of benefit on severance of estates, 177, 70.
agricultural tenancies exempted from rule, 178.
benefit of what obligations apportionable, 178.
benefit of obligation when apportionable, 178.
burden on servient heritage not to be increased, 178
covenant for quiet enjoyment,
distinguished from apportionment of periodical payments by time, 177.
notice of severance, 178. *See* Severance.
rule of apportionment not applicable to involuntary transfers, 178.
when benefit is not severable, 178.

Apportionment of periodical payments on transfer, 173.
contract or local usage, effect of, 176.
Court sale and, 11, 174.

Apportionment of periodical payments on transfer—*contd.*
date of rent payable, whether affected, 176.
distinguished from apportionment of benefits on severance of estates, 173.
English rule, 174.
excluded by contract or local usage, 176.
execution purchaser, position of, 11.
limitations of Indian rule, 174.
Indian rule, scope of, 174.
periodical payments, other, 175.

Appurtenant—
"easements appurtenant," meaning of, 83.

Assignment by way of charge, 786.

Assignment of contracts, 773.
benefit can be assigned but not burden, 773.
mode of assignment, 774.

Assignment of debts, 772.

Assignment of debt by way of mortgage, 785.

Assignment of debt for unpaid price, 86, 331.
assignee gets benefit of seller's charge, 331.

Assignment of Leasehold—*See* Assignment of term by lessee.

Assignment of marine or fire policy, 786.

Assignment of mortgage debt—
actionable claim, whether, 86, 767, 768.
by registered instrument as immoveable property, 86.
by unregistered instrument treated as assignment of debt divorced from the security, 86.
in English law, 768.

Assignment of reversion by lessor, 703-706.
absolute assignment, 704.
assignee has rights and liabilities so long as he is owner, 705.
assignee liable if lessee so elects, 705.
assignment of reversion of part of property, 705.
attornment whether necessary, 704.
covenants running with the land, assignee's rights to, 704.
duration of assignee's liability, 704.
lessee is assignee of part of reversion, 704.
part of reversion, 704.
rent prior to assignment, assignee's rights to, 705.
rights of assignee, 705.
severance of reversion, 705.
usufructuary mortgagee is assignee of part of reversion, 706.

Assignment of term by lessee, 660, 678, 679.
absolute assignee liable for rent, and on covenants running with the land, 681-683.
absolute assignment creates privity of estate, 679.
assignee not liable on personal or collateral covenants unless restrictive, 683, 684.
covenant not to assign, 685.
does not absolve lessee from contractual liabilities, 680.
English mortgage (assignment absolute), 679.

Assignment of term by lessee—*contd.*
Indian mortgage (assignment not absolute), 679.
Indian mortgage or sub-lease does not create privity of estate, 679.
lessee liable as surety for assignee, 683.
lessee's covenant not to assign, 685.
lessee's liability after assignment, 680, 683.
liability of absolute assignee, 681, 682.
liability of assignee does not depend upon possession, 683.
liability of lessee after, 680, 682, 683.
mortgage or sub-lease, assignment by way of, 679.
non-transferable tenures, 687.
part of the term, assignment of, 687.
possession and liability of assignee, 682, 683.
privity of estate between lessor and assignee, when established, 681, 682.
privity of estate, what is, 680, 681.
restrictive covenants when assigned, 684.
sub-lease of whole unexpired term, 679.
sub-lessee not liable to head lessor, 681, 682.
surrender by lessee does not operate as an assignment, 716.
whole residue of the term, assignment of, 678, 679.

Attached to the earth, 13, 20, 84, 85, 676, 677.
house, 85.
machinery, 85.

Attached to what is imbedded in the earth, 24, 25.

Attachment—*See* Court Sales.
attaching judgment creditor has no charge, 553.
attaching judgment creditor had right to redeem under the old section, 550, 550.
prevails over obligation created by contract of sale, 193, 194, 304.

Attestation—
anomalous mortgage requires, 383.
charge, on, whether necessary, 607.
consent, whether attestation implies, 719, 720, 200, 201.
definition, 13, 18.
English law as to, 18.
estoppel, whether attestation operates to create an, 19, 200.
invalid attestation of a deed of mortgage, 392.
such deed will not operate as a charge, 392.
mortgage deed before Act, whether requires, 9.
mortgage deed requires, 390.
where executant a pardanashin lady, 19.
retrospective operation of, 18, 390.

Attested Instrument—
proof of, 391.

Attesting witness—
illiterate person can be, 18, 391.
must sign in presence of executant, 19, 390.
party to deed cannot be, 18, 391.
person interested may be, 18, 391.
registering officer whether competent, to be, 18, 390.
scribe whether competent to be, 391.

Attornment by tenant—
whether necessary, 704.

Authority to transfer, 79.
when person has no title, 79.

Beneficial interest in moveable property, assignment of, 770.

Benefit of contract, 63, 773, 783.
Benefit of contract annexed to ownership of land, assignment of, 783.

Benefit to arise out of land, 15, 16, 83, 84.

Benefits after completion, 334.

Birt-maha-brahmani, 61.

Boundaries—
lessor's duty, 702.
mortgagee's duty, 413.

Breach of lessor's covenant for quiet enjoyment, 669.
damages, 669.

British India—
definition, 6.
Native States, not included in, 6, 7.
Scheduled districts, included in, 7.

Buddhist law, 8, 12, 755, 764.
monk, whether may be transferee, 76.
rules of, not saved by the Act, 12.

Building schemes, 190.

Burgadar, 646.

Buyer—
charge of, 334, 335.
damages, recovery of, by, 339.
disclosure, duty of, on the part of, 332.
liability of, after completion of sale, 309, 310, 333.
in respect of incumbrances, 333.
losses, 333.
outgoings, 333, 334.
before completion of sale, 309, 310.
for non-disclosure of material facts, 332.
payment of price, 332, 333.
remedies of, before completion of sale, 338, 339.
damages, suit for, 339.
rights of, after completion of sale, 309, 310, 337.
to retain amount payable to mortgagee where property is sold free from incumbrances, 345.
as to improvements, 334.
increments, 334.
rents and profits, 325, 326.
before completion of sale, 309, 310, 338, 339.
charge for earnest money, 335, 336.
price pre-paid, 334, 335.

Cantonments—
ss. 54 (2) & (3), 59, 107, 123, extended to. 6, 8, 394, 659, 755.

Cessation of interest after deposit under s. 83, 547, 548.
mortgagor must have done all he can to enable mortgagee to take the amount, 548, 549.
notice served on the mortgagee, 549.
stipulation for notice before redemption, 549.

Champerty and maintenance—
law of, whether applicable in India, 784.

Chance of a legacy—51, 58.

Chance of succession—*See* Spes successionis.

Charge—
advance of money by itself does not create, 603, 604.
arrears of rent, 608.
attestation whether necessary, 607.
attachment not a, 553.
by act of parties, 605.
instances of, 605, 606.
registration of, when necessary, 607.
contingent charge, 606.
created by decree, enforced in execution, 460, 461.
defined, 603.
distinguished from mortgage, 358, 359, 604.
does not amount to a mortgage, 604, 605.
enforcement of, 337, 604, 610.
instances of, 607, 608.
merger of, 611, 613.
not enforced against transferee without notice, 610.
notice of, 609.
operation of law, by, 608, 609.
partition deed, by, 522.
premium, unpaid, whether charge for, 639.
registration of, 607.
security bond to Court is not, 604.
seller's charge for unpaid price, 326.
seller's charge, whether passes with assignment, 88.
subject-matter of, (specified property), 607.
sub-purchaser's charge, 337.
transferee without notice and, 609.
trustee's charge, 65, 611.
unpaid premium for, 639.

Charitable Trust, 129, 130.

Charities—
gift for encouragement of sport, 129.
gift to charity in a remote event, 130.
rule against perpetuity is not applicable, 11[illegible], 130.

Cheque—
not revoked if presented in donor's lifetime, and payment wrongfully refused, 762.
revoked by donor's death, 762.

Chowkidar, 62.

Class, transfer to, 12.
anomalous results of *Leake* v. *Robinson*, 118.
former rule exactly opposite, 118.
if interest fails as to some, others take, 117.
Indian Succession Act, 119.

Clog on redemption, 397.
collateral benefit to mortgagee, 403.
condition of sale in default, 399, 400.
condition postponing redemption in case of default, 400, 401.
doctrine of, applies to anomalous mortgages, 601.
long term for redemption, whether, a, 402, 403.
penalty in case of default, 401.
restraint on alienation, 401.
subsequent agreement, 406, 407.

Commencement of Act, 6.

Commencement of a lease, 627.

Company—
living person included in, 46, 50.
mortgage by liquidator, 11.

Compensation for use and occupation, 631.
claim for, not assignable, 66.
tenant at will liable for, 631.

Competent to contract, 77.

Competent to transfer, 77, 78.
authorized to transfer, 79.
adjudged lunatic is not, 78.
disqualified to contract, 78, 79.
lunatic except during lucid interval is not, 78.
minor is not, 78.

Compromise is not a transfer, 49, 58, 93.
involving restraint on alienation, valid, 93.
involuntary sale, 96.

Computation of time in a lease, 706.

Condition, 89, 717.
distinguished from covenant, 717.

Condition of residence, 150, 160.

Condition or limitation, 90.
absolutely restraining alienation, 91.
compromise decree and, 96.
definition of, 90.
determining interest on insolvency, invalid, 101.
Hindu law, 96.
involuntary transfer and, 96.
Mahomedan law, 96.
postponing enjoyment after majority, repugnant, 134.
transfer subject to, 90.

Condition precedent—
condition subsequent, when construed as, 141.
distinguished from condition subsequent, 132, 133, 148.
followed by gift over is conditional limitation, 136.
fulfilment of, 149.
Indian Succession Act, 148, 149.
performance of, 149.
transfer, conditional, 148.
void condition precedent, 148.
void if it defeats the provisions of law, 148.
void if impossible, 148.
void if immoral, 148.
void if opposed to public policy, 148.

Condition precedent construed as condition subsequent, 141.

Condition subsequent—
condition precedent construed as, 141.
distinguished from conditional limitation, 136, 160.
distinguished from condition precedent, 132, 133, 148.
fulfilment of, 157.
if ambiguous construed in sense favourable to the vested interest, 157.
in partial restraint of marriage, 161.
Indian Succession Act, 159, 161.
invalid if void as condition precedent, 160.
penalty, where amounting to, 144.
revesting on, 159.
time for performance, 364.
valid when, 160, 161.
void condition subsequent does not affect the transfer, 148.

Conditional limitation, 136.
condition precedent, followed by a gift over, 136.
distinguished from condition subsequent, 136.
does not prevent estate from vesting, 136.
Hindu law, in, 157.
Indian Succession Act, 155.
Mahomedan law, in, 157.
repugnancy, void for, 156.
revests the estate in another person, 136.
ulterior transfer is effected by, 154, 155.
ulterior transfer is subject to rules in specified sections, 154, 155.

Conditional transfer, 147.
acceleration, where prior bequest fails, 151, 152.
condition precedent, 148.
coupled with transfer to another, 151.
failure of prior disposition, and, 151, 152.
Indian Succession Act, 150.

Consent, express or implied—
attestation does not imply consent, 200.
in cases of ostensible ownership, 199, 200.
may be implied by conduct, 199, 200.

Consideration—
dower debt is valid consideration, 273.
excludes natural love and affection, 273.
gifts are without, 747.
inadequacy does not presume fraud, 273.
of leases, 639.

Consolidation of mortgages, 430.
equity of consolidation abolished, 430.
may be allowed by contract, 430.
mortgagee bound to consolidate, 461.
mortgagor may redeem each mortgage separately, 462.

Construction—
amending statutes, 4.
beneficial construction, 3.
declaratory or explanatory statutes, 4.
general Act does not derogate from special Act, 3.
golden rule, 2.
grammatical sense of words, 2.
headings to group of sections, 1.
illustrations an aid to, 5.
intention to take property without compensation not to be imputed, 4.
literal construction, 3.
marginal notes excluded, 5.
preamble an aid to, 1.
previous state of law, 2.
proceedings of Legislative Council excluded, 4.
rules of, 2-5.
statutes affecting substantive law, 4, 9.
statutes affecting procedure, 4.
statutes apparently inconsistent, 3.
statutes encroaching upon private rights, 4.
strict construction, 3.

Constructive notice, 14, 26.
actual possession, 14, 27, 35, 36.
municipal taxes, of, 31.
not presumed from mere negligence, 30.
part of property, sale of, 32.
presumed from gross negligence, 30.
registration, 13, 20, 28, 32.
specific circumstance starting point of enquiry, 29, 203 (ill. 3).
state of property, whether, 39.
wilful abstention from inquiry or search, 27-30, 171.
See Notice and Notice to an agent.

Contingent class, 142.
ascertainment of class, 142.
contingent, when not, 143.
exception to s. 21 not applicable, 143.

Contingent interest, 138.
condition precedent construed as subsequent, 141.
contingent class, 142.
distinguished from vested interest, 138, 139.

Contingent interest, 138—*contd.*
exception, 139, 141.
Indian Succession Act, 139.
not contingent, if absolute gift of income, 139, 141.
specified uncertain event, 138.
spes successionis not, 141.

Contract—
benefit of, whether assignable, 693.
transfer and, 42.

Contract Act—
parts of Transfer of Property Act taken as part of, 43.
s. 12, 78.
s. 23, 73, 148.
s. 24, 72.
s. 178, 178A, 196.
s. 248, 763.

Contract of sale—
conveyancing practice in India. *See same head.*
created equitable interest prior to Act, 113.
creates equitable interest in English law, 303.
creates no interest in property under Act, 113, 291, 308.
equities of person contracting to buy, 304.
obligation created by, does not prevail over attachment, 193, 304.

Contractual obligation—s. 40—
covenant for pre-emption is, 194.
enforced against volunteer or purchaser with notice, 185, 193.
notice of, may be constructive, 195.
personal though annexed to ownership, 193.
purchaser at Court sale, 195.
will not prevail over attachment, 193, 304.

Contribution to mortgage debt, 526.
after enactment of s. 92, 537.
before enactment of s. 92, 537.
co-mortgagor omitted from mortgagee's suit, 537.
converse of marshalling, 527.
debt must be common, 540.
English rule of inverse order, 532.
equal equities, 541.
excluded by contract, 539.
extent of: in proportion to value of properties, not to benefit received, 539.
laches of mortgagee, 536.
marshalling, right of contribution is subject to, 541.
mortgage debt not fully discharged, if, 538.
mortgagee, doctrine not applicable to, 532.
laches of, 536.
mortgagee purchasing share in equity of redemption liable, 533.
mortgagee purchasing share in property not liable, 534.
mortgagor sells part and retains a share, where, 531.
obligation not personal, 529.
parties to, 538.

Contribution to mortgage debt, 526—*contd.*
prior incumbrance deducted, 529, 530.
prior mortgage realized by sale of one property, its value for contribution is nil, 529.
Principle of contribution, 551, 552.
rateable proportion of prior incumbrance deducted, 529.
release by mortgagee of part of security, 534, 535.
right to, modified by contract, 539.
right to, not modified by equitable considerations, 540.
right is subject to marshalling, 541.
suit for, 536.
valuation for, 539.
who must make: two or more persons having distinct and separate rights, 528.

Conveyance—
definition in L.P.A., 1925, 48.
transfer not necessarily by conveyance, 48.

Conveyancing practice in India—
contract of sale, as regards, 340, 344.
costs of conveyance, 344.
description, errors of, 343.
investigation of title, 340.
length of title, 340.
requisitions, 340.
rescission, right of, 343.
time for completion, 344.
title, stipulations as to, 342, 343.

Co-owner—
damage by, after transfer, 217.
dwelling house, transfer by, of, 217.
Hindu law, under, transfer by, 216.
interests of, 218.
liabilities of transferee from, 217.
presumption of equality, 219.
transfer by, 216.
transferee, rights of, from, 216.

Co-owner's interests, 218.

Court—
not a juridical person, 358, 362.

Court sales, 81.
apportionment and, 11, 174.
effect of antecedent contract on, 195.
fraudulent transfer and, 262.
improvements by purchaser at, 232.
lis pendens and, 253.
mortgagee purchasing equity of redemption at, 413, 414.
principle of s. 8 applied, 81, 82.
purchaser is transferee by operation of law, 10, 195.
s. 41 not applicable, 196.
transferee from benami purchaser at, 205.

Covenant—
distinguished from condition, 717.
express overrides implied, 662.

Covenant annexed to land, 186, 323.
See Covenant running with the land.

Covenant for pre-emption—
personal covenant not affected by rule against perpetuity, 113, 114.
prior to Act, void if unlimited in point of time, 113, 114.

Covenant for quiet enjoyment, 321, 666.
apportionment of, 679.
annexed to and goes with lessee's interest, 659, 670.
breach of lessor's covenant, 669.
damages for breach of, 669.
does not extend to tortious acts, 667, 668.
part of premises demised, 670.
payment of rent not condition precedent, 670.
protects lessee from title paramount, 666.
seller's covenant for title is not, excluded by, 323.

Covenant for renewal of lease, 710.
perpetual renewal, 711.

Covenant for title (lessor's), 663, 664.

Covenant for title (mortgagor's), 444.

Covenant for title (seller's), 319.
applies to misdescription of title not of property, 320.
conveyances before the Act, 321.
does not apply to a trustee, 324.
English law, 321.
eviction by title paramount, applies even in case of, 319.
express covenant for title, 323, 324.
incumbrances, discharge of, 318.
limitation for suit on, 321-323.
notice of defect of title, effect of, 319, 320.
runs with the land, 324.

Covenant not to assign (lessee's), 685.
breach involves forfeiture if there is right of re-entry, 685.
consent on payment, 686.
involuntary assignment is not breach, 686.
not broken by a sublease, 686.
not to assign without consent of lessor, 686.
runs with the land, 686.
strictly construed, 686.

Covenant running with the land, 186.
assignee of lessee and, 686, 687.
covenant for title of seller, 319, 323.
covenant not annexed to land, 189.
in a lease, 659, 682, 683.
in a mortgage, 445.
lessee's covenant not to assign, 685, 686.
personal and collateral covenant of lessee is not, 684.
personal and collateral covenant of mortgagor is not, 467.
proviso for re-entry, 717, 718.
restrictive covenant and assignee of lease, 684.

Covenant to defend title (mortgagor's), 444.

Covenant to give possession (lessor's), 664.
abatement or suspension of rent on failure to give possession, 664.

Covenant to pay public charges (mortgagor's), 445.

Covenant to pay rent of leasehold (mortgagor's), 445.

Creditors—Transfer to defeat or delay, 256.
amendment of s. 53, 257.
appointment, deed of, 262.
award, 262.
benami or colourable transfers, 261.
burden of proof of fraud, 267.
consideration, 271, 273.
creditor's suit, 275.
debtor may pay his creditors in any order he pleases, 264, 265.
debtor may nor reserve benefit for himself, 265, 266.
deed of wakf is a transfer under s. 53, 262.
defeat or delay creditors refers to creditors generally, 264.
evidence of fraudulent intention, what is, 268, 269.
gross inadequacy of consideration whether presumption of fraud, 273.
Hindu wife entitled to separate maintenance is creditor, 263.
history of s. 53, 259.
insolvency, 274.
intention how determined, 268, 269.
judgment creditor, 263.
limitation for creditor's suit, 276.
Mahomedan wife is creditor for dower debt, 263.
no presumption of fraud, 257, 268.
partition, sec. 53, applied to, 270.
partners, assignment between, 270.
preference to one creditor is not voidable, 264, 265, 266.
second appeal lies on question under sec. 53, 267.
Statute of Elizabeth, 259.
subsequent creditor, 263.
surrender of life estate is transfer under sec. 53, 262.
transfer, 261.
transferee in good faith and for consideration, 256, 271.
voidable, 262.
voidable to what extent, 273.
wakf, 262.

Crops—
growing, 17.
grown by transferee under defective title, 232.
lessee's right to, 677.
mortgage of future, 50.
moveable property, 13, 17.

Crown—
debt, 223.
grants by, 13, 658.
lease, 659.

Crown—*contd.*
prerogative of, 3.
when bound by statute, 3.

Custom—
affecting alienation of religious office, 61.
affecting alienability of occupancy rights, 76.
affecting non-transferable tenures, 687.

Damages—
breach of covenant by lessor for quiet enjoyment, 669.
where lessee fails to give vacant possession, 702.

Damdupat—
rule of, whether applicable to mortgages, 12.
whether applicable after mortgage suit, 12.

Daniels *v.* Davison, rule in—
whether applicable where matter rests in contract, 38.

Darpatni lease—
restraint on alienation, 95.

Date of expiry of notice to quit, 652.

Death of transferee, 137.

Debt, 86, 769.
assignment of, 772.
mortgage of, 785.
warranty of solvency of, 784.
See Transfer of actionable claim—Assignment of debts—Assignment of mortgage debt—Assignment of debt by way of mortgage.

Decree—
actionable claim, whether, 69, 88.
charge created by, 460, 461.
right to sue, whether, 88.

Deed of Appointment—
whether transferable, 49.

Defeat the provisions of law, 74.

Defect in property, 311.
non-disclosure of, 312.

Defect in title, 311.
material defect, 311.

Define and amend, 1.
Act whether exhaustive, 2.
object to amend existing law, 1.

Delhi—
Act not applicable to province of, 7.

Demise—
actual, 642.
meaning of, 626.

Deposit in Court, 541.
amount of deposit, 544, 545.
cessation of interest, 546, 547.
Court, 544, 547.
deposit, amount of, 544.
effect of, 544, 546.
function of Court ministerial, 542-543.
must not be conditional, 544.
must not be to the account of the mortgagee and a third person, 542, 543.
notice of deposit, 547.
operates as a tender, 545.
refusal to accept valid deposit, effect of, 546.
time for, 543, 544.
under sec. 83 does not discharge mortgage, 454, 545.
when to be made, 543, 544.
after principal money becomes due, 543, 544.
before suit for redemption is barred, 544.
where to be made, 544.
who may make, 542, 543.
mortgagor, 542.
any other person entitled to redeem, 543.
whole balance remaining due on mortgage, must be of, 546.
withdrawal by mortgagee, effect of, 543.

Destruction of security, 463, 468.
acquisition under Land Acquisition Act, is not, 469.

Dharam, gift for, 131.

Discharge of incumbrances on sale, 347.
object of sec. 57, 349.
procedure, 349.

Disclaimer of lessor's title—*See* Forfeiture.

Disqualified to contract, 78, 79.

Disqualified to be a transferee, 75.
Buddhist monk is not, 76.
executive instructions of Government, effect of, 76.
minor is not, 76.
transfer to disqualified person, void, 75.

Distress, 727.

Dominium, 47.

Donee, 748.
must be alive at date of gift, 748.
must be ascertainable person, 748.
presumption in case of several donees, 748.

Donor, 748.

Dowlferist, 643.

Duration of lease, 628.

Dwelling house—
transferee of co-owner of, 217.

Earnest, 335, 336.

Easement—
definition, 60.
easements annexed pass on transfer, 83.
easements in gross, not recognized, 60.
grant of, is not a transfer of property, 48, 60.
includes profits a *prendre*, 60.
mortgagor may not burden property with, 450.
not transferable apart from dominant heritage, 52, 60.
operation of transfer on, 83.
transfer, whether creation of, 48.

Edwards v. Edwards—
Rule in, 145.

Edwards v. Hammond—
Rule in, 141.

Efflux of time—**Determination of leases by**, 708, 712.

Election,—164, 165.
acceptance, 171.
belief of transfer, 169.
benefit reverts to transferor, 169.
different capacity, 170.
disability, 172.
exception, 170.
heir, by, 168.
Hindu law, 172.
illegality, cannot cure, 168.
impossibility of, 169.
indirect benefit, 170.
Mahomedan law, 173.
principle of, 165.
proprietary interest, 167.
ratification, 172.
reverts to donor, when, 169.
same transaction, 167.
status quo cannot be restored, 172.
time for election, 172.
two years, presumption, after, 172.

Encroachment, 671.

Enforcement of obligation not merged in conveyance, 338.

English covenant for quiet enjoyment—**express**, 666.
absolute, 666, 667.
restricted, 666.

English covenant for quiet enjoyment—**implied**, 667.
breach of covenant, 669.
damages, 669, 670.
lessor may not derogate from his grant, 668.
tortious acts, 667.

English law of fixtures, 20.
does not apply in India, 20, 21.

English law—restrictive covenants, 185, 186.

English mortgage—*See* Mortgage—English.

Enjoyment postponed—*See* Vested interest.

En ventre sa mere, 103.

Equitable Charge, 557.

Equitable estates, 47, 48.
are personal rights in India, 48.
not recognized in India, 47, 48, 193.
prior to Act, recognized, 113.

Equitable Mortgage—*See* Mortgage by deposit of title deeds.

Equitable Sub-mortgagee—*See* Sub-mortgagee.

Estate feeding the estoppel, 207-215.
consideration, necessary, 210.
covenant for title, 212.
erroneous representation, 208, 209.
execution sales, 214.
fraudulent representation, 208, 209.
interest acquired subsequently, 213, 214.
invalid transfer, 210, 211.
option of transferee, 214.
option when exercisable, 214, 215.
public policy, transfer against, 210, 211.
purchaser in good faith, 215.
subrogation and, 214.
transferee must act on representation, 209, 210.

Estoppel—
acquiescence, and, 233-235.
admission of sale and, 304.
assignee of lessee, of, 710.
attestation and, 19.
covenant for title by, 443.
debtor when actionable claim transferred, of, 783.
fraudulent and erroneous representation, 208, 209.
lease permanent by estoppel, 639.
lessee, of, 710.
minor, of, 78, 199, 361.
mortgagee, of, 516.
operation of estoppel, whether in favour of lessor only, 710.
reversionary heir, of, 57.
statutory application of, 196.
"the estate feeds the estoppel," 207.
transferee must act on representation, 209, 210.
See Transfer, by unauthorized person—Liability of transferee actionable claim.

Estoppel by acquiescence, 233.
condition to be fulfilled, 233.

Estoppel by acquiescence, 233—*contd.*
distinguished from cases under s. 51, 233-235.
illustration of rule, 235.
Eviction of lessee—
entire, 690.
partial, 691.
Exchange, 742.
defined, 742.
enforced under doctrine of part performance, 282, 743.
express covenants of title, 742, 743.
family settlement is not, 742.
limitation for suit of party deprived, 745.
mode of transfer, 742.
money may be paid for equality of, 743.
mutual transfer, is, 742.
ownership of each party must be exclusive, 742.
part performance doctrine of, 743.
remedy of party, 744.
rights and liabilities of parties, 745, 746.
transfer by husband to wife in discharge of claim for maintenance whether, 742.
triangular exchange not possible, 745.
undertaking as to title, 744.
Exchange of money, 746.
Exclusion of seller's charge, 329
Execution of conveyance, 315.
Execution sales—
s. 43 not applicable to, 215.
Executor—
power to grant leases, 625.
power to mortgage, 361.
Express covenants for title, 319.
Express notice, 25.
Extent of Act, 6, 7.
s. 54 (2) & (3) 6, 7.
s. 59, 394, 6, 7.
s. 107, 6, 7, 659.
s. 123, 6, 7, 755.
Extinction of mortgage security, 612.
Extinction of right of redemption, 413.
Failure to account—*See* Liability of mortgagee in possession.
Family arrangement—
involving restraint on alienation, valid, 93.
is not a transfer, 58, 93.
whether amounts to exchange, 742.
Ferry, 16, 295.
Fiduciary character of seller, 324.
Fire policy, 779, 786.
Fishery, 16, 295.

Fixtures—
attached to what is imbedded, 24.
definition of, 13.
English law, 20.
Hindu law, 21.
hire purchase agreement, 24.
imbedded in the earth, 21.
lessee's right to fixtures, 660, 661, 675, 676.
Mahomedan law, 21.
mode of annexation, 22.
mortgagee's rights to, 23.
object of annexation, 22.
Paramanick's case, rule in, 20.
trade fixtures, 23.

Floating charge—
what is, 606.

Forbidden by law—transfer void, 74, 147.

Foreclosure or sale, 451.
after mortgage money has become due, 452.
anomalous mortgagee's right to, 456.
benamidar mortgagee's suit for, 452.
Bundelkhand Land Alienation Act, 457.
charge, 460.
contract to the contrary, 452.
default of payment of interest, whether allowed on, 453.
English mortgagee's right to, 456.
equitable mortgagee's right to, 456.
imperfect foreclosure, 426.
instalments, payment by, 454.
mortgagee's remedies, 452.
mortgagee by conditional sale and, 456.
mortgagee by deposit of title deeds and, 456.
partial foreclosure. *See* Partial foreclosure or sale.
public works, mortgage of, 457.
security for performance of decree, 460.
simple mortgagee and, 455.
submortgage and, 385.
usufructuary mortgagee and, 455.
where mortgagor is trustee for mortgagee, 457.

Forfeiture of lease, 716-724.
agricultural leases, 722.
breach of express condition, which provides for right of re-entry, 708, 718, 719.
"condition", meaning of, 717.
disclaimer of lessor's title, 719-721.
agricultural tenancies, in, 722.
claim to permanent tenancy is not, 721.
must have been before ejectment suit, 722.
no relief in case of, 733.
verbal, 721.
what is sufficient to constitute, 721, 722.
insolvency, 723.

Forfeiture of lease, 716-724—*contd.*
notice in writing essential, 723.
proviso for re-entry, 718-719.
relief against, 730-733.
(*i*) for non-payment of rent, 730-732.
application must be made at the hearing, 731.
conditions of relief, 731.
law prior to the Act, 731.
sub-lessees, 732.
where lease allows a period of grace, 732.
where terms of a lease have been embodied in a consent decree, 732.
(*ii*) for breach of other conditions, 732, 733.
(*iii*) none where forfeiture is for disclaimer, 733.
(*iv*) extension of time for payment of rent, 732.
under-lessees, effect on, 733.
waiver of, 725-728.
by acceptance of subsequent rent, 726.
by distress, 727.
by other acts, 727.
express waiver, 728.
irrevocability of election to waive forfeiture, 727, 728.
knowledge of breach, 727.
rule in *Dumpor*'s case, 728.
subsequent breaches, 728.
Form and construction of notice to quit, 649-651.
Fraud—
as affecting priority, 516.
concealed fraud, 42.
non-disclosure fraudulent, 308, 337.
Fraudulent transfer—*See* Creditors—Transfer to defeat or delay.
benami transfer distinguishable from, 261.
consideration, 273, 274.
creditor, meaning of, 263. *See* Creditors.
creditor's suit to avoid, 275, 276.
defeat or delay creditors, meaning of, 264.
good faith and for consideration, 271.
history of, 259-261.
insolvency, effect of, 101, 274.
limitation, 276.
moveable property, whether applicable to, sec. 53, 264.
operation of law, transfer by, 263.
partition, 270.
presumption in, 267-270, 276.
relinquishment, 262.
subsequent transferees, 276.
void, 74, 262.
voidable, 262.
wakf, effect of, 262.
Fraudulently or erroneously represents, 208, 209.
Fulfilment of condition precedent, 146.
Fulfilment of condition subsequent, 157.
ignorance no excuse, 158.
illustrations from Indian Succession Act, 158.

Future interests in property, 50, 51.
  reversion, 47.
  vested remainder, 47.

Future maintenance, not transferable, 52.

General Clauses Act—
  definition of immoveable property, 15, 20.
  sec. 6, 8.

Ghatwal tenures, 62, 212.

Gift, 747.
  acceptance, 749.
  actionable claim, 754, 766, 767.
  Buddhist law, 755, 764.
  Court will not perfect incomplete gift, 750.
  dedication to idol is not, 751.
  defined, 747.
  donee defined, 748.
  donor defined, 748.
  essentials of, 747.
  existing and future property, of, 748, 749, 755.
  Hindu law, 750, 754, 763, 764.
  incomplete gift, 761.
  machinery of trusts, 750.
  Mahomedan law, 8, 754, 764, 765.
  mistake, gift by, 760, 761.
  mode of transfer—immoveables, 752.
    attested, 752.
    only by registered instrument, 753.
    registration of, 752.
    signed by or on behalf of donor, 752.
  mode of transfer—moveables, 753.
  mortis causa, 764.
  non-acceptance of several donees, 755, 756.
  onerous gift, 762. *See* Onerous gift.
  See Revocable gift.
  revocable at pleasure, 758.
  revocable by rescission, 758.
  revocation of, 756, 758.
  service tenures, 757.
  subject matter of, 748, 749.
  suspension, of, 756.
  to dharm void, 751.
  trusts, by means of, 750.
  universal donee, 763. *See* Universal donee.
  voluntarily and without consideration, 747.
  when property passes, 751, 752.

Gift, Buddhist law, 755, 764.

Gift, Hindu law, 750, 754, 763, 764.

Gift, Mahomedan law, 11, 754, 764, 765.
  in Pegu district, 764.

Gift *mortis causa*, 764.

Gift of actionable claims, 754, 766, 767.

Gift of existing and future property, 748, 749, 755.

Gift to an idol, 50, 751.

Gift to several of whom one does not accept, 755, 756.

Gift to survivor, 146.

Gift to two or more donees, 677, 748, 755, 756.

Good faith—
not incompatible with mistake of law, 230.
not incompatible with negligence, 230.
rents paid in good faith, 224, 225.
See Improvements made in good faith—Transferee in good faith and for consideration—Transferee in good faith.

Grant—
lessor may not derogate from, 668.

Grass, 13, 17.

Gross negligence, 30-33.
affecting priority, 517, 520.

Growing crops, 13, 17.

Hat, 16.

Headings take effect as preambles, 1.

Health, transfer for advancement of, 131.

Heir apparent, 51, 54.
interest of, not transferable, 54.

Hiba-bil-iwaz, 305.

Hindu law, 8, 12, 54-58, 81, 96, 99, 106, 111, 118, 122, 127, 131, 137, 159, 172, 216, 750, 754, 763.
adopted son, right of, 53.
adoption based on consideration, 74 (4).
Chapter II whether applicable to, 12.
consideration for adoption, 74 (4).
differences between the Hindu law and the Act, 12.
operation of transfer, 80.
rule of damdupat, 12.
spes successionis, 53.

Hire purchase agreement, 24.
object of annexation, 23.

Holding over, 735.
assent of lessor may be inferred, 736, 737.
double value, compensation at, 739.
duration of renewed term, 736.
agreement to the contrary, 737.
heirs of lessee cannot be tenants by holding over, 737.
legal representative of lessor may assent to, 738.

Holding over, 735—*contd.*
mortgage by tenant, 738.
no holding over in case of lease for life, 737.
sub-lessee may be tenant by holding over, 738.
terms of holding over, 738.

Hospital, endowment of, 131.

House, 24, 84, 85.
dwelling house, 217.

Idol—
gift to, 50, 61, 131, 751.
is a juristic person, 50.
living person, whether, 50.

Illustrations an aid to construction, 5.

Imbedded in the earth, 21, 22.
annexed to land, 22.
hire-purchase agreement, 24.
mode of annexation, 22, 23.
objects of annexation, 23.
tests in Indian law, 23.
trade fixtures, 23.

Immoral—
conditions void, 148.
premises let for immoral purpose, 74, 694.
transfers void, 73, 74, 148.

Immoveable property, 15.
benefits to arise out of land, 15.
definition, 13, 15.
definition in General Clauses Act, 15.
distinguished from moveable property, 15.
equity of redemption, 16, 17.
ferry, 16.
fishery, 16.
hat or market, 16.
maintenance decree charged on land whether, 16.
malikhana, 16.
mortgage debt, 16, 17.
mortgagee's right, 16, 17.
rents and profits, 84.
right of assessment, 16.
right to collect dues, 15, 16.
right of way, 16.
royalty whether, 16.
saranjam, 16.
standing timber, 17.
tangible and intangible, 47.
trees, 17.

Implied covenant for title (seller's). *See* Covenant for title (seller's).

Implied covenant for quiet enjoyment. *See* Covenant for quiet enjoyment.

Impossible condition, 147, 148.

Improvements—
conditions to be fulfilled, 228.
court sale, 231.
crops, 232.
defective title, under, 226, 227.
estoppel and principle of, 233.
made in good faith, 230.
manuring land whether, 232.
meaning of, 232.
mesne profits on, 232, 233.
option as to compensation, 232.
Punjab, 231.
purchaser with notice of prior contract not entitled, 231.
rule in Dart, 226.
sec. 51 distinguished from estoppel by acquiescence, 233.
sec. 51 does not apply to leases and mortgages, 227, 228.
sec. 51 does not apply to Court sales, 231.
transferees entitled to, 228-230.
transferor not entitled, 230.
trespasser, by, 230.
valuation of, 232.
what are, 232.
when entitled to expenses of, 228, 229.

Improvements by mortgagee to mortgaged property, 440, 441.
contracts to the contrary, 441.
done under orders of public authority, 440.
necessary to preserve property, 440.
necessary to preserve adequacy of security, 440.

Imputed notice, 14, 40, 41.
See Notice to an agent.

Inam land, 62.

Income—
operation of transfer on, 88.

Incumbrances—
Buyer may pay and set off, if sale not subject to, 333.
Buyer's duty to pay if sale subject to, 317, 333, 334.
Buyer's right of indemnity if sale not subject to, 317, 318.
Sale free from incumbrances unless so provided, 318.
Seller's duty to pay if sale not subject to, 317, 333.
Seller's indemnity if sale subject to, 334.
Seller's no right of indemnity if incumbrance prove invalid, 334.
term of wider connotation than mortgage, 528.

Injury to person or property, 74.

In present or in future, 50.
mortgage of future crop, 51.
transfer may be, 50.

Insolvency—
condition determining interest on insolvency, 101.
forfeiture on insolvency, 101, 102.
forfeiture of lease on insolvency, 102, 723.
law of, not affected by sec. 53, 256, 274, 275.
preference valid under sec. 53, 274.
provisions of, more stringent than sec. 53, 274.
under English law, 102.
under Indian Succession Act, 102.

Inspection—mortgagee's right of, 429.

Instalments—mortgagee not bound to accept, 454.

Instrument—
definition of, 13, 18.
definition excludes will, 18.
is transaction as well as evidence of transaction, 18.

Insurance—
application of insurance money by mortgagee, 509.
particular condition as to, 345.

Insured property, 223, 224.
application of insurance money, 223, 333.
purchaser's rights to insurance money, 223.

Interesse termini—Doctrine of, 657.

Interest in property, 47.
for benefit of person not in existence, 103.

Interest or income, 88.
absolute gift, of, makes estate vested, 138, 142.
operation of transfer on, 88.

Interest—
accessory to principal, 453, 454.
cessation of, after deposit under sec. 84, 547-549. *See* Same head.
in lieu of notice before redemption, 420, 549.
on money spent by mortgagee, 496.
mortgagee in possession liable for interest on surplus, 513.
mortgagee takes receipt in lieu of interest, 514.

Interpretation clause, 13.

Invalid condition precedent, 148.

Invalid condition subsequent, 161, 162.

Involuntary alienation—
not breach of lessor's covenant against alienation, 96, 686.
operates as *lis pendens*, 253.

Jajman vahis (or *Yajman vahi*), 61.

Joint tenancy or tenancy in common, 218.
joint tenancy unknown to Hindu law except in a coparcenary, 218, 219.
presumption of, 219.
words of severance indicate tenancy in common, 219.

Joint transfer for consideration. *See* Transfer, joint for consideration.

Karnam land, 62.

Kanom, 449.

Laches of mortgagee, 536.

Land Acquisition Act—
acquisition under, 499.
security not destroyed, 469, 499.

Latent defect, 310.

Law of Property Act, 1925—
s. 4, 53.
s. 9, 448, 485.
s. 44, 313, 340.
s. 45, 313, 315, 325.
s. 47, 224.
s. 60, 91.
s. 76, 187, 192, 324.
s. 80, 192.
s. 93, 430.
s. 94, 588.
s. 95, 429.
s. 96, 429.
s. 99, 448.
s. 131, 91.
s. 136, 771.
s. 140, 178.
s. 141, 192, 705.
s. 143, 728.
s. 144, 656.
s. 146, 657, 723, 730, 733.
s. 150, 658, 734.
s. 151, 704.
s. 164, 124.
s. 169, 97.
s. 172, 252, 259, 274.
s. 173, 239, 258, 259.
s. 184, 153.
s. 205, 46, 48.

Leake v. Robinson, 117-120.
Indian Succession Act, 117.
rule abolished, 117.

Lease, 624.
accession to leasehold property, 659, 671.
actual demise, 642.
agreement to, 641. *See* Agreement to lease.
agriculture. *See* Agriculture leases.
alienation, condition restraining, 94, 95.
effect of involuntary alienation, 96.
assignment of, 679, 685. *See* Assignment of term, *and* Assignment of reversion.
Cantonment, lease in, 659.
certain term or period of time, for, 631.
commencement of, 627, 706.
in future, 628.
computation of time, 706.
condition determining interest of lessee on insolvency, 101.
consequences of non-registration, 657.
consideration, 639.
covenant for renewal, 710.
creates right *in rem*, 627.
creation of, 656-659.
by Crown grant, 658.
by decree or order of Court, 658.
by oral agreement and possession, 657.
by registered instrument, 656.
by unregistered instrument, 656.
consequences of non-registration, 657.
kinds of leases : for a term exceeding one year, 656, 657.
from year to year, 656.
other leases, 656.
reserving a yearly rent, 657.
possession under an agreement of lease, effect of, 286, 293, 658.
signatures of both lessor and lessee essential, 658.
Crown grants, 658.
darpatni lease, 95.

Lease—*contd.*
- decree creating, 658.
- definition, 624.
- demise, meaning of, 626.
- destruction of premises leased, 672.
- determination of, 692, 708.
  - by breach of condition where re-entry provided for, 718, 719.
  - by disclaimer of lessor's title, 719, 720.
  - by efflux of time, 709.
  - by forfeiture, 716. *See* Forfeiture of lease.
  - by happening of event on which term was contingent, 712.
  - by insolvency of lessee, 723.
  - by merger, 712. *See under* Merger.
  - by notice to quit, 724. *See* Notice to quit.
  - by novation or new relationship, 715.
  - by relinquishment of possession by lessee, 715, 716.
  - by surrender, express or implied, 714. *See* Surrender.
  - by termination of lessor's interest or power to lease, 712.
  - emergency legislation affecting, 709.
- disclaimer by lessee, 719-721.
- distinguished from agreement to lease, 641.
- distinguished from license, 644.
- duration of, 624, 646, 647, 707.
  - certain time, 632.
  - commencement of term, 627.
    - in future, 628.
  - computation of year or other term, 707.
  - from year to year, 632, 649.
  - future commencement of term, 628.
  - holding over, effect of, 735-739. *See* Holding over.
  - implied duration, 646.
    - agricultural purposes, for, 648.
    - manufacturing purposes, for, 648.
    - effect of contract, or local law or usage on, 647.
  - indefinite period, 631.
  - life, for, 632.
  - monthly leases, 647.
  - option of renewal, effect of, 628.
  - option to terminate, effect of, 707.
  - periodic leases, 632.
    - notice to quit in, 648-655. *See* Notice to quit.
  - perpetuity, in, 634-637. *See* Lease in perpetuity.
  - uncertain duration, 631, 677.
- emergency war legislation, 702.
- estate of inheritance, 629, 709.
- exception to rule against restraint on alienation, 94.
- execution of, by whom, 658.
- forfeiture of, 708, 716, 717. *See* Forfeiture of lease.
- how made, 656. *See* Creation of leases, *above*.
- illegal or immoral purpose, for, 694.
- joint tenants, by, 625.
- leasehold estates, 629, 631.
- licence distinguished from, 644.

Lease—*contd.*
minor, by, 76, 624, 625.
to, 76, 624, 625.
mortgage of, 442.
mortgagee in possession, by, 505.
mortgagor, by, 252.
notice to quit. *See* Notice to quit.
option of renewal, 624.
option to break before full term has expired, 707.
oral agreement with delivery of possession, 657.
parties to, 624, 625.
periodic, 632.
perpetuity, lease in, 634. *See* Lease in perpetuity.
possession under invalid agreement of lease, 286, 293.
possession under valid agreement of lease, 285, 658.
premium, 639. *See* Premium.
re-entry, right of, whether transferable, 59.
registration of, 657.
rent, 639. *See* Rent.
repairs. *See* Repairs.
reservation of yearly rent, 657.
restriction on assignment without consent of lessor, 95, 685.
effect of breach of, 96, 709, 716, 717.
right *in rem* created by, 627.
signatures of both lessor and lessee essential, 76, 658.
subject-matter, 626.
tenants in common, by, 625.
term certain, for, 632.
term of. *See* duration of, *above*.
verbal leases, whether s. 110 applies, 707.
words of present demise, 642.
zuripeshgi lease, 370, 639.
Lease for a certain time, 631.
Lease for life, 631.
Lease in perpetuity, 634.
by adverse possession, 638.
by estoppel, 639.
by express grant, 634.
by prescription, 638.
by presumed grant, 635.
Leasehold—
what is, [illegible].
Leasehold estates, 629, 631.
for a certain time, 631.
for life, 632.
in perpetuity, 634.
periodic, 632.
Legacy—
chance of, 58.
Legal incidents, 83.
definition of, 83.
Lekha mukhi mortgage, 368.

Lessee, 625.
assignment of term by. *See* Assignment of term.
attornment by, whether necessary, 704.
definition of, 625.
easements cannot be acquired by, 670.
holding over by, 735-739. *See* Holding over.
improvements made by, 226, 227.
liabilities of. *See* Liabilities of Lessee.
repairs by. *See* Repairs.
rights of. *See* Rights of Lessee.
structural alterations, lessee has no right to make, 699.
trespass, in case of, 698, 699.
trespassers, suit against, 698, 699.
who may be, 625.

Lessor, 624.
assignment of reversion by. *See* Assignment of reversion.
definition of, 624.
effect of partial eviction, by lessor, 691.
liabilities of. *See* Liabilities of lessor.
may not derogate from his grant, 668.
repairs, not liable for, 673.
express covenant for, 673. *See* Repairs.
rights of. *See* Rights of Lessor.
transferee of. *See* Assignment of reversion.
who may be, 624-625.

Liability of buyer. *See* Buyer.

Liabilities of lessee, 659.
assignee and lessee, distinction between, 683.
assignment of term of lease, after, 682, 683.
boundaries, to preserve, 702.
buildings belonging to lessor, not to pull down, 661, 694, 695, 700.
buildings, not to erect, 661, 701.
damages for failure to restore possession, 702.
destruction of premises leased, 672.
diversion to different use, 700.
duty of disclosure, 661, 687.
encroachments, to give notice to lessor of, 628, 661.
estoppel, 709, 710.
irresistible force, non-liability for, 695.
joint lessees and failure to restore possession, 701.
liability ceases when, 680.
liability of assignees of part of demised premises, 683.
local usage, effect of, on lessee's covenants and liabilities, 659, 662.
mines and quarries not to open, 661, 700, 701.
prudent user, 661, 699.
rent, to pay, 661, 687, 688. *See* Rent.
to pay in case of eviction, 690.
of partial eviction, 691.
repair, to keep in, 661, 694.
repair, to restore in, 661, 694.
See Repairs.
restore possession on termination of lease, to, 662, 701.
timber, not to fell, 629, 661, 700.
user, must be prudent, 661, 699.
premises not to be diverted to different, 661, 700.
waste, act of, 699.
waste, not to permit, 661, 699.
wear and tear, not liable for reasonable, 661, 699.

Liabilities of lessor, 659.
absolute covenant for quiet enjoyment, 665, 666, 667.
breach of covenant for quiet enjoyment, 669.
breach of duty of disclosure, 662, 663.
consequence of failure to give possession, 664.
contract or local usage, 662.
covenant for quiet enjoyment, 659, 665. *See* Same head under English law, 666.
covenant to give possession, 664.
damages for breach of covenant for quiet enjoyment, 669.
defect in title, no duty to disclose, 662.
destruction of premises leased, 672.
duty of disclosure, 659, 662.
local usage, effect of, on lessor's covenants and liabilities, 662.
may not derogate from his grant, 668.
onus on lessor to prove that he has put lessee in possession, 664.
payment by lessee on behalf of, 675.
possession, to give, 664.
repair, for, 673, 674. *See* Repairs.
restricted covenant for quiet enjoyment, 666.
shifted where lessee has paid rent, 664.
tortious acts, 667.

Liability of mortgagee in possession, 502.
account under rule of wilful default, 506, 510.
accounts claimable on redemption, 510.
accounts, to keep, 509, 510.
duty cannot be contracted out, 511.
agent employed by mortgagee, 512, 513.
assessment, to pay, 507, 508.
collection charges after deposit, whether entitled to, 513.
collection of rents and profits, 505.
Dekkan Agriculturists Relief Act, 504.
deposit of mortgage money in Court, 513.
expenses properly incurred may be deducted, 512.
insurance, 509.
insurance money, application of, 509.
interest, to pay, on surplus, 513.
loss occasioned by mortgagee's default, 513, 514.
management, 505.
mortgagor entitled to account only on redemption, 511.
no account if receipts are in lieu of interest, 514.
occupation rent, meaning of, 511, 512.
personal services, mortgagee not entitled to charge for, 512, 513.
possession of mortgagee, 504.
public charges, to pay, 507.
receipts in lieu of interest, 514.
remuneration for personal services, 512, 513.
rents and profits, collection of, 505.
repairs, 508.
surplus, 513.
system of accounting, 511.
waste, 508.
wilful default, 506, 510.

Liability of seller after completion, 309.
implied covenant for title, 319.
such possession as nature of property permits, 317.
to give possession, 316.
See Covenant for title (seller's).

Liability of seller before completion, 309.
abstract of title, 312, 313.
care of property, 315.
conveyance, to execute, 315.
defect in property, 311.
defect in title, 311.
defect must be material, 311.
duty of disclosure, 310.
no duty to disclose patent defects, 310, 311.
non-disclosure, effects of, 312.
place of production of deeds, 312.
production of title-deeds, 312.
requisitions on title, to answer, 313, 314.
title deeds, production of, on request, 312.
to discharge incumbrances if sale not subject to, 317.
to pay outgoings, 317.
to pay rents up to date of sale, 318.
waiver of requisitions, 314.

Liability of seller irrespective of completion—
title deeds, to deliver, on receipt of price except when deeds comprise other property, 324, 325.

Liability of transferee of actionable claim, 781.
estoppel of debtor, 783.
mortgage debt is not an actionable claim, 13, 86, 767, 783.
notice immaterial, 779, 783.
repealed s. 135, 784.
subject to liabilities and equities, 781, 782.

Liability of transferor of actionable claim—
warranty of solvency, of debtor, 784.

License, 644.
accretions, whether licensee entitled to, 671.
distinguished from a lease, 644.
instances of, 645, 646.

Limitation of estates, 89.
alternative limitations, 121.
if estate not recognized by law, transfer fails, 91.
void for remoteness, 111, 120 121.

Limitation period of—
suit by subrogee, 581.
suit for personal reimbursement, 581.
suit for surplus sale proceeds of mortgaged property, 501.
suit on covenant for title, 321, 322.
suit on English mortgage, 456.
suit to enforce seller's charge, 329.
suit to recover purchase money, 329.
suit to revoke gift for fraud, 760.

Limited power of transfer, 179, 180.
legal necessity, 179, 180.
onus of proof of justifying circumstances, 180, 181.
recitals by transferor not generally sufficient, 181.
s. 38 refers to cases such as arise under Hindu law, 180.

Liquidator of Company—
mortgage by, under order of Court, 11.

Lis pendens, 235, 236.
"active prosecution," 237.
administration suit, 248.
adoption during, 253.
affect the rights, 244.
amendment of s. 52 how far retrospective, iv, 238.
any party, 243.
appeal or execution proceedings, a continuation of suit, 241, 242.
attachment before suit does not prevent, 254.
authority of Court for transfer, 255.
award proceedings, 252.
British Court, suit in, 246.
collusive suit is not real suit, 240.
compromise, 239, 240.
consent decrees, 239, 240.
contentious proceedings, 238, 239.
continues during appeal and execution proceeding, 241, 242.
court sales, 253.
directly and specifically in issue, 246, 247.
estoppel, 256.
foreign court, suit in, 246.
immoveable property only, 246, 247.
insolvency during suit does not operate as *lis pendens*, 254.
involuntary alienations, 253.
lease by a mortgagor, 252.
lis pendens between co-defendants, 239.
lis pendens, in the C.P.C., 255.
lis pendens, in same suit, 254.
misdescription in pleadings, 252.
mortgage suits, 250.
mortgagee purchasing share of equity of redemptions, 424.
mortgagee, sale by, under power, 245.
moveable property, 246.
no *lis pendens* after order in claim proceedings, 243.
no *lis pendens*, between sale and sale certificate, 243.
notice whether necessary, 236, 238, 239.
omission of words "active prosecution," 237.
omission of word "contentious," 238.
order 21, r. 63, 243.
otherwise dealt with, 252.
partition suits, 250, 251.
pendency of suit, 240.
pre-emption suits, 251.
preliminary decree on a mortgage, continues after, 241, 242.
proceeding before Settlement Officer, 243.

Lis pendens, 235, 236—*contd.*
registered deed and, 237, 245.
rents suits, 252.
review and revision, 243.
right prior to suit, 245.
rule not based on notice, 236, 238, 239.
sales for recovery of land revenue, 253, 254.
sale under order 21, rule 83 of Civil Procedure Code, 255.
same suit, in, 254.
Settlement Officer, proceeding before, 243.
suit, transfer before, 244.
suits decided *ex parte*, 239.
suits decided by compromise, 239, 240.
suits outside the scope of *lis pendens*, 247.
suits that operate as *lis pendens*, 249.
suits to enforce contribution to mortgage debt, 250.
s. 52 excludes s. 41, 205, 246.
taxes, sale for recovery of, 253, 254.
transfer before suit, 244, 245.
transferred or otherwise dealt with, 252.

Living Person, 46, 50.
defined, 46.
idol, 50.
includes a corporation, 46, 50.
includes a child *en ventre sa mere*, 103.

Loan—
rent paid in advance whether, 225.

Local Government—
may except part of territory administered from certain sections, 7.
right to extend Act or part of Act to territories under administration, 7.

Local usage, 647, 662, 739.
affecting agricultural leases, 739.
affecting notice to quit, 646, 647.
affecting rights and liabilities of lessor and lessee, 646, 662.
excluding rule of apportionment, 176.

Lodger, 645.

Machinery, 23, 24, 85.

Maddison v. Alderson, rule in. *See* Part performance.

Mahomedan gift, 7, 11, 748, 749, 754, 755.
delivery of possession necessary, 7, 11, 754, 764.
in the Pegu district, 765.

Mahomedan heir—
transfer by, 54, 58.

Mahomedan law, 7, 11, 58, 96, 99, 111, 120, 138, 173, 262, 304, 749, 754, 764.
chance of heir succeeding, 54, 58.
Chapter II how far applicable to, 11.
pre-emption, 63.

Maintenance, 52, 64, 182.
advancement, 184.

Maintenance, 52, 64, 182—*contd.*
amendment of law, 182.
annuity can be attached and sold, 65.
arrears of, can be attached and sold, 65.
family debts, 184.
future maintenance, not transferable, 52, 64.
marriage, 184.
right to future maintenance not transferable, 52, 64.
transfer when third person entitled to, 182.

Malik, 81.

Malikhana, 16.

Marine policy—
not transferable under s. 130, 766, 779.
transferred by endorsement, 786.

Marketable title—
proof of discharge of incumbrances, 318.
title free from reasonable doubt, 319.

Married woman—restraint on power of anticipation, 96, 97.
marriage expenses under Mitakshara law, 184.

Marshalling by purchaser, 345, 346.
between purchaser and purchaser, 346.
excluded by contract to the contrary, 347.
independent of notice, 346.
lessee not entitled, 347.
not applicable to execution sales, 347.
omission of the words "as against the seller," 346.
so as not to prejudice the mortgagee, 347.

Marshalling securities, 522, 523.
common debtor, 524.
converse of contribution, 527.
excluded by contract, right of, 525.
funds must be on the same footing, 525.
irrespective of notice, 524.
lessee has no right, 526.
moveables, hypothecation of, section 81 does not apply to, 523, 524.
notice not necessary, 524.
other incumbrancers not to be prejudiced, 525.
prejudice to volunteer, 525.
prior mortgagee not to be prejudiced, 524.
puisne mortgagee purchasing equity of redemption, 524.
purchaser, right of, 525.
surety, right of, 526.
volunteer, right of, 526.
volunteer, prejudice to, 525.

Material defect, 311.

Maxims—
Accessio cedit principali, 436.
He who seeks equity must do equity, 226, 430.

Maxims—*contd.*
Id certum est quod certum fieri potest, 359, 522.
No one may approbate and reprobate, 165.
omne majus continet in se minus, 544.
Pari delicto potior est conditis possidentis, 72.
Permutatio est vicina emptioni, 743.
qui facit per alium facit per se, 39.
Quicquid inaedificatur solo, solo cedit, 20.
Quicquid plantatur solo, solo cedit, 20, 21.
Qui prior est tempore, potior est jure, 188, 221, 515.
Qui sensit commodum, debet et sentire onus, 763.
Redeem up, foreclose down, 554, 589, 590.
Ut lite pendente nihil innovetur, 236.
Ut res magis valeat quam pereat, 650.

Mercantile document or title to goods, 788, 789.

Mere negligence—
no presumption of notice, 30, 31.

Merger, 611.
charge in decree for rent, 619.
collateral security of mortgage whether merges in judgment, 613.
debt merges in judgment, 613.
determination of leases by, 712.
estates must be held in the same right, 713.
interests of lessor and lessee must be in the whole property, 712.
leases prior to the Act, 713, 714.
no estate must intervene, 713.
sublease, effect of merger on, 713.
distinguished from novation, 620.
equitable mortgage merges in formal mortgage, 613.
estates in the same right, 713.
extinction of mortgage security, 612.
instances of merger, 617, 618.
instances of non-merger, 618.
leases. *See under* determination of leases *above*.
mortgagee acquiring equity of redemption, 415, 420, 458, 614.
novation distinguished from, 620.
novation distinguished from renewal, 620.
no merger if estate of third person intervenes, 616, 713.
no common law rule of merger in India, 612.
of less estate in greater estate, 614.
of lower security in higher security, 613.
prior to Transfer of Property Act, 713, 714.
purchasing mortgagee is also puisne mortgagee, when, 619, 620.
renewal and novation, 620.
rule of intention, 614, 616.
applied to a rent charge, 619.
applies as between mortgagee and subsequent mortgagee, 619.
sublease, effect on, 713.
when mortgagee purchases equity of redemption if no puisne mortgagee, 619.

Mesne mortgagors—589, 596.

Mesne profits—
due to improvements, 232.
mere claim to, not transferable, 66.
transferable if accompanied by sale of land, 66.

Minerals, 85.
agricultural tenant, rights of, 85.
lease, whether includes minerals, 83, 85.
patni tenure, 85.
transfer of property whether includes, 83.

Mines and quarries—
whether lessee has a right to work, 700, 701.

Minor—
cannot be a mortgagor, 361.
lease by a minor void, 78, 625.
lease to a minor void, 76, 625.
may be a mortgagee, 76, 362, 565.
may be a vendee, 76, 625.
no estoppel against a minor, 78, 199, 361.
not competent to transfer, 78.
not disqualified to be a transferee, 76.
retaining onerous gift after attaining majority, estopped, 763.

Misdescription, 320.

Misdescription affecting priority, 320, 516.

Misrepresentation, 516.

Mode of annexation, 22, 23.

Mokarari, 634.

Mortgage, 350, 352, 353.
agreement to mortgage, 357.
attestation, 390-392.
charge, difference between, and, 359.
classification, 363.
complete, when, 394.
consolidation of mortgages, 430, 461. *See same head.*
construction, 354.
costs of mortgagee, 9.
covenant not to alienate, 354.
current account, for securing, 360.
customary, 382.
debt: whether mortgage debt is immoveable property, 17. *See* Mortgage debt.
definition, 350, 353.
distinguished from charge, 359.
distinguished from sale with condition of retransfer, 355, 357.
estate feeding estoppel and, 212.
foreclosure of. *See* Foreclosure or sale.
form of expression, 354.
future advances, for securing, 388, 520.
assurance, when to be made by, 387.
charge, 522.

Mortgage—*contd.*
future English law different, 521.
maximum to be expressed, 521.
rule of priority, exception to, 520, 521.
debts, for, 361.
history of, 352.
holding over, by tenant, 735.
how made, 388-395.
attestation, 390.
invalid attestation does not create a 'charge,' 392.
before the Act, 392.
delivery of possession, 389.
principal money secured being less (or more) than Rs. 100, 389.
registered instrument, what is, 389.
registration, 392, 393.
invalid registration does not create a 'charge,' 393.
signature of the mortgagor, 389.
agent, 391.
indivisibility of, 420, 421, 457, 532.
doctrine applies with reference to both mortgagor and mortgagee, 427.
mortgagee's right to proceed against any property comprised in the mortgage, 532.
intention, evidence of, 355, 358.
kinds of,
anomalous. *See* Mortgage—Anomalous.
by conditional sale. *See* Mortgage by conditional sale.
by deposit of title deeds. *See* Mortgage by deposit of title deeds.
customary, 382.
English. *See* Mortgage—English.
equitable. *See* Mortgage by deposit of title deeds.
simple. *See* Mortgage—Simple.
simple usufructuary, 380.
usufructuary. *See* Mortgage—Usufructuary.
usufructuary by conditional sale, 382.
mode of transfer, 389. *See* 'how made' *above*.
money advanced or to be advanced, 360.
mortgage money, meaning of, 362, 363.
moveables, of, 386, 387.
performance of an engagement, for 361.
principal money secured, 389.
purpose of, 360.
redemption of. *See* Redemption.
registration, 392.
effect of, 394.
if invalid, does not effect a 'charge,' 393.
right *in rem* accessory to debt, 359.
sale. *See* Foreclosure or sale.
sale with condition of retransfer, 355-357.
securing current account, for, 360.
securing future advances, for. *See* 'future advances' *above*.
securing future debt, for, 361.
securing performance of engagement, for, 361.

Mortgage—*contd.*
security bond, 358.
signature on, 389.
specific immoveable property, meaning of, 359, 360.
sub-mortgage, 383-386. *See* Sub-mortgage.
tenant holding over, by, 738.
takes effect from date of execution, 389.
transfer of an interest, 358.
unattested mortgage will not operate as a charge, 392.
unregistered mortgage will not effect a charge, 392.
unregistered mortgage available as proof of debt, 392.
when complete, 389.

Mortgage—Anomalous, 351, 380, 383, 601.
attestation, 383.
charge and, 435.
definition, 351.
doctrine of clog applies, 601.
mortgagee's remedies depend upon terms of deed, 456, 601.
redemption of, 435.
rights and liabilities under, 601.

Mortgage by conditional sale, 364.
certain date, 367.
definition, 350.
distinguished from sale with a condition of retransfer, 355, 356.
foreclosure, 456.
mortgagee's remedy, 456.
personal liability, not essential ingredient, 367.
relief against forfeiture, 364-367.

Mortgage by deposit of title deeds, 351, 375.
all deeds need not be deposited, 518.
debt, existence of, essential, 376.
definition, 351.
deposit, what is, 376.
equitable mortgage, 221, 375.
equivalent to a simple mortgage, 375.
intention to create a security, 377, 378.
limitation for mortgagee's suit, 380, 456, 457.
mortgagee's remedy, 456, 457, 601.
nature of: a completed transfer and not mere oral agreement, 221.
no distinction between legal and equitable mortgage, 221, 375.
no mortgage if deeds show no title, 377.
places where it may be made, 376.
priority, 221.
registration, 378, 379.
requisites of, 376.
restricted to centres of commerce, 375.
rights and liabilities same as in a simple mortgage, 601.
territorial restrictions, 376.
transfer of, 380.

Mortgage—Customary, 382, 383.

Mortgage debt—
actionable claim, whether, 86, 767-769.
assignee subject to liabilities but not entitled to equities of assignor, 383-386, 783.
assignment of, must be by registered instrument, 86.
contribution to, by several persons entitled to the mortgaged property. *See* Contribution to mortgage debt.
immoveable property, 15-17.
moveable property for the purpose of attachment, 17.
ss. 130 and 131 not applicable to assignment of, 384, 385.
unregistered assignment of, may operate as assignment of debt divorced from security, 87.

Mortgage—English, 351, 371-375.
definition, 351.
definition discussed, 372-375.
limitation, period of, 456.
mortgagee's remedy by sale only, if executed on or after 1st April 1930, 456.
mortgagee's remedy by foreclosure or sale if executed before 1st April 1930, 456.
mortgagor in possession is tenant on sufferance, 374, 375.
personal covenant in, 371, 374.
redemption of, 371.
requisites of, 371.
sale, power of, without intervention of the Court, 374.

Mortgage—Equitable—*See* Mortgage by deposit of title deeds.

Mortgage money, 350, 362, 412.
foreclosure or sale, after mortgage-money becomes due, 452.
includes interest after due date, 362, 363.
includes all costs properly incurred by mortgagee, 412.
redemption, after due, 407-409. *See* Right of mortgagee to sue for mortgage money.

Mortgage—Simple, 350, 363, 364.
definition, 350.
distinguished from charge, 359.
foreclosure not available to mortgagee, 455.
personal obligation, 363, 364.
possession not given, 364.
receiver, whether can be appointed, 487.
sale, remedy of, 363, 455.

Mortgage simple usufructuary, 380, 381.

Mortgage—Usufructuary, 351, 368.
deed of further charge, and, 435.
definition of, 351, 368.
foreclosure not available to mortgagee, 455.
forms of, 368, 369.
how made, 368, 369.
before the Act, by delivery of possession, 392.
mortgagee is transferee of right of possession, 455.
personal liability, whether any, 369 [cf. s. 68, cl. 1 (c)].
possession, mortgagor's right of, 368, 369.
sale, remedy by way of, not available to mortgagee, 455.
unless mortgage was before the Act, 9.
time limit, whether any, 369.
usury regulations, 370.
zuripeshgi leases, 370.

Mortgage usufructuary by conditional sale, 382.

Mortgage of moveable property, 386, 387
moveables not in existence, 388.
pawn or pledge, 358.

Mortgagee—
abandonment of security by, 464, 465, 474.
acquiescence of, under sec. 68, 437.
consolidate mortgages, obligation to, 430, 461.
corporation may be, 362.
costs of, 9.
equity of redemption purchased at Court sale, 413, 414.
improvements by, 228.
includes persons deriving title from mortgagee, 362, 395.
in possession. *See* Mortgagee in possession.
liabilities of. *See* Liability of Mortgagee in possession.
minor may be, 76, 362.
mortgage-money, right to sue for, 463. *See* Rights of mortgagee to sue for mortgage money.
of public works, may not sell or foreclose, 457.
partition, rights of, to, 215, 216.
possession by. *See* Mortgagee in possession.
power of sale, 474. *See* Mortgagee's power of sale.
purchase of equity of redemption at Court sale, 413, 414.
purchasing share of equity of redemption is subject to *lis pendens*, 424.
remedies of, 452. *See* Mortgagee's remedies.
renew lease, whether bound to, 495.
rights of, to foreclose, 451. *See* Foreclosure or sale.
to spend money, 490,491. *See* Rights of mortgagee to spend money.
to sue for mortgage money, 428,429. *See* Rights of mortgagee to sue for mortgage money.
security, abandonment of, by, 463-474.
substituted security, 497. *See* Substituted security.
transfer by, and mortgagor, 220.
who may be, 362.

Mortgagee's power of sale without the intervention of Court, 474, 477.
amendment of s. 69, 476.
application of sale proceeds, 482.
conditions of exercise of power, 478.
Court, intervention of, without, 477.
effect of mortgagee's sale, 481.
exercise of power, 480.
fixtures, sale of, 478.
instalments, 479.
mortgagor, remedy of, 481.
must be expressly conferred, 477.
purchasers, protection of, 481.
receiver, appointment of, 482.
remedy of mortgagor, 481.
restraint on exercise of power, 479.
retrospective, section not, 476, 482.

Mortgagee's power of sale without the intervention of Court, 474, 477—*contd.*
s. 69 not retrospective, 482.
Trustees' and Mortgagee's Powers Act, 474, 475, 476.
what may be sold, 478.
when valid, 475, 477.
who may exercise power, 477, 478.
who may purchase, 480.

Mortgagee in possession—
liabilities of, 502. *See* Liability of mortgagee in possession.
power to grant leases, 505.
rights of, 490. *See* Rights of mortgagee to spend money.

Mortgagee of public works, 457.

Mortgagee's remedies, 452.
(*i*) foreclosure, 456, 457.
(*ii*) sale, 364, 452, 456, 457.
(*iii*) suit on personal covenant, 452.
remedies of various classes of mortgagees :
anomalous—depends on terms of deed, 456.
by conditional sale—foreclosure, 456.
English—sale, 456 ; foreclosure or sale, 456.
equitable—sale, 456.
simple—sale, 363, 455.
simple usufructuary—sale, 456.
usufructuary—cannot sell or foreclose, 455.
usufructuary by conditional sale—foreclosure, 456.
right to resort to any estate comprised in the mortgage, 532. *See* Right of mortgagee to sue for mortgage-money.

Mortgagor—
co-mortgagor redeeming, rights of. *See* Rights of redeeming co-mortgagor.
implied contracts or covenants of, 444, 445.
benefit of, 446.
contract to the contrary, 443.
covenant for title, 444.
to defend title, 444.
to discharge prior mortgages, 445, 446.
to pay public charges, 445.
to pay rent of leasehold, 445.
includes persons deriving title from mortgagor, 361, 395.
liability of, on personal covenant, 466.
mesne mortgagee, 589-596. *See* Rights of mesne mortgagees.
minor cannot be, 361.
notice or tender to agent, 622.
personal covenant. *See* Personal covenant.
power to lease, 446, 447.
contract to contrary, 448.
covenant against alienation, 449.
kanom, in case of, 449.
none prior to Act 20 of 1929, 447.
rights of,
on redemption, 412.
to accounts, 503, 510.

Mortgagor—*contd.*
to possession, 413.
to reconveyance or acknowledgment, 413.
to deposit mortgage money in Court, 541, 542. *See* Deposit in Court.
to inspection of documents, 429.
to recover possession (usufructuary mortgage), 432.
to redeem. *See* Redemption.
transfer by mortgagor and mortgagee, 220.
trustee for mortgagee, when, 457.

Mukaddami, 634.

Mutawalli of wakf—office not transferable, 61.

Negligence—
presumption of notice, 30.

Negotiable instrument, 788-789.

Non-disclosure, 312, 313, 317, 337.
is fraudulent, when, 337.

Non-transferable tenures, 76, 687.

Not in existence, 103.
child *ventre sa mere* is in existence, 103.
interest created for benefit of person not in existence, 102.

Notice, 14, 25. *See* Registration ; Constructive notice ; Notice to an agent.
actual possession, 35.
agent, to, 39.
constructive notice, 26. *See* Constructive notice.
Daniels *v.* Davison, rule in, whether applicable in contract, 38.
deed, of, in one transaction is not notice in subsequent independent transaction, 29.
definition, 14.
doctrine controls unconscionable transactions, 25.
express notice, 25.
imputed notice, 14, 39.
of deed is notice of all documents in chain of title therein recited, 33.
of deed is notice of all material facts recited, 33.
registration, 32.
to person incompetent to contract, how given, 623.
unconscionable transactions and, 25.
Wajib-ul-urz, contractual obligation, in, 195.

Notice before redemption, 420.

Notice of deposit in Court, 547.
service of notice, 622, 623.

Notice of equity or liability affecting assignor of actionable claim immaterial, 783.

Notice of severance, 176, 177.
reversion, of the, 705.

Notice of transfer of actionable claim, 780.
address of transferee, 781.
conditional notice, 781.

Notice of transfer of actionable claim, 780—*contd.*
effect of notice, 780.
form of notice, 780.
must be in writing, 780.
payment by debtor without notice protected, 767, 780.
waiver of, 781.

Notice to an agent, 14, 39. *See* Agent.
fraud of agent, 15, 42.
imputed notice, 14, 39.
knowledge of agent is knowledge of principal, 40.
scope of the rule, 40.

Notice to quit—
agent, service by, 654.
conditional, whether good, 651.
construction of, 649.
disclaimer by lessee, no notice necessary in case of, 649.
effect of contract, local law or usage, 647.
expiry of, 652.
fixed term, no notice necessary in the case of, 649.
form of, 649.
joint lessors, by, 654.
length of, 651, 652.
must extend to all premises, 649.
must indicate intention to determine at a certain time, 650.
periodic tenancies, in, 648, 649.
prior to suit for eviction, 648.
service of, 654, 655.
at lessee's residence, 655.
by affixing to property, 655.
by post, 655.
by whom may be made, 653, 654.
delivery to servant or member of family, 655.
mere leaving at tenant's residence not sufficient, 655.
on agent duly authorised, 654.
on joint tenant, 654, 655.
on officer of corporation, 654.
on solicitor, 654.
personally, 654.
proof of, 654.
special legislation, 655.
sub-tenant, landlord cannot give to, 653, 654.
tenancies before Act, 8, 9, 646, 647.
term of. *See* Duration *above*.
waiver of, 728, 729.
by acceptance of subsequent rent, 729.
by second notice to quit, 729, 730.
not by tenant holding over, 730.
who may give, 653.

Novation, 620.
distinguished from merger, 620.
distinguished from renewal, 620.
of actionable claim, 776.

Object of annexation, 23.

Occupancy right—
whether transferable, 76.

Officer of Court of Justice, 787.
assignment to pleader of claim to dower invalid, 787.
dealings in stock and shares not prohibited, 787, 788.
may not traffic in actionable claims, 786.
object of restriction, 787.
pleader may not purchase policy of life assurance, 11, 788.
pleader may purchase life policy at Court sale, 11, 788.

Official Assignee or Receiver—
moneys in hands of receiver in mortgage suit, whether entitled to, 487.
sale by, is transfer to which Act applies, 10.
vesting of property in, is transfer by operation of law, 10.
when empowered, has authority to transfer, 79.

Onerous gift, 762.
minor donee repudiating after majority, estopped, 762, 763.

Open contract of sale, 310.

Operation of transfer—
attached to the earth, 84.
charge, debt secured by, 88.
Court sales, 81.
debts, 86.
different intention implied or expressed, 82.
easements annexed thereto, 83.
Hindu widow, gift to, 81.
Hindu wife, sale to, 81.
house, 85.
income, 88.
interest, 88.
machinery, 85.
mortgage debts, 86.
passes all interest of transferor, 80.
passes legal incidents, 79.
rents and profits, 84.
revenue sales, 82.

Opposed to the nature of the interest, 52, 72.
transfer void, 52, 72.

Option as to compensation for improvements, 232.

Option as to fixtures under Paramanick's case, 232.

Option of lessee to avoid lease in case of destruction, 660, 672.

Option of renewal of lease—
does not affect terms, 628.

Option to break lease, 707.

Oral transfer, 88.

Ostensible owner, 195. *See* Transfer by ostensible owner.
benamidar is, 197.
mortgagor is not, 197.
transfer by, 195.

Outgoings after completion, 331.

Outgoings pending completion, 317.

Owelty, 223.
priority of lien for, 223.

Ownership—
a bundle of rights, 47.
partial ownership, 47.

Pala or turn of worship—
is moveable property, 16.
is not transferable, 61.

Palyan land, 62.

Paracudi, 634.

Part performance, 277.
acts which constitute part performance, 279-282.
must have been done in performance of contract, 279-280.
must be unequivocal, 280.
must have been done by the party seeking this equity, 281.
agreement of lease creating present demise, 287, 292.
agreements invalid otherwise than for want of registration, doctrine inapplicable to, 288.
Ariff v. *Jadunath*, 282, 283.
s. 53A is not consistent with, 283.
ascertained with reasonable certainty, 286.
available only as a defence, 285.
consideration essential, 286.
equity of part performance, 278-283.
equity of *Walsh* v. *Lonsdale*, 288, 289.
excluded in India, 288-290.
fiduciary capacity of vendor, 291.
gift not enforced, 286.
has performed or is willing to perform, 287.
in part performance of the contract, 280, 286.
lease, agreement of, 288, 290, 293.
limitation, 291.
Mahomed Musa's case, 282, 283.
moveable property, doctrine not applicable to, 286.
notwithstanding contract though required to be registered is not registered, 287.
not completed in manner prescribed by law, 287.
origin of the equitable doctrine of, 278, 279.
part performance under s. 53A, 284-286.
part performance prior to s. 53A, 277, 278.
passive equity in India, 285, 286.
but not in England, 285, 286.
not under s. 27A, Specific Relief Act, 293.
possession by transferee essential, 286.
purchaser with notice, enforced against, 287.
reversioners and part performance, 287.
retrospective, whether s. 53A is, 277.
s. 49 Registration Act, 292.

Part Performance, 277—*contd.*
s. 27A, Specific Relief Act, 293.
title is not conferred by the doctrine of, 288, 291.
what acts constitute, 279-281.
where there is an instrument of transfer, 287.
will not validate invalid agreement, 288.
writing essential, 284, 285.

Partial foreclosure or sale, 457, 460.
division of equity of redemption does not justify, 457.
foreclosure or sale must be against all persons interested, 457.
mortgagee purchasing share of equity of redemption may recover balance of debt from residue, 458.
no foreclosure or sale in respect of share of part mortgagee, 457.
partition when recognised by mortgagee, 458, 459.
release of part of debt, whole property is liable for the remainder, 460.
remedy of part mortgagee, 458.

Partial redemption, 420, 421.
division of mortgagee's interest does not justify, 459.
mortgagee purchasing share of coparcener, 428.
permitted only if mortgagee acquires a share in equity of redemption, 423.
suit for partial redemption, 424.

Partial restraint on alienation, 92.

Particular conditions, 340.
cost of conveyance, 344.
insurance, 345.
interest on unpaid price, 344.
payment of deposit, 342.
purchaser's right of rescission, 343.
requiring fact to be assumed, 342.
restriction requisitions, 340.
restricting period of title, 340.
time for completion, 344.
title as it is, 342.
title to satisfaction of buyer's solicitors, 342.
vendor's right of rescission, 343.

Partition—
fraudulent transfer, whether, 270.
mortgagee of co-owner, right of, to, 216.
mortgagee's priority on, 222.
oral, 89.
restraint on, 99.
right to, 9.
See Restraint on partition—Substituted Security.

Passive equity of, 285 and notes to s. 51.

Patent defect, 311.

Patnis—
subsoil rights, 85.
whether Act applicable to Patnis, 8.

Payment of mortgage debt, 409.
at the proper time, 412.
at the proper place, 412.

Pay order, 775.

Pension—
defined, 71.
political pension, 71.
private pension, 71.
when not transferable, 71.
by foreign state, 72.

Performance of condition—
Indian Succession Act, 162.
prevented by fraud, 163.
time of, specified, 162.
transfer on, 162.

Performance of condition precedent, 149.
illustration from Indian Succession Act, 150.

Performance of condition subsequent, 157.
condition strictly construed, 157.
if ambiguous construed in sense favourable to vested interest, 157
ignorance, no excuse, 158.

Permanent leases—*See* Lease in perpetuity.

Perpetuity—rule against, 107.
beneficial to mankind, 131.
charge and, 116.
charities, application to, 112, 128.
English rule, 111.
English law and Indian law, difference, 128, 129.
meaning of, 107.
mortgage and, 116, 117.
Hindu law, 111.
hospital, bequest to, 131.
immoveable property, applies to, 111.
Indian Succession Act, rule in, 110.
Mahomedan law, 111.
meaning of, 107.
moveable and immoveable property, applies to, 111.
personal agreements, whether applicable to, 112.
power of appointment and, 112.
principle of rule, 107.
regards possible not actual events, 109.
religion, 131.
rule against perpetuity in its primary sense, 107.
in its modern sense, 108.

Personal covenant—
abandonment of security, by mortgagee before enforcement of, 474.
depriving security by wrongful act of mortgagor, 469.
destruction of security, 468.
implied in simple mortgage, 363, 466.
interest and damages, for breach of, 473.
liability on, 466.
loan *prima facie* involves personal liability, 466.
not essential to mortgage by conditional sale, 367.

Personal covenant—*contd.*
personal remedy of mortgagee, 465.
remedy on, 465-468.
runs with land, whether, 683, 684.
stay of suit for personal remedy, 473.
usufructuary mortgages, 470-472.
when implied in mortgages, 363, 465-467.

Pleader—*See* Officer of Court of Justice.

Pleadings—
unregistered mortgage admitted in, 394.

Policy of fire insurance—*See* Fire Policy.

Policy of life insurance—
purchase by pleader, 11, 788.
transferred under s. 130, 766, 776, 777.

Policy of marine insurance—*See* Marine Policy.

Possession—
actual possession is constructive notice, 14, 35, 36.
must continue till date of transfer, 37.
usufructuary mortgagee's right to, 432.
as between auction purchasers of prior and subsequent mortgagees, 593, 594.
as its nature permits, 317.
constructive possession is not notice, 37.
interest and possession mutually exclusive, 325, 326.
of mortgagee, 470, 471.
seller's duty to give, 316.

Possibility—**not transferable**, 50, 51, 59.

Postponement of enjoyment, 134, 135.
accumulation of income, 135, 136.
after majority invalid, 134.
does not prevent vesting, 132.
exception to s. 11, 100.

Postponement of Prior Mortgage—*See* Priority.

Power of appointment—
is not property, 46.
rule against perpetuity and, 112.
vesting of property under, 136.

Power of revocation—
transfer by person having, 206.

Power of sale—*See* Mortgagee's power of sale without the intervention of the Court.

Preamble, 1.
Act whether exhaustive, 2.
an aid to construction, 1.
" define and amend," 1.
headings take effect as, 1.

Pre-emption, 63, 194.
contractual obligation under s. 40, 193.

Pre-emption—*contd.*
covenant not affected by rule against perpetuity, 193, 194.
contract, by, 63.
nature of, 63.
right not defeated by dealing subsequent to suit, 261, 262.

Premium, 624, 639.
defined, 624.
no charge for unpaid premium, 639.
zuripeshgi lease, in, 639.

Prerogative of Crown, 3.

Price, 297.
of the essence of a contract of sale, 297.
money only, 297.

Prior interest, 135.
alternative limitations, 121.
does not postpone vesting of subsequent interest, 135.
Hindu law, in, 122.
invalid under ss. 13 or 14, then subsequent interest fails, 121, 151, 152.
not invalid but subsequently fails, then subsequent interest in accelerated, 121, 151, 152.
otherwise invalid, subsequent interest if dependent fails, 121.
vested gift, 121, 122.

Priority, 203, 515.
crown debt, 223.
exception to rule of, 222.
forfeited, 223.
by estoppel, 516.
by fraud, 515, 516.
by gross negligence, 515, 517.
by misrepresentation, 515, 516.
judicial sales, 499.
mortgages, priority of, 515-520.
fraud, 516.
gross negligence, 517.
maximum amount secured, 520.
charge, 522.
English law, 521.
subsequent advances 520.
maximum expressed, 520.
misrepresentation, 516.
receiver, by, 222, 223.
res judicata, 519.
mortgagor's liability not affected by, 519.
owelty, lien for, 223.
partition and mortgagee's rights, 222, 223.
purchaser's liability, whether affected, 519.
registered deed, where, 221.
res judicata, may be lost by, 519.
salvage liens, 223.
s. 79 an exception to rule of, 520.
successive transfers, 221.
same date, where transfer on, 222.

Privity of Estate—*See* Assignment of term by lessee.

Proceeds of revenue sale—*See* Substituted security.

Proceedings of Legislative Council, 4.

Production of title deeds by seller, 312.

Proof of attested instrument, 391.

Proof of discharge of incumbrance, 317, 318.

Property, 46. *See* Transfer of property.
- actionable claim is, 46.
- corporeal or incorporeal hereditament, 47.
- defined in L.P.A., 1925, 46.
- equitable estates. *See* Equitable Estates.
- exceptions to rule of transferability, 53.
- future interests in, 47.
- future property, 50, 51, 52.
- idol, 50.
- interests in, 47.
- power of appointment, is not, 46.
- religious office, 61.
- restricted interests in, 60.
- restriction on enjoyment of, 97-101.
- reversion or other intangible thing, 47.
- right to conveyance of land, 47, 48.
- tangible immoveable property, 47.
- transferability the general rule, 52.
  - exceptions, 53.

Proviso for re-entry, 59, 718.
- enforceable by lessor's transferee, 723.
- runs with the land, 719.

Public benefit—
- Hindu law, 131.
- Mahomedan law, 132.
- rule of perpetuity and, 128-132.

Public Charges—
- buyer to pay, accruing after sale, 333, 334.
- include tagavi and local rates, 333.
- mortgagee in possession to pay, 507.
- mortgagor in possession to pay, 507.
- seller to pay accruing before sale, 318.

Public office—
- gratuity payable to legal representative assigned, 70.
- not transferable, 70.
- sale of, forbidden, 70.

Public policy—
- condition opposed to, void, 75.
- marriage brokerage, 75.
- public office, sale of, 70.
- putwara, purchase by, 75.
- right to sue, assignment of, 69, 70.

Public policy—*contd.*
some actionable claims not transferable, on grounds of, 779.
stifling prosecution, 75.
transfer opposed to, void, 75.

Puisne Mortgagee—
prior mortgages, covenant by mortgagor to discharge, 445, 446.
redemption by, 549, 652.
subrogation, 553, 556.
where puisne mortgage is collusive or fraudulent, 560.

Punjab—
Act not in force, 7.
oral assignment of actionable claims valid, 777.
principle of s. 53 followed, 261.
principles of Act followed but not technical rules, 7, 709, 731, 744.
reasonable expenditure on improvement allowed to mortgagee, 441.
rule as to date of expiry of notice followed, 652.

Purchaser—*See* Buyer.

Purdanasheen, 19, 203, 204, 759.

Putwari—
purchase by, 75.

Railway receipts, 788.

Ratification, 172.

Razinama—
effect of, 50.

Reasonable care—
purchaser from ostensible owner, 201.

Receiver appointed by mortgagee—
after suit filed, 486, 487.
appointed by mortgagee exercising power of sale, 482, 484, 485.
no appointment till such power is exercisable, 485.
contract to the contrary, 486.
directions, right to apply for, 486.
jurisdiction of Court, 486.
official assignee, whether entitled to moneys in hands of, 487.
position of, 485, 486.
possession of, nature of, 486, 487.
power of, as to income, 486.
remuneration of, 486.
right to apply for directions, 486.
Section 69A, not retrospective, 476 (s. 69 cl. 5).
simple mortgagee, by, 487.
when appointed, 485, 486.
who may be appointed, 485.

Recital of payment in sale deed, 329.

Recitals not proof of necessity, 181.

Record of rights, 35.

Rectification, 338.

Redeem up, foreclose down, 589.
rule expressed in ss. 91(a) and 94, 589.

Redemption, 395.
accounts on, from mortgagee in possession, 509.
act of parties, extinguished by, 413.
adverse possession, acquired by, 419.
before expiry of term, 408.
benamidar by, 420.
clog on redemption, 397. *See* Clog on redemption.
collateral benefit to mortgagee, 403.
condition of sale in default, 399.
condition postponing redemption in case of default, 400, 401.
contract to contrary, 397.
consolidation, doctrine of, 430.
Court sale, mortgagee purchasing at, 413, 414.
creditor's right of, 553.
date of, 407, 408.
delivery of mortgage deed, 412.
deposit in Court, by, 541. *See* Deposit in Court.
expenses of, 599.
extinguished by act of parties, 413.
by decree of Court, 416.
by operation of law, 416.
foreclosure and redemption co-extensive, 390.
limitation, 419, 420.
long term for, 402.
mortgage-money, 412.
mortgagee purchasing at Court sale, 413-416.
mortgage decree where co-mortgagor redeems, 599.
mortgagor's rights on, 412, 428.
notice before redemption, 420, 547.
obligation of mortgagee on, 428.
partial redemption, 420, 424, 425. *See* Partial redemption.
payment or tender of mortgage debt, 409, 410.
place of, 412.
time of, 412.
penalty in case of default, 401.
persons who may sue for
attaching judgment-creditor cannot, 549, 550.
charge holder, 553.
co-mortgagors, one of several, 551.
creditor obtaining decree for sale in administration suit, 549, 553.
Hindu illegitimate son, 551.
Hindu reversioner, 551.
landlord, 550.
lessee, 551.
person having interest or charge, 551-553.
interest must be proprietary, 550.
puisne mortgagee, 552.
purchaser of equity of redemption, 551, 552.
sub-mortgagee, 552.
surety, 553.

Redemption—*contd.*
redemption and foreclosure co-extensive, 397.
restraint on alienation, 401.
rights on redemption, 412, 428.
right to require mortgagee to assign to third person, 428.
separate or simultaneous, where mortgages are of different properties, 429, 430.
of the same property, 429, 430.
submortgage and, 383.
subsequent agreement, 406.
subsequent sale, 400.
suit for, 418, 419.
surety's right of, 553.
tender must be unconditional, 410.
time for, 407, 412.
when right of redemption arises, 407.

Redemption of usufructuary mortgage, 432.

Re-entry, mere right of, not transferable, 59.

Registered—
meaning of, 13, 20.

Registering officer, whether attesting witness, 19, 390, 391.

Registration—
constructive notice to subsequent transferees, 13, 32, 33.
defect of procedure does not invalidate, 35.
lease, of, 656.
mortgage invalidly registered is not a charge, 393.
must be valid, 13, 20.
not notice if no duty to search register, 32, 34.
not notice if register entry incorrect, 35.
of mortgage deeds, 392-394.
of mortgage by deposit of title-deeds, 378.
of sale deeds, 299.
pleadings, admission of unregistered mortgage, in, 394.
time from which operates as notice, 34.

Registration Act—
certain sections not to be extended where not in force, 6, 7.
certain sections supplemental, 45.
mortgages by deposit of title deeds, priority of, under, 221.
priority as between transferees under, 221.
specified sections of Transfer of Property Act, and, 8.

Regulations—
Bengal Alluvion and Diluvion Regulation (11 of 1825), 671.
Beng. Reg. 15 of 1793, 365, 366.
Beng. Reg. 34 of 1802, 9, 365.
Beng. Reg. 2 of 1805, 671.
Beng. Reg. 17 of 1806, 10, 365, 542.
Beng. Reg. 8 of 1819, 8.
Beng. Reg. 1 of 1798, 365, 542.
Mad. Reg. 34 of 1802, 366.

Release—
by mortgagee, 534, 535.
of a debt is not a gift, 749.

Relief against forfeiture of lease, 730-732. *See* forfeiture.

Religion—
gift for advancement of, 128, 131.
gift for spread of Hindu religion, 131.

Religious ceremonies, gift for performance of, 131.

Religious offices, 61.
birtmaha brahmani, 61.
custom, transferability by, 61.
pala or turn of worship, 61.
transferability of office of shebait, 61.
mohunt, 61.
mutawalli, 61.

Remainder, 47.

Remedies of mortgagee—*See* Mortgagee's remedies.

Remedy of part mortgagee, 457, 458.
Renewal of lease—*See* Covenant for renewal of lease.

Renewal of mortgaged lease, 441, 490.
mortgagee may spend money, for, 490, 495.
mortgagor not liable to renew, 445.

Renewal of securities, 620.
but original security may be abandoned, 621.
renewed mortgage does not loose priority, 621.

Rent—*See* Rent and Profits.
abatement of, 690–693. *See* Abatement of rent
accruing after sale, buyer to pay, 318, 334.
accruing before sale, seller to pay, 318, 334.
apportionment of, 173-175.
assignee of reversion entitled to rent after the assignment, 705.
assignee not entitled to rent prior to the assignment, 705.
bona fide payment to a holder under defective title, 224.
demand for rent from person found in possession, effect of, 641.
diminished rent, payment of, effect of, 641.
illegal or immoral purposes, lease for, 694.
implied covenant of mortgagor to pay rent, 445.
increased rent, payment of, effect of, 641.
joint lessees, payment by one of, 688.
joint lessors, payment to one of, 688.
lessee's obligation to pay, 661, 687.
lessor not entitled to, where he has failed to give possession to lessee, 664.
non-payment of, does not determine lease, 641.
paid in advance, 225.
paid to mortgagor without notice of mortgage, 225.
part of mortgage money if lease and mortgage are one transaction, 454.
payment of, by a stranger, 688.
payment by joint lessee is payment by all, 688.
payment, mode of, 640, 690.

Rent—*See* Rent and Profits—*contd.*
payment of, and covenant for quiet enjoyment, 665.
payment to joint lessor is payment to all, 688.
payment to one co-sharer is not a discharge against all, 688.
penalty, what amounts to, 689.
periodically or on specific occasions, 641.
place of payment, 690.
premium distinguished from, 639.
premises let for immoral purposes, 694.
rent-charge of landlord, 619.
rent notes, 643.
stipulation for increased rent, 689.
suspension of, 690. *See same head.*
tenants-in-common lessors, payment to one of, 688.
time of payment, 689.

Rent and Profits—
accruing due before transfer are not legal incidents, 84.
benefit to arise out of land, 84, 326.
buyer's right after completion, 84, 325.
seller's right before completion, 84, 325.

Repairs—
breach of covenant to repair, 694, 697.
damages for breach of covenant to repair, 697.
express covenant to repair, 696.
general covenant to repair, 696.
irresistible force, damage due to, 695.
lessee's liability, 694, 695.
lessor not liable, 673.
lessor's express covenant for, 673, 674.
breach of, does not entitle lessee to determine lease, 674.
construction of, 673, 674.
extent of lessor's liability, 673, 674.
remedies for breach of, 673.
right of entry by lessor for repairs, 696.
right of entry and view, 696.
reasonable wear and tear, 695.
special covenant to repair, 696.
Landlord and Tenant (war damages) Act 1939, 694.
unauthorized alterations are a breach, 697.

Repeal—
Acts repealed, 8.

Repugnancy—
absolute restraint on power of transfer, void for, 91, 92.
condition or limitation may be void for, 90, 91 (c. s. 12).
restriction on enjoyment, void for, 97.

Requisitions, 313.
declarations to contradict recitals in documents unacceptable, 314.
distinguished from inquiries, 314.
on conveyance, 314.
on title, 314.
seller's duty to answer, 314.
waiver of requisitions, 314.

Rescission, 337.
condition as to purchaser's right of, 343.
condition as to vendor's right of, 343.

Residence, condition of, 150, 160.

Res judicata, priority may be lost by, 519, 520.

Restraint on alienation, 89. *See* Condition and Limitation.
absolute restraint invalid, 89, 90, 91.
agreement in restraint invalid, 90, 93.
compromise or family settlement valid, 93, 94.
involuntary alienation not a breach unless condition expressly prohibits alienation in execution, 96.
lease exception to rule, 94, 95.
limited in point of time valid, 92.
limited to a class valid, 91.
partial restraint, 92.
restraint in lease valid, 94, 95.

Restraint on enjoyment, 97.
exception to *sec.* 11 recognises rule in *Tulk* v. *Moxhay*, 100.
s. 11 applies only if transfer creates absolute interest, 98.
distinguished from *sec.* 10, 98.

Restraint on partition, 99.

Restraint on power of anticipation, 96, 97.

Restraint on transferor, 94.

Restricted interests, 60, 61.
not transferable, 60, 61.
See Religious office—Service tenures.

Restrictive covenants—
affirmative covenants, distinguished from, 191.
assignee of lessee bound by, 683, 684.
attachment, and, 193, 194.
building schemes, 190.
covenants annexed to the land, 186.
covenants not annexed to land, 189.
covenants running with the land, 192.
contractual obligation, 193.
enforced against gratuitous transferee of covenantor, 185.
enforced against transferee with notice, 185.
English law, restrictive covenants in, 185, 186.
Indian law, restrictive covenants in, 189, 190.
leases, 186, 191, 683, 684.
pre-emption for, nature of, 193.
valid when for beneficial ownership of transferor's other land, 189, 190.

Retrospective—(*See* under each section).
Act how far restrospective, 4.
effect of amending Acts, 3, 8, 9.
effect of declaratory or explanatory statutes, 4.
effect of enactments, 2-4.
procedure, rule of, whether, 9, 10.

Retrospective—(*See* under each section)—*contd.*
s. 52 whether amendment retrospective, 238.
s. 68 not retrospective, 464.
s. 69 not retrospective, 476, 482.
ss. 92 and 101, retrospective, 555, 612.

Revenue records—
not documents of title, 201.

Revenue sales, 253, 254.

Reversion, 47.
transfer by Hindu reversioner, 54, 55.

Reversionary heir—
agreement to transfer invalid, 56.
estoppel of, 57.
relinquishment of right, of, is a nullity, 54.
spes successionis, 53.
substituted contract may be valid, 56.
transfer not validated by estoppel, 55.
transfer of right is a nullity, 54.
under English law, 58.

Revocable gift, 94, 756.
depends upon agreement between donor and donee, 757.
gift subject to condition precedent, 756.
gift subject to condition subsequent, 757.
incomplete gift always revocable, 761.
no revocation *aliunde*, 761.
not revocable for unilateral mistake, 760.
purdanasheen women, by, 759.
revocable at pleasure, no gift, 758.
revocation by rescission, 758.
service tenures analogous, 757.

Rights of buyer—*See* Buyer.

Rights of lessee, 659-662.
abatement of rent, 691.
accretions, to, 671.
assign term, to, 678.
benefit of covenant for quiet enjoyment, 665. *See same head.*
contract, by, 662.
covenant for quiet enjoyment is annexed to and goes with lessee's interest, 67
crops, to, 677.
fixtures, to, 675, 676.
local usage, by, 662.
option to avoid lease in case of destruction, 672.
payments made on behalf of lessor to be reimbursed for, 675.
possession, to recover, 664.
repairs, with respect to, 673, 674. *See* Repairs.
statute law, by, 662.
trees, to, 677.

Sale, 294.
agreement of, created equitable interest prior to Transfer of Property Act, 113.
agreement of, creates no interest in land, 112, 294, 303.
agreement of, does not offend against rule against perpetuity, 112-116.
consideration, 297.
contract of sale, specific performance of, 303.
contract of sale transfers no right *in rem*, 116, 303.
defined, 294.
delivery of the property, 299, 301, 302.
delivery plus unregistered deed, 303.
effect of attachment on, 302, 303.
equitable estate, 303.
equities of person contracting to buy, 304.
estoppel, by, 304.
Mahomedan law, 304.
mode of transfer, 299-302.
conveyance, 299, 300.
delivery of possession, 299, 301.
official receiver's sale, 299.
parties to, 295.
price, meaning of, 297.
extrinsic evidence as to, 298.
priority of sales, 300.
property passes, when, 300, 301.
Punjab, 300.
registration, 209.
subject matter of, 295.
unregistered deed, effect of, 301.

Sale of mortgaged property—*See* Foreclosure or sale.

Salvage payments, 588.

Savings—
certain enactments, of, 8, 9.
to incidents, of, 8, 9.
liabilities, of, 8, 9.
rights, of, 8, 9.
Hindu law, 12.
Mahomedan law, 11.
partition, rights of, 9.
Patni, 8.

Security—
abandonment of, by mortgagee, 466, 474.
destruction of, right of mortgagee in case of, 469, 499.

Security bond—
does not create a charge, 604.
is not always a mortgage, 604.
transfer, whether a, 358.

Security for performance of decree—
enforced in execution, 460.

Seller's charge for unpaid price—*See* Rights of seller after completion.

Seller's liability after completion—*See* Liability of seller after completion.

Seller's liability before completion—*See* Liability of seller before completion.

Seller's liability irrespective of completion—*See* Liability of seller irrespective of completion.

Seller's remedies after completion, 285.

Seller's remedies before completion—*See* Remedies before completion.

Service of notice of deposit in Court, 622.

Service of notice to quit, 654, 655—*See* Notice to quit.

Service tenures, 62.
- analogous to revocable gifts, 757, 758.
- chowkidar in Bengal, 62.
- ghatwal tenures, 62.
- grant of land burdened with service, 62-63.
- grant of office, 62, 63.
- karnam lands in Madras, 62.
- nature of, 62.
- Palyan land in Madras, 62.
- resumption of, 62, 63.
- swastivachakam service in temple, 62.
- watandar, 62.

Simple mortgage—*See* Mortgage simple.

Simple mortgage usufructuary—*See* Mortgage, simple usufructuary.

Spes successionis, 53.
- adopted son, 53.
- distinguished from interest future or contingent, 53.
- English law, 58.
- Hindu law, 54.
- legacy, chance of, 58.
- Mahomedan heir, 54.
- Mahomedan law, 58.
- not transferable, 51, 52.
- reversionary heir, relinquishment by, 54.

Standard of value with reference to waste by mortgagor, 450.

Standing timber, 13, 17.
- right to cut down, 21.

Statutes—
- 32 Hen. 8 c. 34 (grauntiees of reversions), 670, 719.
- 4 Anne c. 16 (attornment), 224.
- 4 & 5 Anne c. 3 (attornment, Stat. Rev.), 704.
- 13 Elliz. c. 5 (fraudulent deeds and alienations), 260.
- 27 Elliz. c. 4 (covenous and fraudulent conveyances), 257, 260.
- 4 Geo. 2 c. 28 (Landlord and Tenant Act, 1730), 702.
- 39 & 40 Geo. 3 c. 98 (accumulations), 124.
- 8 & 9 Vict. c. 106 (The Real Property Act, 1845), 713, 744.
- 14 & 15 Vict. c. 25 (Landlord and Tenant Act, 1851), 678.
- 22 & 23 Vict. c. 35 (Law of Property Amendment Act, 1859), 728.

Statutes—*contd.*
23 & 24 Vict. c. 145 (Trustees and Mortgagees Act, 1860), 476, 485.
36 & 37 Vict. c. 66 (Judicature Act, 1873), 771.
33 & 34 Vict. c. 37 (apportionment), 174.
37 & 38 Vict. c. 78 (Vendor and Purchaser Act, 1874), 313, 340.
44 & 45 Vict. c. 41 (Conveyancing Act, 1881), 80, 313, 349, 430, 448, 479, 485, 496, 705, 733.
56 & 57 Vict. c. 21 (The Voluntary Conveyances Act, 1893), 258, 277.
1 & 2 Geo. 5 c. 367 (The Conveyancing Act, 1911), 705.
15 Geo. 5 c. 5—*See* Law of Property Act, 1925.

Stay of suit under s. 68 (a) or (b), 473, 474.

Sublease—
does not create privity of estate with head lessor, 679.
is not absolute assignment, 679, 680.
merger, effect of, on, 712.
not liable to head lessor, 681, 682.
not prejudiced by surrender of lease, 734.
relief against forfeiture, 654.

Sub-mortgage, 383-385.
equitable sub-mortgage, 385.
equities against mortgagor how far binding on sub-mortgagee, 384, 385.
rights of redemption and foreclosure, 385, 386.
void if mortgage void, 385.

Subrogation, 553, 554, 556.
advance to pay off a mortgage, 570.
against the mortgagor or any other mortgagee, 569.
agreement by, 556.
benami purchaser is a volunteer and is not subrogated, 564.
by operation of law, 557, 558.
co-mortgagor redeeming, 561.
conventional, 556.
covenant excludes subrogation, 567-569.
equitable charge, 557.
intention, rule of, 566.
interest on principle sum, 564.
legal, 558-561.
limitation, 581.
mistaken application of this principle, 560.
mortgagee redeeming prior mortgage, 569.
mortgages of a different class, 570.
mortgagor not subrogated, 562.
mortgagor's surety redeeming mortgage, 561.
nature of, 556.
partial subrogation abolished, 580, 581.
personal right of reimbursement, 556.
persons other than mortgagor may be subrogated, 566.
puisne mortgage collusive or fraudulent, no subrogation, 560.
puisne mortgagee redeeming a prior mortgagee, 559, 569, 570.
purchase invalid, purchaser not subrogated, 565.
purchase subsequently set aside, purchaser whether subrogated, 565.

Subrogation—*contd.*
purchaser of equity of redemption redeeming, 561.
purchaser's covenant excludes, 562.
rights of redemption foreclosure and sale acquired on, 569.
surety of mortgagor redeeming, 561.
volunteer not subrogated, 564.

Subsequent contingent interest, 144.
application of section 23, 145.

Subsequent interest—
accelerated if prior interest valid but subsequently fails, 121, 152.
fails if dependent on prior interest otherwise invalid, 121.
fails if prior interest invalid under s. 13 or 14, 120, 151, 152, 158.
if invalid prior interest not affected, 158.
vesting not postponed by intervention of prior interest, 135.

Subsequent transferees—
prior voluntary transfer not presumed fraudulent, 276.
transfer in fraud of, 276, 277.

Substituted security, 498.
compensation under Land Acquisition Act, 499.
limitation for suit to enforce mortgagee's claim against, 501.
mortgagor's title altered, 500.
priority, 500.
proceeds of judicial sale of mortgaged property, 499.
sale occasioned by mortgagee's own default, 500.
of revenue and rent sales, 498.
share on partition allotted to the mortgagor, 499, 500.

Successive transfers, 221.

Suit for contribution, 536.

Suit for partial redemption, 424, 420.

Suit for redemption, 418.

Superstitious uses—English law not applicable, 131.

Surety—
liability after waiver of notice to quit, 728.
right to redeem, 553.
subrogation, 561.

Surrender of lease, 708.
express surrender, 714.
implied surrender, 714, 715.
may be oral, 89.
new relationship implies surrender, 716.
relinquishment of possession implies surrender, 716, 717.
subleases, effect on, 734.
under-leases, effect on, 734, 735.

Survivor—
gift to, 146.
Indian Succession Act, 146.

Suspension of rent, 690.
abatement of rent, 692.
diluvion, in case of, 693.
eviction, 690.
Land Acquisition Act, 694.
partial eviction, 691-693.
title paramount, by, 693.

Tacking—
mortgagor not affected, 588.
prohibition, of, 587.
salvage payments, 588.
with or without notice, 588.

Tenants in common—
nature of interest, of, 218.

Tenancy at sufferance, 629.
determination of, 629, 709, 725.
does not create relationship of landlord and tenant, 629, 725.

Tenancy at will, 629, 630.
how arises, 630.
how determined, 630, 647, 709, 724.
liability for compensation for use and occupation, 629.

Tenancy from year to year or month to month– *See* Lease, duration of.

Tender, 410.
to an agent, 622.
to person incompetent to contract, 623.

Things rooted in the earth, 21.

Time of vesting—when transfer complete, 136.
contrary intention, 137.
not beyond period of perpetuity, 137.

Time for performance of condition subsequent, 162.
performance prevented by fraud, 163.

Title deeds, 312.
pass with conveyance, 324.
seller's duty to deliver on receipt of price, 324, 325.
seller's duty to produce, 325.

Trade fixtures, 23, 24.

Transfer by act of parties, 1, 2, 10.
Act applies, 1, 2, 10.
company, mortgage by, 11.
difference between contract and, 44.
mortgage, in, 258, 259.
sale by receiver, 10, 299.

Transfer by one co-owner, 215, 216.
conditions and liabilities affecting the share, 217.
dwelling house, 217.
Hindu law, 216.
mortgagee's right to partition, 217.
s. 44 applies to sales and mortgages 217.

Transfer by oper n of law, 2, 10.
Act not applica to, 2.
actionable clain 79.
Court sale is, 10.
receiver's sale is 10, 299.
testamentary suc on, 2.
vesting in Officia eiver is, 10.

Transfer by ostens owner, 195, 197.
although no frau al owner, 198.
consent express o ied, 198.
good faith, 204.
implied consent, 1 9, 200.
lis pendens and, 20
minor not estoppe
onus of proof, whe
partial interest, of,
reasonable care, 201
Registration Act, 2
requirements of s.
s. 41 applies to mort 98.
s. 52 excludes s. 41,
statutory application of estoppel, 196.
subsequent transfere , 205.
transferee from certif taser, 206.
when real owner is 03.

Transfer by person ha hority to revoke former transfer, 206.

Transfer by tenants in 220.

Transfer by unauthoriz , 206.
any interest which the may acquire, 213.
at any time when the c transfer subsists, 214.
at the option of the tra
covenants for title, 212.
execution sales, 214.
fraudulently or erroneou ts, 208.
invalid transfer, 210, 211
mortgages, 211, 213.
Punjab, 212.
s. 43 applies to an exchan
s. 43 when not applicable,
subrogation, 214.
the estate feeds the estopp
transferee acts on the repr
transferee in good faith wit 9, 210.
when there is no representa 215.
s. 41 and s. 43 considered,

Transfer contingent on happ ertain event—*See* Subsequent contingent interest.

Transfer for benefit of public s.

Transfer for benefit of unbor Unborn person.

Transfer for consideration by distinct interests, 219.
Transfer in fraud of creditors—*See* Creditors. Also see Subsequent transferees.
Transfer, joint for consideration, 218.
co-owner's interests, 218.
joint tenancy and tenancy in common, 218.
mortgagor and co-mortgagee, transfer by, 218.
presumption of equality, 219.
Transfer of actionable claim, 766, 770.
assignee has a right of suit, 778, 779.
assignment of contracts, 773.
assignment of debts, 772.
benefit of contract annexed to ownership of land, 783.
dedication to idol, 779.
effectual from date of execution, 777, 778.
fixed deposit, 779.
gift, 754.
incapacity of officers of justice, 786.
instrument to be in writing, 776, 777.
liability of transferee, 781. *See* Liability of transferee of actionable claim.
marine and fire policies, 779.
mode of, 774, 775.
negotiable instruments excluded, 787, 78[illegible].
notice of transfer to be in writing, 779. *See* Notice of transfer of actionable claim.
operation of law, by, 779.
oral assignment valid in the Punjab, 777.
payment by debtor without notice protected, 780.
pay order distinguished, 775.
priority, 778.
public policy—some actionable claims not transferable, 779.
right of suit after, 778, 779.
stocks and shares, 779.
warranty of solvency, 784.
without consideration, 776.
See Actionable claim—Liability of transferec of actionable claim—Notice of transfer of actionable claim—Officer of Court of Justice.
Transfer of debt by way of mortgage, 785, 786.
Transfer of property—*See* Property.
agreement in restraint of, 93.
cannot be effected except as prescribed by the Act, 89, 90, 299, 300.
charge whether, 49.
chance of receiving gratuitous payment, 51.
compromise is not, 49.
condition, subject to, 91, 93.
contract and, 44.
contractual, whether, 48, 49.
conditional on performance, 163.
defeating the provisions of law, 74.
defined, 46.
does not necessarily involve a conveyance, 48.
English law, under, 47, 48.
forbidden by law, 74.
fraudulent transfer, 74. *See* Fraudulent transfer.

Transfer of property—*contd.*
future crop, mortgage of, 51.
future in, 47.
future property, 53.
grant of an easement is not, 60.
if property not in possession, 138.
in present or in future, 51, 52.
involuntary, 96.
kabuliyat, 50.
limitation subject to, 90, 91.
living person, must be by, 50.
mortgage, whether, 48.
not necessarily contractual, 48
oral transfer, 88.
partial restraint, 92.
present or future, in, 51, 52.
priority of rights created by, 221.
razinama, 50.
restraint on transferor, 94.
successive transfers, 221.
surrender whether, 48.
what may be transferred, 51, 52. *See* Operation of transfer.

Transfer of Property Act—
application of, 2.
commencement, 6, 7.
extended to Bombay, 7.
extended to Sind, 7.
extent, 6.
Local Government has power to extend, 7.
not exhaustive, 2.
retrospective operation of changes introduced by, 4.
when not applicable, 2, 8, 9, 10, 11, 49, 50.

Transfer of Property (Amendment) Act, 1929,
commencement 6, 7.

Transfer to class—*See* Class.

Transfer to defeat and delay creditors—*See* Creditors.

Transfer to defraud subsequent transferees—*See* Subsequent transferees.

Transfer to survivor, 146.

Transfer to take effect on failure of interest, 120.
alternative limitations, 121.
prior interest invalid under ss. 13 or 14, 121.
prior interest otherwise invalid, 121.
prior interest valid, but subsequently fails, 121.

Transfer where third person entitled to maintenance—*See* Maintenance

Transferee—*See* Disqualified to be a transferee.

Transferee in good faith for consideration—
saved under s. 43, 206. *See* Creditors.

Transferor—*See* Competent to transfer.

Trees and shrubs, 21.
if sold to be cut and removed, moveable, 21.
if benefit derived from further growth, immoveable, 21.
sale of, unconditional, under English law, 21.
whether immoveable property, 20.

Trust—
gift by machinery of, 750.
if incomplete Court will not enforce, 750.
not complete till property transferred to trustee, 750.
transfer of some interests necessitate, 47, 48.

Trustees and Mortgagees Powers Act, 1866, 476.

Ulterior disposition, 151.
accelerated by failure of prior disposition, 152
effected by conditional limitation, 154.
Hindu law, 159, 160.
if invalid prior interest not affected, 158.
Indian Succession Act, 159.
not accelerated if contrary intention expressed, 152.

Ulterior transfer, 154.
effected by conditional limitation, 154.
void for repugnancy if prior interest absolute, 156.

Ultra vires—
contract, not necessarily illegal, 73.
company may recover, though loan is *ultra vires*, 73.

Unborn person, Transfer for benefit of—
by machinery of trusts, 103.
English law, transfer to, under, 106.
en ventre sa mere, 103.
Hindu law, 106.
interest vests at birth, 138.
interest may not vest at birth if contrary intention is expressed, 138.
Mahomedan law, 107.
moveable property, 106.
must be of whole remaining interest, 103.
prior interest, transfer subject to, 103.

Underlease—
forfeiture, effect of, on, 734, 735.
surrender, effect of, 734.

Universal donee, 763.

Unlawful object or condition—Transfer void, 52, 72, 73.

Untransferable right of occupancy, 687.

Use and occupation—Compensation for, 631.

Usufructuary mortgage—*See* Mortgage unfructuary.

Usury regulations, 8, 10, 365, 366, 370.

Valuation of improvements, 232.

Valuation of security—*See* Security.

Vested interest, 132.
accumulation after attaining majority, 135, 136.
although enjoyment postponed, 132.
although prior interest created, 132.
although subject to direction for accumulation, 132.
condition postponing enjoyment after majority is repugnant, to, 134.
conditional limitation does not prevent vesting, 136.
contrary intention, 137.
death of transferee, 137.
distinguished from contingent interest, 133.
Hindu law, 137.
ignorance of condition no excuse, 158.
illustrations in I.S.A., 133.
Indian Succession Act, 133.
law favours vesting of estates, 132.
Mahomedan law, 137.
not defeated by death, 132.
postponement of enjoyment, 134, 135.
power of appointment, vesting under, 136, 137.
prior interest, 135.
spes successionis is not, 141.
time of vesting, 136.
unborn person, 138.
vested interest not taken away except by clear words, 157.

Vested remainder—
future interest, whether, 47.

Void condition precedent, 148.

Void condition subsequent, 160, 161.

Volunteer—
benami purchaser treated as, and not subrogated, 564.
mistaken application of principle that volunteer not subrogated, 556.
purchaser invalid, purchaser a volunteer, 556.
volunteer not subrogated, 556.

Waiver of forfeiture, 725-728. *See* Forfeiture.

Waiver of notice to quit, 728-730. *See* Notice to quit.
acceptance of rent for subsequent period, 730.
difference between a forfeiture and waiver of notice, 729.
holding over is not waiver, 730.
second notice to quit, 730.

Waiver of requisitions, 314.

Waiver of seller's charge, 331.

Wakf, 111.
direction for accumulation valid, 111.
is a transfer under s. 53, 262.

Walsh v. Lonsdale, rule (equity) in—*See* Part Performance.

Warranty of solvency—*See* Transfer of actionable claim.

Waste by lessee, 699.

Waste by mortgagee in possession, 508, 509.

Waste by mortgagor in possession, 449.
easement, mortgagor may not burden property with, 450.
standard of value of security, 449.

Watan land, 62.

Welsh mortgage, 368.

Wilful abstention from inquiry or search, 27-30.
omission to inspect deed of title, 28.

Wilful default, 344.

Withdrawal of deposit by mortgagee, 545.

Withdrawal of redemption suit, 418.

Yajman vahi, 61.

Zuripeshgi leases, 370, 371.
lease and mortgage may or may not be separable, 370, 639.